

**Benchbook for**

**Mississippi**

**Chancery Court**

**Judges**

**2021**



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**DIRECTOR**

Randy G. Pierce

**ADDRESS**

Mississippi Judicial College  
University of Mississippi  
P.O. Box 1848  
University, Mississippi 38677

**TELEPHONE AND FACSIMILE**

Telephone: (662) 915-5955  
Facsimile: (662) 915-7845

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## FOREWORD

The *Benchbook for Mississippi Chancery Court Judges* is drafted in such a way as to easily facilitate the addition of new material, changes in the law, and make corrections as needed.

To search for a word, phrase, or particular chapter within the *Benchbook* document, please press down the “Ctrl/Control” button and then press the “F” button, and a “Find” box will open. Simply type the word, phrase, or particular chapter’s name, such as “burden of proof” or “Chapter 16,” in the blank and press “Enter.” Click “Next” to move through the document.

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Any suggestions that you may have to further improve the style, format, presentation, or subject matter of the *Benchbook* should be addressed to:

Mississippi Judicial College  
c/o Carole E. Murphey  
Research Counsel II  
P.O. Box 1848  
University, MS 38677  
E-mail: [cmurphey@olemiss.edu](mailto:cmurphey@olemiss.edu)  
Telephone: 662-915-5955  
Fax: 662-915-7845

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## **CHAPTER 1**

### **THE CHANCERY COURT**

#### **Establishment of the Chancery Courts**

**Mississippi Constitution, Article VI, § 144, Judicial power of state, states:**

The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

#### **Chancery Court Subject Matter Jurisdiction**

**Mississippi Constitution, Article VI, § 159, Jurisdiction of chancery court, states:**

The chancery court shall have full jurisdiction in the following matters and cases, viz.:

- (a) All matters in equity;
- (b) Divorce and alimony;
- (c) Matters testamentary and of administration;
- (d) Minor's business;
- (e) Cases of idiocy, lunacy, and persons of unsound mind;
- (f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.

**Mississippi Constitution, Article VI, § 160, Additional jurisdiction of chancery court, states:**

And in addition to the jurisdiction heretofore exercised by the chancery court in suits to try title and to cancel deeds and other clouds upon title to real estate, it shall have jurisdiction in such cases to decree possession, and to displace possession; to decree rents and compensation for improvements and taxes; and in all cases where said court heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law.

**Mississippi Constitution, Article VI, § 161, Concurrent jurisdiction of chancery and circuit court, provides:**

And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it appear that the accounts to be investigated are mutual and complicated.

**Appellate Jurisdiction (Selected Statutes)**

**§ 11-51-79 From county court:**

No appeals or certiorari shall be taken from any interlocutory order of the county court, but if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor. Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefor and bond given according to law, except as hereinafter provided. Such appeal shall operate as a supersedeas only when such would be applicable in the case of appeals to the Supreme Court. Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate court in termtime or in vacation. If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties as is provided in affirmances in the Supreme Court. If prejudicial error be found, the court shall reverse and shall enter judgment or decree in the manner and against like parties and with like penalties as is provided in reversals in the Supreme Court; provided, that if a new trial is granted the cause shall be remanded to the docket of such circuit or chancery court and a new trial be had therein de novo. Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court; provided, however, that the county judge may within said thirty (30) days, for good cause shown by affidavit, extend the time, but in no case exceeding sixty (60) days from the date of the said final judgment or decree. Judgments or decrees of affirmance, except as otherwise hereinafter provided, may be appealed to the Supreme Court under the same rules and regulations and under the same penalties, in case of affirmance, as appertain to appeals from other final judgments or decrees of said courts, but when on appeal from the county court a case has been reversed by the circuit or chancery court there shall be no appeal to the Supreme Court until final judgment or decree in the

court to which it has been appealed. When the result of an appeal in the Supreme Court shall be a reversal of the lower court and in all material particulars in effect an affirmance of the judgment or decree of the county court, the mandate may go directly to the county court, otherwise to the proper lower court. Provided, however, that when appeals are taken in felony cases which have been transferred from the circuit court to the county court for trial, and have been there tried, such appeals from the judgment of the county court shall be taken directly to the Supreme Court.

**§ 17-11-57 Procedure for appeals:**

Any person aggrieved by a judgment or decision of the governing body of the district or of an associated county or city involved in an approved project, may appeal therefrom within ten days from the date thereof to the chancery court of any county within the district having jurisdiction of the subject matter, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the persons acting as chairman or the presiding officer of the county or city or the governing body of the district. The executive director of the district or the clerk of such county or city shall transmit the bill of exceptions to the chancery court at once and the court shall either in term time or vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the chancery court shall render such judgment as should have been rendered, and certify the same to the district or county or city, and costs shall be awarded as in other cases. The district or any associated member thereof may employ counsel to defend such appeals or defend or prosecute any suit, to be paid out of the funds of the district or such county or city. Any such appeal may be heard and determined in vacation in the discretion of the court on motion of any party and written notice for ten days to the other party or parties or the attorney of record, and the hearing of same shall be held in the county where the suit is pending, unless the judge in his order shall otherwise direct. No appeals shall be taken from any order relating to or authorizing the issuance of bonds; these matters shall be heard in the manner provided by Section 17-11-51.

**§ 17-17-29 Penalties; injunctions; recovery; fines:**

(1) Any person found by the commission violating any of the provisions of Sections 17-17-1 through 17-17-47, or any rule or regulation or written order of the commission in pursuance thereof, or any condition or limitation of a permit, shall be subject to a civil penalty of not more than Twenty-five Thousand Dollars (\$25,000.00) for each violation, such penalty to be assessed and levied by the commission after a hearing. Appeals from the imposition of the civil penalty may be taken to the chancery court in the same manner as appeals from orders of the commission. . . .

**§ 17-17-45      Appeal to appropriate chancery court:**

In addition to any other remedies that might now be available, any person or interested party aggrieved by an order of the commission or of the permit board of the bureau of pollution control shall have the right to perfect an appeal to the appropriate chancery court in the manner set forth in Sections 49-17-41 and 49-17-29.

**§ 21-27-221      Review:**

(2) Any person aggrieved by the final decision of the board or commission as a result of any hearing held under the provisions of Sections 21-27-201 through 21-27-221, including hearings requested incidental to the issuance, denial, modification or revocation of any operator certification issued hereunder, may, within thirty (30) days of receipt of written notice of the action of the board or commission, appeal such final decision to the chancery court of the county of the situs in whole or in part of the subject matter by giving a cost bond with sufficient sureties, payable to the state in the sum of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), to be fixed by the board or commission and to be filed with and approved by the chief administrative officer of the appropriate agency, who shall forthwith certify the same together with a certified copy of the record made before the board or commission or designated hearing officer in the matter to the chancery court to which the appeal is taken, which shall thereupon become the record of the cause. An appeal to the chancery court as provided herein shall not stay the decision of the board or commission. The aggrieved party may, within such thirty (30) days, petition the said chancery court for an appeal with supersedeas and the chancellor shall grant a hearing on said petition and upon good cause shown may grant such appeal with supersedeas; the appellant shall be required to post a supersedeas bond with sufficient sureties according to law in an amount to be determined by the chancellor. Appeals shall be considered only upon the record as made before the board or commission. The chancery court shall always be deemed open for hearing of such appeals and the chancellor may hear the same in termtime or in vacation at any place in his district, and the same shall have precedence over all civil cases, except election contests. The chancery court shall review all questions of law and of fact. If no prejudicial error be found, the matter shall be affirmed. If prejudicial error be found, the same shall be reversed, and the chancery court shall remand the matter to the board or commission for appropriate action as may be indicated or necessary under the circumstances. Appeals may be taken from the chancery court to the Supreme Court in the manner as now required by law, except that if a supersedeas is desired by the party appealing to the chancery court, he may apply therefor to the chancellor thereof, who shall award a writ of supersedeas, without additional bond, if in his judgment material damage is not



likely to result thereby; but otherwise, he shall require such supersedeas bond as he deems proper, which shall be payable to the state for damage.

**§ 25-41-15      Enforcement of chapter; authority of ethics commission; judicial review:**

Any party may petition the chancery court of the county in which the public body is located to enforce or appeal any order of the Ethics Commission issued pursuant to this chapter. In any such appeal the chancery court shall conduct a de novo review.

**§ 25-61-13      Proceedings to compel public access:**

Any party may petition the chancery court of the county in which the public body is located to enforce or appeal any order of the Ethics Commission issued pursuant to this chapter. In any such appeal the chancery court shall conduct a de novo review. Nothing in this chapter shall be construed to prohibit any party from filing a complaint in any chancery court having jurisdiction, nor shall a party be obligated to exhaust administrative remedies before filing a complaint. However, any party filing such a complaint in chancery court shall serve written notice upon the Ethics Commission at the time of filing the complaint. The written notice is for information only and does not make the Ethics Commission a party to the case.

**§ 27-77-7      Judicial review:**

(1) The findings and order of the Board of Tax Appeals entered under Section 27-77-5 shall be final unless the agency or the taxpayer shall, within sixty (60) days from the date the Board of Tax Appeals mailed the order, file a petition in the chancery court appealing the order. If the petition under this subsection is filed by the taxpayer, the petition shall be filed against the Department of Revenue as respondent. If the petition under this subsection is filed by the agency, the petition shall be filed against the taxpayer as respondent. The petition shall contain a concise statement of the facts as contended by the petitioner, identify the order from which the appeal is being taken and set out the type of relief sought. If in the action, the taxpayer is seeking a refund or credit for an alleged overpayment of any tax other than individual or corporate income tax or franchise tax, the taxpayer shall allege in the petition or in his answer, where the appeal is filed by the agency, that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else; however, this requirement shall not apply in any case involving a claim for incentives based on payroll withholding or other incentives, rebates or other economic benefits the computation of which is based, in whole or in part, upon taxes withheld or paid. The respondent to the petition has thirty (30) days from the

date of service of the petition to file a cross-appeal.

(2) A petition under subsection (1) of this section shall be filed in the chancery court of the county or judicial district in which the taxpayer has a place of business or in the Chancery Court of the First Judicial District of Hinds County, Mississippi; however, a resident taxpayer may file the petition in the chancery court of the county or judicial district in which he is a resident. If both the agency and the taxpayer file a petition under subsection (1) of this section, the appeals shall be consolidated and the chancery court where the taxpayer filed his petition shall have jurisdiction over the consolidated appeal.

(3) Unless otherwise ordered by the chancery court upon motion by the agency, no taxpayer appealing an order of the Board of Tax Appeals under this section shall be required to post security or a bond, or otherwise pay to the agency, under protest or otherwise, any contested taxes, interest, penalties or other amounts. After a petition or cross-appeal is filed by a taxpayer under this section, if the agency believes that its ability to obtain payment from the taxpayer of the taxes, penalties and interest in issue is jeopardized by its inability to proceed with collection due to the filing of the appeal or cross-appeal by the taxpayer or if the agency believes that the appeal or cross-appeal is being brought to delay payment of the taxes, penalties or interest in issue, the agency may move the chancery court to require the taxpayer to post a bond or other adequate security for the payment of any judgment of the court. Upon consideration of such motion, after notice and hearing, the chancellor shall determine whether a bond or other security is needed to protect the interest of the state in regard to the timely payment of the taxes, penalties and interest in issue. If the chancellor determines that a bond or other security is necessary to protect the interest of the state, the chancellor shall provide the taxpayer sixty (60) days from the date that he enters an order on the motion to post with the clerk of the court the bond or other security that the chancellor determines is needed to protect the state's interest. To avoid the accruing of additional penalty and interest while an appeal is pending, a taxpayer appealing an order of the Board of Tax Appeals affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the Board of Tax Appeals to be paid and seek a refund of such taxes, plus interest thereon, in the appeal. The taxpayer shall pay to the agency any tax included in the assessment which he is not contesting. If the petition initiating the appeal is filed by the taxpayer, the payment of the uncontested tax shall be made prior to the expiration of the sixty-day time period for filing a petition under subsection (1) of this section or the commissioner may institute collection proceedings for such uncontested amount. If the petition initiating the appeal is filed by the agency, the payment of the uncontested tax shall be made prior to the expiration of the sixty-day time period for the filing of the petition. Failure of the taxpayer to timely pay the uncontested tax shall not bar the taxpayer from obtaining a reduction, abatement and/or refund of any contested tax in the appeal and shall not result in the taxpayer's appeal or cross-appeal being dismissed or

delayed or judgment being entered granting the agency the relief it requested.

(4) In an action under this section resulting from an order of the Board of Tax Appeals involving a refund claim denial, the agency shall refund or credit to the taxpayer, as provided by law, the amount of any overpayment included in the refund claim which the agency does not contest. If the petition initiating the appeal is filed by the agency, the uncontested overpayment shall be paid or credited to the taxpayer prior to the expiration of the sixty-day time period for filing a petition under subsection (1) of this section. If the petition initiating the appeal is filed by the taxpayer, such uncontested overpayment shall be paid or credited to the taxpayer prior to the expiration of the thirty-day time period for the filing of an answer or other response to the petition as provided in subsection (5) of this section. Failure of the agency to timely pay or credit the uncontested overpayment to the taxpayer shall bar the agency from obtaining an affirmation, in whole or in part, of the refund claim denial in issue until the payment or claim is made, but shall not result in the agency's appeal or cross-appeal being dismissed or judgment being entered granting the taxpayer the relief he requested.

(5) Upon the filing of the petition under subsection (1) of this section, the clerk of the court shall issue a summons to the respondent requiring the respondent to answer or otherwise respond to the petition within thirty (30) days of service. Where the agency is the respondent, the summons shall be served on the agency by personal service on the commissioner as the chief executive officer of the agency. The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine the cause or issues joined as in other cases. In any petition, cross-appeal or answer in which the taxpayer is seeking a refund or credit for an alleged overpayment of any tax other than individual or corporate income tax or franchise tax the taxpayer shall prove by a preponderance of the evidence that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else; however, this requirement shall not apply in any case involving a claim for incentives based on withholding taxes or other incentives, rebates or other economic benefits the computation of which is based, in whole or in part, upon taxes withheld or paid. At trial of any action brought under this section, the chancery court shall give no deference to the decision of the Board of Tax Appeals, the Board of Review or the Department of Revenue, but shall give deference to the department's interpretation and application of the statutes as reflected in duly enacted regulations and other officially adopted publications. The chancery court shall try the case de novo and conduct a full evidentiary judicial hearing on all factual and legal issues raised by the taxpayer which address the substantive or procedural propriety of the actions of the Department of Revenue being appealed. The chancery court is expressly prohibited from trying any action filed pursuant to this section using the more limited standard of review specified for appeals in Section 27-77-13 of this chapter. Based on the evidence presented at trial, the chancery court shall determine whether the party bringing the appeal

has proven by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested. The chancery court shall decide all factual and legal questions presented, including those as to legality and the amount of tax, refund, tax credit or tax incentive due as well as whether and to what extent the imposition of interest and/or penalties are warranted under the facts of the case, and if it finds that the tax assessment, denial of the claim for a tax refund, tax credit or tax incentive or other action of the agency in issue is incorrect or invalid, in whole or in part, it shall determine the amount of tax or refund due, including interest and, if applicable, penalty to date, and enter such order or judgment as it deems proper. Interest and penalty included in this determination shall be computed by the court based on the methods for computing penalty and interest as specified by law for the type of tax in issue, and the court shall have the same discretion as the commissioner in determining whether and to what extent such amounts are warranted under the facts of the case. When the chancery court determines that an overpayment exists, the determination as to whether such overpayment shall be refunded to the taxpayer or credited against the taxpayer's future taxes shall be made by the chancery court based on the method for handling overpayments as specified by the law for the type of tax in issue. Either the agency or the taxpayer, or both, shall have the right to appeal from the order of the chancery court to the Supreme Court as in other cases. If an appeal is taken from the order of the chancery court, any bond or other security required to be posted by order of the chancery court shall continue to remain in place until a final decision is rendered in the case.

**§ 27-77-13      Judicial review of agency actions regarding of privileges, permits, tags, registrations, etc.:**

(1) The findings and order of the Board of Tax Appeals entered in accordance with Section 27-77-9, 27-77-11 or Section 27-77-12, shall be final unless the agency or the permittee, IFTA licensee, IRP registrant, tag holder, or title interest holder of the permit, IFTA license, IRP registration, tag or title in regard to which action was taken in the order shall, within thirty (30) days from the date of the order, file a petition in chancery court seeking a review of the order. If a petition under this subsection is filed by the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder, the petition shall be filed against the agency as respondent. If a petition under this subsection is filed by the agency, the petition shall be filed against the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder of the permit, IFTA license, IRP registration, tag or title which is the subject of the order sought to be reviewed as respondent. The respondent to a petition has thirty (30) days from the date of service of the petition to file a cross-appeal. The petition shall contain a concise statement of the facts as contended by the petitioner, identify the order from which the appeal is being taken and the type of relief sought. Where the petition is being filed by a

permittee, IFTA licensee, IRP registrant, tag holder or title interest holder, the petition shall also contain a certificate that the petitioner has paid to the executive director the estimated cost of the preparation of the entire record of the Board of Tax Appeals on the matter for which a review is sought.

(2) A petition under subsection (1) of this section shall be filed in the chancery court of the county or judicial district in which the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder of the permit, IFTA license, IRP registration, tag or title which is the subject of the order of the Board of Tax Appeals sought to be reviewed has a place of business or in the First Judicial District of Hinds County, Mississippi; however, a resident permittee, IFTA licensee, IRP registrant, tag holder or title interest holder may file a petition in the chancery court of the county or judicial district in which he is a resident. If both the agency and the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder file a petition under subsection (1) of this section, the appeals shall be consolidated and the chancery court where the first petition was filed shall have jurisdiction over the consolidated appeal. If it cannot be determined which petition was filed first, the chancery court where the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder filed his petition shall have jurisdiction over the consolidated appeal.

(3) The review by the chancery court of the order of the Board of Tax Appeals on a petition filed under subsection (1) of this section shall be based on the record made before the Board of Tax Appeals. Before filing a petition under subsection (1) of this section, a petitioner, who is a permittee, IFTA licensee, IRP registrant, tag holder or title interest holder, shall obtain from the executive director an estimate of the cost to prepare the entire record of the Board of Tax Appeals and shall pay to the executive director the amount of the estimate. If, upon the preparation of the record, it is determined that the estimate paid was insufficient to pay the actual cost of the preparation of the record, the executive director shall mail to the petitioner a written notice of the deficiency. The petitioner shall pay the deficiency to the executive director within thirty (30) days from the date of this written notice. If upon the preparation of the record, it is determined that the estimate paid by the petitioner exceeds the actual cost of the preparation of the record, the executive director shall remit to the petitioner the amount by which the estimate paid exceeds the actual cost. The chancery court shall dismiss with prejudice any petition filed by a permittee, IFTA licensee, IRP registrant, tag holder or title interest holder where it is shown that the petitioner failed to pay prior to filing the petition the estimated cost for preparation of the record of the Board of Tax Appeals or failed to pay any deficiency in the estimate within thirty (30) days of a notice of deficiency. Where the agency files a petition under subsection (1) of this section, the agency shall pay the cost of the preparation of the entire record of the Board of Tax Appeals on the matter for which a review is sought. Where both the agency and the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder file a petition under subsection (1) of this section

from the same Board of Tax Appeals order, the executive director shall remit to the permittee, IFTA licensee, IRP registrant, tag holder or title interest holder that filed the petition the amount by which, if any, the payment received from this permittee, IFTA licensee, IRP registrant, tag holder or title interest holder for preparation of the record exceeds one-half (  $\frac{1}{2}$  ) of the actual cost of preparation of the record. The other half of the actual cost of preparation of the record in this situation shall be paid by the agency.

(4) Upon the filing of the petition under subsection (1) of this section, the clerk of the court in which the petition is filed shall issue a summons to the respondent requiring the respondent to answer or otherwise respond to the petition within thirty (30) days of service. Where the agency is the respondent, the summons shall be served on the agency by personal service on the commissioner as the chief executive officer of the agency.

(5) Upon the filing of an answer and/or response to the petition filed under subsection (1) of this section, and upon the filing of the record made before the Board of Tax Appeals with the clerk of the court, the chancery court shall, upon the motion of either party, establish a schedule for the filing of briefs in the action. The scope of review of the chancery court in an action filed under subsection (1) of this section shall be limited to a review of the record made before the Board of Tax Appeals to determine if the action of the Board of Tax Appeals is unlawful for the reason that it was:

- (a) Not supported by substantial evidence;
- (b) Arbitrary or capricious;
- (c) Beyond the power of the Board of Tax Appeals to make; or
- (d) In violation of some statutory or constitutional right of the petitioner.

(6) No relief shall be granted based upon the chancery court's finding of harmless error by the Board of Tax Appeals in complying with any procedural requirement; however, in the event that there is a finding of prejudicial error in the proceedings, the cause shall be remanded to the Board of Tax Appeals for a rehearing consistent with the findings of the court. . . .

### **§ 27-115-33 Appeals:**

(2) Any person aggrieved by a decision of the board may appeal the decision to the chancery court of the county in which its corporate headquarters is located within ten (10) days of the date of the decision of the board.

(3) The chancery court shall hear appeals from the board.

(4) The chancery court may remand an appeal to the board to conduct further hearings necessary to adjudicate the appeal. . . .

### **§ 29-1-143 Chancery court jurisdiction:**

The chancery court shall have jurisdiction of all matters and causes, including

suits and appeals from the commission, arising from the administration of Sections 29-1-125 through 29-1-143, except such causes and suits which the constitution gives to the circuit court. All suits in court shall be governed by the established rules of procedure for the court where the suit is maintained. The commission, as the agent of the state, may be made a party defendant as a citizen, and all process for the commission shall be served on its secretary.

**§ 29-3-1      Control by board of education:**

In the event any party is aggrieved by the decision of the appraisers setting forth the appraised rental value, the party so aggrieved shall be entitled to an appeal to the chancery court in which the land is located. Such appeal shall be taken within twenty (20) days following the decision. The chancery court, on appeal, may review all of the proceedings, may receive additional evidence, and make findings of fact, as well as conclusions of law to insure that a fair and reasonable return may be obtained on the sixteenth section lands or lands in lieu thereof.

**§ 29-7-17      Penalties for violating provisions:**

Appeals from the imposition of a civil penalty may be taken to the appropriate chancery court in the same manner as appeals from the orders of the commission.

**§ 49-27-39      Council's order affirmed on appeal:**

(a) An appeal may be taken by the applicant, or any person or corporation, municipal corporation, county or interested community group who has been aggrieved by such order, from the denial, suspension or revocation of a permit or the issuance of a permit or conditional permit and who has filed written protest or objection as specified in Sections 49-27-9 through 49-27-21, within thirty (30) days after the mailing to the parties of the order of issuance, denial, suspension or revocation of any such permit, to the chancery court of any county having jurisdiction over the property which may be affected by any such proposed activity to be authorized by such permit.

(b) If the court finds that the order appealed from is supported by substantial evidence, consistent with the public policy set forth in this chapter, is not arbitrary or capricious and does not violate constitutional rights, it shall affirm the council's order.

**§ 51-33-37      Issuance of bonds funding indebtedness:**

For the purpose of funding or paying any legal indebtedness, now or hereafter outstanding, of any drainage district organized and existing under any law or laws of the state of Mississippi or that may be hereafter organized under any law of the

state, to the extent that same when added to the outstanding bonded indebtedness of the district shall not exceed the balance due to the district on the assessment of land of the district, the drainage commissioners and court for such district may issue bonds of the district aggregating such amount, provided that interest on such indebtedness may not be calculated against the district in determining the amount of such indebtedness. . . . Any objector having filed his objections prior to the hearing may appeal from the decision of such administrative or governing authority to the chancery court having jurisdiction of the affairs of said district, on making and filing, within ten (10) days from date of hearing, appeal bond in the penal sum of two hundred dollars (\$200.00) approved by the clerk of said chancery court, conditioned to pay all costs which may be adjudged against objector. . . .

**§ 53-11-31      Appeal to chancery court:**

Any interested person adversely affected by any provision or section of this chapter within the jurisdiction of the board or by any rule, regulation or order made by the board thereunder, or by any act done or threatened thereunder, may obtain court review and seek relief by appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, or the chancery court of the county in which the land involved, or any part thereof, is situated. The term “interested person” shall be interpreted broadly and liberally and shall include all mineral and royalty owners, mineral lessees, if any, and the owners of surface on which injection or re-injection wells and other surface equipment connected with a geologic sequestration facility is or will be situated. Any interested party may appeal to the chancery court of the county in which the land involved or any part thereof is situated, if appeal is demanded within thirty (30) days from the date that the rule, regulation or order of the board is filed for record in the office of the board.

The appeal may be taken by filing notice of the appeal with the board, whereupon the board shall, under its certificate, transmit to the court appealed to all documents and papers on file in the matter, together with a transcript of the record, which documents and papers together with said transcript of the record shall be transmitted to the clerk of the chancery court of the county to which the appeal is taken. Except as otherwise provided in this section, the appeal otherwise shall be made in accordance with the provisions of Sections 53-1-39 and 53-1-41.

**§ 69-7-209      Refusal to grant license; appeal:**

Any person feeling aggrieved with the decision of the commissioner of agriculture and commerce in refusing to grant a license hereunder shall have recourse by an appeal to the chancery court of Hinds County, Mississippi, by petition filed within



thirty days from the date of final refusal to issue such license. The chancery court of Hinds County shall have and it is hereby given full jurisdiction of such appeal and it may enter any appropriate orders therein in term time or in vacation.

**§ 75-33-23     Unsanitary establishment or equipment:**

Any person aggrieved with the order of the commissioner, or any of his lawful and duly authorized agents, shall have immediate recourse by any appeal to the chancery court of the jurisdiction in which the establishment may be located. The chancery court shall have and it is hereby given full jurisdiction to hear and determine the appeal and enter any and all appropriate orders in term time or in vacation.

**§ 83-9-23     Residents 65 or older:**

(3) Any person aggrieved by the decision of the commissioner under the provisions of this section may appeal therefrom within thirty days after receipt of notice thereof to the chancery court of the first judicial district of Hinds County by writ of certiorari, upon giving bond with surety or sureties and in such penalty as shall be approved by the chancery court of said county, conditioned that such appellant will pay all cost of the appeal in the event such appeal is unsuccessful. The said chancery court shall have the authority and jurisdiction to hear said appeal and render its decision in regard thereto, either in term time or vacation.

**§ 83-19-109     Appeals from actions of commissioner:**

Any person becoming a party as hereinbefore provided and feeling aggrieved by the decision of the commissioner of insurance under the provisions of Sections 83-19-99 to 83-19-123 may appeal therefrom within thirty (30) days after the receipt of notice thereof to the chancery court of the first judicial district of Hinds County by writ of certiorari upon giving bond with surety or sureties in such penalty as shall be approved by the chancery court of said county, conditioned that such appellant will pay all costs of the appeal in the event such appeal is unsuccessful. The said chancery court shall have the authority and jurisdiction to hear said appeal and to render its decision in regard thereto either in term time or vacation.

### Transfer of Jurisdiction

**Mississippi Constitution, Article VI, § Section 162 Transfer to circuit court**, provides:

All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court.

We take this opportunity to inform the trial bench and bar of an ever-increasing problem we are encountering - this Court is inundated with interlocutory appeals, many of which involve the issue of whether a case has been appropriately commenced in circuit or chancery court. . . . We implore our learned trial judges to studiously and timely consider a motion to transfer based on subject matter jurisdiction to assure that jurisdiction is proper. . . . *Trustmark National Bank v. Johnson*, 865 So. 2d 1148, 1152-53 (Miss. 2004).

Under the Mississippi Constitution of 1890, circuit courts are courts of general jurisdiction, while chancery courts have limited jurisdiction over “all matters in equity” and other designated matters. The constitution contains complementary provisions for the transfer of cases commenced in the wrong forum. The jurisdiction of the chancery court is a question of subject matter jurisdiction that may be raised by either party at any time. However, this Court is prohibited by the Mississippi Constitution from reversing on this issue after a final judgment. A party aggrieved by the trial court's grant or denial of a motion to transfer may seek relief by pursuing an interlocutory appeal, as DPI has done here. “To determine whether a court has subject matter jurisdiction, we look to the face of the complaint, examining the nature of the controversy and the relief sought.” The reviewing court must look to the substance, not the form, of a claim to determine whether that claim is legal or equitable. We have consistently held that if it appears from the face of a well-pleaded complaint that an independent basis for equity jurisdiction exists, our chancery courts may hear and adjudge law claims. In that circumstance, the legal claims lie within the pendent jurisdiction of the chancery court. As long as the chancery court's equity jurisdiction has attached, the chancery court has discretion to award legal and punitive damages. Conversely, “if the complaint seeks legal relief, even in combination with equitable relief, the circuit court can have proper subject matter jurisdiction.” In fact, if there is some doubt as to whether a case is within the jurisdiction of the chancery court, the case is better tried in circuit court because “it is more appropriate for a circuit court to hear equity claims than it is for a chancery court to hear actions at law since circuit courts have general jurisdiction but chancery courts enjoy only limited jurisdiction.” This Court also has

cited the constitutional right to a jury trial as a reason for resolving doubtful cases in favor of circuit court jurisdiction. Nonetheless, a party cannot, by invoking the right to a jury trial, secure a transfer to circuit court of a case properly within the chancery court's jurisdiction. ***Derr Plantation, Inc. v. Swarek*, 14 So. 3d 711, 715-16 (Miss. 2009) (citations omitted).**

Mathis filed a “Complaint for Declaratory and Other Relief” in the Chancery Court . . . against a real estate franchising corporation, ERA Franchise Systems, Inc. (“ERA”), his former business partners, their newly-formed business entities, and his former partners' new partners in the newly-formed business entities. ERA filed a motion to have the action transferred to circuit court. The chancellor held a hearing and, ruling that he would bifurcate the trial between equitable and legal claims, denied the motion to transfer. ERA then filed a petition for interlocutory appeal which this Court granted. . . . We agree with Mathis's assertion that a true stockholder derivative action is a suit in equity which confers jurisdiction on the chancery court. However, . . . Mathis is asserting his own personal claims, in addition to the derivative claims of REP, in a direct action that may benefit him alone, to the exclusion of the other equity owner in REP. Based on these facts, we must conclude that, as to the derivative claims through which Mathis seeks compensatory and punitive damages, he is pursuing a direct legal action rather than a true shareholder's derivative action. . . . Because Mathis's claims contain questions of law and equity, request punitive damages, and because having the claims adjudicated in chancery court would deprive ERA of the right to a jury trial, we find the chancellor erred in denying the defendants' motion to transfer the case to circuit court. We reverse the chancery court's denial of defendant's motion and remand with instructions to transfer the case to the . . . Circuit Court. ***ERA Franchise Systems, Inc. v. Mathis*, 931 So. 2d 1278, 1279-84 (Miss. 2006) (citations omitted).**

In its order denying Starkville's motion to transfer this case to circuit court, the chancellor stated that “[s]ubject matter jurisdiction is determined from the allegations of the complaint. The complaint seeks specific performance of a contract which is an equitable remedy. . . .” In *Trustmark*, we held that the circuit court erred in denying a motion to transfer to chancery court. In so doing, we readily acknowledged that most of our recently decided cases on the issue of transfer involved the question of whether a case commenced in chancery court should have been transferred to circuit court. We noted in *Trustmark* that the circuit court complaint, while asserting claims of negligence, breach of contract, breach of fiduciary duty and gross negligence, actually focused on the administration of a trust

which had been under “the exclusive jurisdiction of the chancery court and has been since its inception.” . . . When we review Starkville's complaint in today's case, we can state with confidence that the relief sought on specific performance of a contract is typically the type of relief to be considered by our chancellors sitting as a court of equity. Additionally, Starkville presumably made a knowing and conscious decision to commence this litigation in chancery court (as opposed to circuit court) when it filed its complaint in 1995. . . . In fact, in today's case, the same chancellor has been involved with the litigation of this case since its inception in 1995. Who was in a better position to fairly and correctly decide the issues in this case than the learned chancellor who had presided over all the proceedings in this case from the very beginning? Thus, for the reasons stated, we find that the chancellor quite appropriately denied Starkville's motion to transfer this case to the Circuit Court. . . . ***City of Starkville v. 4-County Elec. Power Ass'n*, 909 So. 2d 1094 1101-02 (Miss. 2005) (citations omitted).**

**Mississippi Constitution, Article VI, § 157 Exclusive jurisdiction of chancery court; transfer** provides:

All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court.

The Plaintiffs have brought a negligence action against the Trustee of the Ruth S. Biedenharn Trust, which has been under the jurisdiction of the . . . Chancery Court since its inception. “In short, this proceeding is for determination of property rights in the assets of an estate being administered under the jurisdiction of the chancery court.” . . . The Plaintiffs' claims clearly involve the construction, interpretation, and administration of the Ruth S. Biedenharn Trust. The administration of Milton's share of the Trust assets are matters properly before the . . . Chancery Court. Determining the appropriateness of any disbursements under the Trust requires the interpretation of that Trust. Any allegations of misuse of the Trust funds are matters to be decided by the . . . Chancery Court. Even though the Plaintiffs have artfully pled a legal action, their claims attack the heart of the Ruth S. Biedenharn Trust, which lies in the bosom of the . . . Chancery Court. As such, we find that the Circuit Court . . . erred when it denied Trustmark's Motion To Dismiss or To Transfer. We thus reverse the order denying a transfer to chancery court and remand this case to the Circuit Court . . . with instructions to forthwith enter an order transferring this case to the Chancery Court . . . . ***Trustmark National Bank v. Johnson*, 865 So. 2d 1148, 1152-53 (Miss. 2004).**

**Mississippi Constitution, Article VI, § 147 Reversal of judgment for want of jurisdiction; remand, provides:**

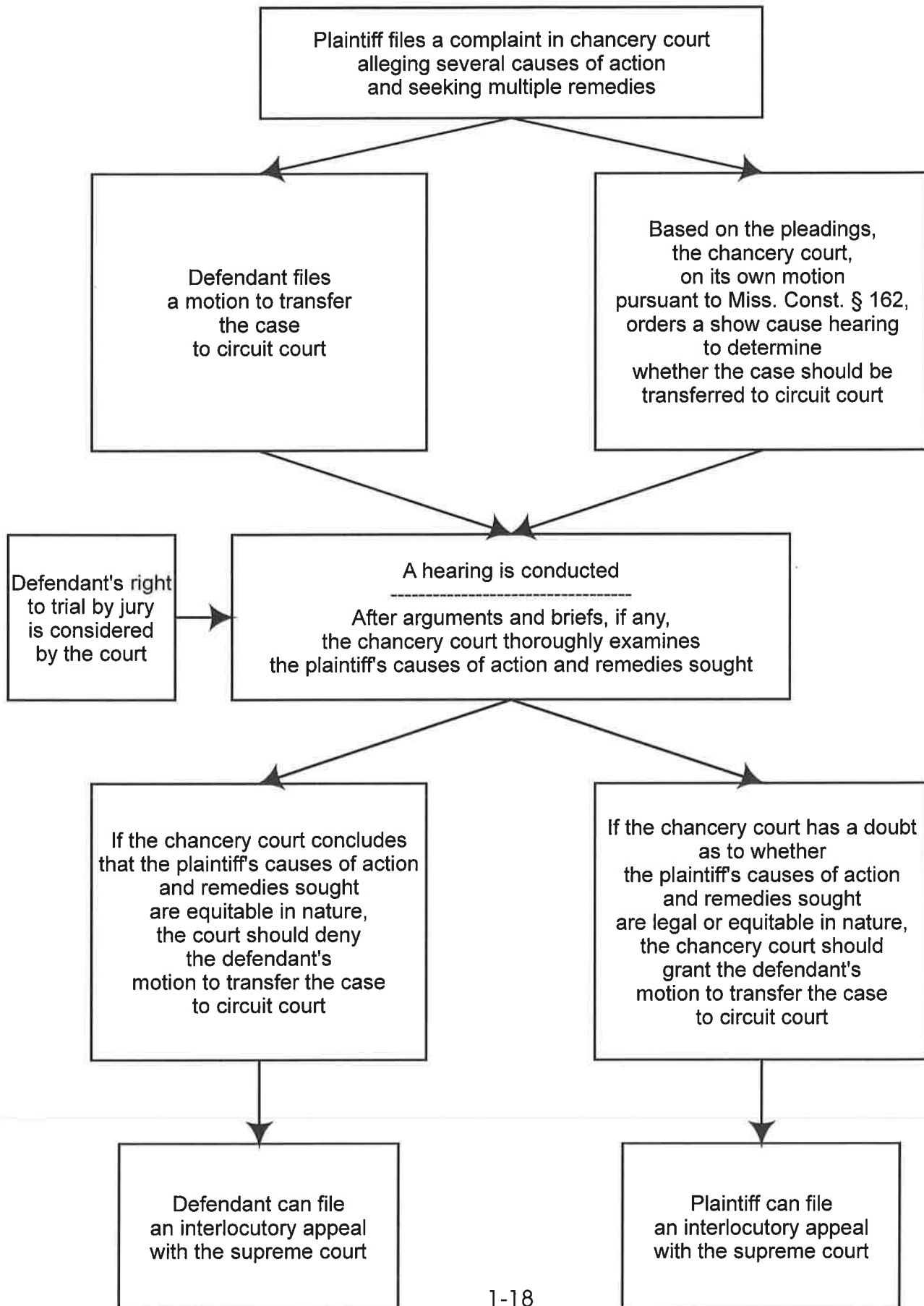
No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.

Finally, it is apparent that Southern has followed the correct procedure in bringing this jurisdictional issue before this Court on interlocutory appeal. The Mississippi Constitution would prohibit Southern from gaining a reversal on this jurisdictional issue following a trial on the merits. . . . Given that Southern has raised this issue on interlocutory appeal, however, this Court is faced with no judgment of the Chancery Court, and the provisions of Article 6, § 147 accordingly do not serve to bar the present appeal. The trial court's ruling is accordingly reversed, and we remand this case to the Chancery Court of Washington County with directions that it shall promptly transfer this case to the Circuit Court of Washington County. *Southern Leisure Homes, Inc. v. Hardin*, 742 So. 2d 1088, 1091 (Miss. 1999) (citations omitted).

**§ 11-3-9      Want of jurisdiction:**

A judgment or decree in any chancery or circuit court rendered in a civil case, shall not be reversed or annulled on account of want of jurisdiction to render the judgment or decree.

## **Motion to Transfer from Chancery Court to Circuit Court**



Which Actions are Equitable or Legal			
Cause of Action or Relief Sought	Nature of Action	Court	Citation
Assumpsit after the contract is void & unenforceable	Equity	Chancery	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Assumpsit where the contract is not void	May be Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Breach of contract involving marital or divorce claims	Equity	Chancery	<i>Germany v. Germany</i> , 123 So. 3d 423, 431 (Miss. 2013).
Breach of contract where actual damages are sought	Law	Circuit	<i>Southern Leisure Homes, Inc. v. Hardin</i> , 742 So. 2d 1088, 1090 (Miss. 1999).  <i>Tyson Breeders, Inc. v. Harrison</i> , 940 So. 2d 230, 231-34 (Miss. 2006).
Breach of contract where specific performance is sought & contract is valid	Equity	Chancery	<i>City of Starkville v. 4-County EPA</i> , 909 So. 2d 1094, 1102 (Miss. 2005).
Breach of contract where specific performance is sought in a land sale	Equity	Chancery	<i>Copiah Med. Assoc. v. Baptist Health Sys.</i> , 898 So. 2d 656, 660 (Miss. 2005).  <i>Derr Plantation, Inc. v. Swarek</i> , 14 So. 3d 711, 717-720 (Miss. 2009).
Breach of duty of good faith and fair dealing	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Breach of fiduciary duty (Tort action)	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Constructive trust	Equity	Chancery	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Conversion (Intentional tort)	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1181 (Miss. 2004).

Which Actions are Equitable or Legal			
Fraud where actual or punitive damages are sought	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1179 (Miss. 2004).
Fraud where an equitable relief is sought	Equity	Chancery	<i>Southern Leisure Homes, Inc. v. Hardin</i> , 742 So. 2d 1088, 1090 (Miss. 1999).
Fraudulent inducement where actual or punitive damages are sought	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1179 (Miss. 2004).
Gross negligence (Tort action)	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1181 (Miss. 2004).
Injunctive relief (No adequate remedy at law)	Equity	Chancery	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1181 (Miss. 2004).
Negligence (Tort action)	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1181 (Miss. 2004).
Negligence in management of trust under the jurisdiction of the chancery court	Equity	Chancery	<i>Trustmark Nat'l Bank v. Johnson</i> , 865 So. 2d 1148, 1153 (Miss. 2004).
Punitive damages	Law	Circuit	<i>ERA Franchise Sys., Inc v. Mathis</i> , 931 So. 2d 1278, 1282 (Miss. 2006).
Stockholder derivative action (not seeking personal claims)	Equity	Chancery	<i>ERA Franchise Sys., Inc v. Mathis</i> , 931 So. 2d 1278, 1281 (Miss. 2006).
Tortious breach of contract	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Unjust enrichment	Equity	Chancery	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1180 (Miss. 2004).
Violations of the Mississippi Consumer Protection Act	Law	Circuit	<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So. 2d 1175, 1181 (Miss. 2004).



**Jurisdiction and Authority Conferred by Selected Statutes**

**§ 9-1-17      Punishment of contempt:**

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars (\$100.00) for each offense, nor shall the imprisonment continue longer than thirty (30) days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey or perform any rules, order, or judgment of the court, such court shall have power to fine and imprison such officer or person until he shall give evidence, or until the rule, order, or judgment shall be complied with.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

**§ 9-1-19      Authority of judges of supreme, circuit courts and chancellors and judges of Court of Appeals to grant remedial writs:**

The judges of the Supreme and circuit courts and chancellors and judges of the Court of Appeals, in termtime and in vacation, may severally order the issuance of writs of habeas corpus, mandamus, certiorari, supersedeas and attachments, and grant injunctions and all other remedial writs, in all cases where the same may properly be granted according to right and justice, returnable to any court, whether the suit or proceedings be pending in the district of the judge or chancellor granting the same or not. The fiat of such judge or chancellor shall authorize the issuance of the process for a writ returnable to the proper court or before the proper officer; and all such process or writs may be granted, issued and executed on Sunday.

**§ 9-1-23      District domicile required [to be conservators of the peace]:**

The judges of the Supreme, circuit and county courts and chancellors and judges of the Court of Appeals shall be conservators of the peace for the state, each with full power to do all acts which conservators of the peace may lawfully do; and the circuit judges and chancellors shall reside within their respective districts and the county judges shall reside in their respective counties.

**§ 9-1-27      Appointment of officers pro tempore:**

Whenever a vacancy shall exist in the office of clerk of any court, sheriff, or coroner and the vacancy shall not have been filled on or before the commencement of the term of any court which the clerk, sheriff, or coroner is required to attend, or if the clerk, sheriff, or coroner shall be absent, deceased, become unable, or refuse to discharge his duties, or be on trial therein, the court, or the judge or judges thereof, shall have power to appoint a suitable person to discharge the duties of clerk, sheriff, or coroner pro tempore, who shall take the oath required by law, and perform the duties and receive the emoluments of the office to which he is appointed, until the proper incumbent shall be duly qualified or return to his duties.

**§ 9-5-81      Jurisdiction:**

The chancery court in addition to the full jurisdiction in all the matters and cases expressly conferred upon it by the constitution shall have jurisdiction of all cases transferred to it by the circuit court or remanded to it by the supreme court; and such further jurisdiction, as is, in this chapter or elsewhere, provided by law.

**§ 9-5-83      Administration of estate:**

The court in which a will may have been admitted to probate, letters of administration granted, or a guardian may have been appointed, shall have jurisdiction to hear and determine all questions in relation to the execution of the trust of the executor, administrator, guardian, or other officer appointed for the administration and management of the estate, and all demands against it by heirs at law, distributees, devisees, legatees, wards, creditors, or others; and shall have jurisdiction of all cases in which bonds or other obligations shall have been executed in any proceeding in relation to the estate, or other proceedings, had in said chancery court, to hear and determine upon proper proceedings and evidence, the liability of the obligors in such bond or obligation, whether as principal or surety, and by decree and process to enforce such liability.

**§ 9-5-85      Subpoena of witnesses:**

The chancery court shall have power to issue a summons for any person, or subpoena for any witness, whose appearance in court may be deemed necessary for any purpose, whether such party or witness reside in the same or any other county. It shall be the duty of the party summoned or subpoenaed, to attend the court according to the command of the process; and if it be necessary or proper to enforce the appearance of the party, the court, on the return of the process executed and failure to appear, may issue an attachment, and may fine the party

when brought in for a contempt. If a witness before the court shall refuse to testify, the court may commit such witness for contempt of the court.

**§ 9-5-87      Punishment for violations:**

The chancery court, or the chancellor in vacation, or judge granting the writ, shall have power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment, or both, or the chancellor or judge granting the writ may require bail for the appearance of the party at the next term of the court to answer for the contempt; but such person shall be first cited to appear and answer. And any person so punished by order of the chancellor in vacation, may on five (5) days' notice to the opposite party, apply to a judge of the Supreme Court, who, for good cause shown, may supersede the punishment until the meeting of the said chancery court.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

**§ 9-5-89      Appointment of guardian ad litem:**

The court may appoint a guardian ad litem to any infant or defendant of unsound mind, and allow him suitable compensation payable out of the estate of such party, but the appointment shall not be made except when the court shall consider it necessary for the protection of the interest of such defendant; and a decree or judgment of any court shall not be void or erroneous because of the failure to have a guardian ad litem.

**§ 9-5-93      Matters set in vacation:**

Whenever the chancery court or chancellor has lawfully set any matter in vacation for confirmation or decree, and no contest has been timely filed, if an order or decree determining the same or setting another date therefor be not entered upon such date, the chancellor shall have the power to enter an order or decree on any day prior to the adjournment of the next succeeding term, without further process. Provided, that if the matter be one in which contest might have been entered prior to the date set and such contest be filed before the entry of such order or decree, the same shall be disposed of as if such contest had been timely filed.

**§ 9-5-95      Extension of time in vacation:**

The court or chancellor in vacation shall have power in proper cases for good cause shown to grant a reasonable enlargement of the time for the filing of an answer or answers, or of a demurrer or demurrers, and shall have power in like cases and for like cause shown to set aside decrees pro confesso and thereupon to permit the filing of answer or answers. But no such enlargement of time should be granted where the request therefor is solely for delay or is the result of inexcusable neglect on the part of the defendant or his solicitor.

**§ 9-5-97      Powers of chancellor in vacation:**

In the matter of ordering, decreeing and confirming sales of real and personal property of decedents, or of minors, or of persons of unsound mind, and in all other matters testamentary or of administration, in minors' business, matters affecting persons of unsound mind, and in the matter of the removal of disabilities of minority, the chancellors of the several districts of this state are hereby authorized and empowered to do in vacation all things, and to exercise all the powers in such matters that could be done by them in term time; and all laws governing the action of the chancery court in such matters, and the process and procedure therein, shall apply when the chancellor shall act therein in vacation; but before any sale of real estate shall be confirmed by the chancellor in vacation, the parties in interest shall have notice thereof as provided by law in the matter of confirming sales by chancellors in vacation.

**§ 9-5-103      Reduction of specified bonds:**

Whenever it shall appear by petition to the chancery court, or chancellor in vacation, that any bond given by an assignee, receiver, executor, administrator, guardian, or trustee is in excess of the value of the estate being administered, and as such is an unnecessary expense to the estate, or that other sufficient cause appears for so doing, the chancery court or chancellor in vacation may, after five days' service of copy of said petition on the surety, cancel the bond or reduce the same to an amount sufficient to protect the estate, or accept a new bond in substitution of an existing one. However, the decree rendered shall not affect the liability upon a bond which accrued prior to its cancellation, reduction or substitution.

**§ 9-5-105      Payment of costs:**

When any chancellor in this state shall, by agreement of the parties, hear any cause or matter in vacation, at any place, other than the place of his residence, all expenses incurred by him in attendance upon said hearing, shall be paid equally

by the parties thereto, upon the chancellor's filing an itemized statement thereof, with the clerk of the chancery court of the county in which such matter shall be pending; and when at any such hearing the attendance of the court reporter shall be required his actual expenses shall be likewise paid.

**§ 9-5-255      Appointment of family masters:**

(1) Except as provided by subsection (9) of this section, the senior chancellor of each chancery court district in the state may apply to the Chief Justice of the Supreme Court for the appointment of one or more persons to serve as family masters in chancery in each of the counties or for all of the counties within the respective chancery court district if the senior chancellor states in writing that the chancery court district's docket is crowded enough to warrant an appointment of a family master. . . .

(2) Family masters in chancery shall have the power to hear cases and recommend orders establishing, modifying and enforcing orders for support in matters referred to them by chancellors and judges of the circuit, county or family courts of such county. The family master in chancery shall have jurisdiction over paternity matters brought pursuant to the Mississippi Uniform Law on Paternity and referred to them by chancellors and judges of the circuit, county or family courts of such county. . . .

**§ 11-1-16      Proceedings in vacation:**

(1) Notwithstanding the provisions of any other law to the contrary, the judge of any circuit, chancery, county, youth or family court or any other court of record shall, in vacation, and in the same manner as at a regular term, have jurisdiction to hear and determine and make and enter judgments, orders and decrees in all cases, civil or criminal, which are pending in the court and which were triable at the preceding term. Parties and witnesses duly summoned, subpoenaed or bound by recognizance at the preceding term shall be bound to attend without the necessity of additional process. Petit juries may be impaneled in such cases in the same manner as in termtime. All judgments, orders and decrees which the judge may render or make in such cases tried shall be signed by him and thereupon be entered and recorded on the minute book of the court in which the case or matter is pending, and shall have the same force and effect as if made, entered and recorded in termtime. Appeals may be had and taken therefrom when so entered and recorded, as in other cases, in like manner as is provided by law when cases are tried in termtime.

(2) The provisions of this section shall be supplemental and in addition to all other jurisdiction and authority which the judge of any such court may lawfully exercise in vacation or at a special term.

**§ 11-1-17      Rendition of final decree; appeal:**

All chancellors or judges of the chancery and circuit courts of the state of Mississippi shall render their final decree on any and all matters taken under advisement by such chancellors or judges not later than six (6) months after the date when same are taken under advisement or not later than six (6) months after the date on which the chancellors or courts or judges set as a date for the final brief or memoranda of authority is required to be filed on or as to the cause taken under advisement, whichever is the latest date after the date on which the cause or case is taken under advisement.

In the event a final decree has not been entered within the six months period hereinbefore referred to, then any party to said law suit shall have the right to appeal on the record as otherwise provided the same as if a final decree has been rendered adversely. Said appeal shall be to the supreme court of the state of Mississippi and shall be treated as a preferred case over other cases except election contests.

**§ 11-5-79      Decree as circuit court judgment:**

The decree of a court of chancery shall have the force, operation, and effect of a judgment at law in the circuit court.

**§ 11-13-11      Restraining tax collection, jurisdiction:**

The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law.

**§ 11-55-5      Costs awarded for meritless action:**

(1) Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure. . . .

**§ 13-5-26      Drawing and assigning jurors:**

A judge or any court or any other state or county official having authority to conduct a trial or hearing with a jury within the county may direct the circuit clerk to draw and assign to that court or official the number of jurors he deems necessary. . . .

**§ 29-1-143      Chancery court jurisdiction:**

The chancery court shall have jurisdiction of all matters and causes, including suits and appeals from the commission, arising from the administration of Sections 29-1-125 through 29-1-143, except such causes and suits which the constitution gives to the circuit court. All suits in court shall be governed by the established rules of procedure for the court where the suit is maintained. The commission, as the agent of the state, may be made a party defendant as a citizen, and all process for the commission shall be served on its secretary.

**§ 41-41-53      Parental consent; judicial waiver:**

(3) A minor who elects not to seek or does not obtain consent from her parents or legal guardian under this section may petition, on her own behalf or by next friend, the chancery court in the county in which the minor resides or in the county in which the abortion is to be performed for a waiver of the consent requirement of this section pursuant to the procedures of Section 41-41-55.

**§ 41-41-55      Application; minors' rights; waiver procedure:**

(1) The requirements and procedures under Sections 41-41-51 through 41-41-63 shall apply and are available to minors whether or not they are residents of this state.

(2) The minor may participate in proceedings in the court on her own behalf. The court shall advise her that she has a right to court-appointed counsel and shall provide her with such counsel upon her request or if she is not already adequately represented.

(3) Court proceedings under this section shall be confidential and anonymous and shall be given such precedence over other pending matters as is necessary to insure that the court may reach a decision promptly, but in no case shall the court fail to rule within seventy-two (72) hours of the time the application is filed. If for any reason the court fails to rule within seventy-two (72) hours of the time the application is filed, the minor may proceed as if the consent requirement of Section 41-41-53 has been waived.

(4) Consent shall be waived if the court finds by clear and convincing evidence either:

- (a) That the minor is mature and well-informed enough to make the abortion decision on her own; or
- (b) That performance of the abortion would be in the best interests of the minor.

(5) A court that conducts proceedings under this section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(6) An expedited confidential and anonymous appeal shall be available to any minor to whom the court denies a waiver of consent. The Mississippi Supreme Court shall issue promptly such rules and regulations as are necessary to insure that proceedings under Sections 41-41-51 through 41-41-63 are handled in an expeditious, confidential and anonymous manner.

(7) No filing fees shall be required of any minor who avails herself of the procedures provided by this section.

**§ 41-57-23      Proceedings to correct birth certificate containing major deficiencies; acknowledgment of paternity:**

(1) Any petition, bill of complaint or other proceeding filed in the chancery court to: (a) change the date of birth by two (2) or more days, (b) change the surname of a child, (c) change the surname of either or both parents, (d) change the birthplace of the child because of an error or omission of such information as originally recorded, or (e) make any changes or additions to a birth certificate resulting from a legitimation, filiation or any changes not specifically authorized elsewhere by statute, shall be filed in the county of residence of the petitioner or filed in any chancery court district of the state if the petitioner be a nonresident petitioner. In all such proceedings, the State Board of Health shall be made a respondent therein, and a certified copy of the petition, bill of complaint or other proceeding shall be forwarded to the State Board of Health. Process may be served upon the State Registrar of Vital Records. The State Board of Health shall file an answer to all such proceedings within the time as provided by general law. The provisions of this section shall not apply to adoption proceedings. Upon receipt of a certified copy of a decree, which authorizes and directs the State Board of Health to alter the certificate, it shall comply with all of the provisions of such decree.

**§ 93-1-17      Persons authorized to solemnize marriage:**

[A]ny judge of the Supreme Court, Court of Appeals, circuit court, chancery court or county court may solemnize the rites of matrimony between any persons anywhere within this state who shall produce a license granted as herein directed.



**In Forma Pauperis**

**§ 11-53-17 Indigent action without security:**

A citizen may commence any civil action, or answer a rule for security for costs in any court without being required to prepay fees or give security for costs, before or after commencing suit, by taking and subscribing the following affidavit:

I, \_\_\_\_\_, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the costs or give security for the same in the civil action (describing it) which I am about to commence (or which I have begun, as the case may be) and that, to the best of my belief, I am entitled to the redress which I seek by such suit.

However, “[t]he right to proceed in forma pauperis in civil cases does not extend beyond the initial trial of the matter.” While section 11-53-17 allows “persons who are truly indigent [to] proceed in civil actions as paupers[,] . . . this statute authorizes in forma pauperis proceeding[s] in civil cases at the trial level only.” ***Walker v. Bailey*, 270 So. 3d 195, 201 (Miss. Ct. App. 2018) (citations omitted).**

One of the great problems of civil government is securing justice to the poor. Under the Constitution all persons are entitled to maintain an action in the courts for an injury done to him in his lands, goods, person, or reputation, and the courts shall be open and justice shall be administered without sale, denial, or delay. It is the policy of the law that every person, however humble or poor, may resort to the courts for the vindication of his rights and the redress of his wrongs. Justice must be granted to every person, whether such person is able to pay the costs or not; if he is too poor to pay the costs, under the law he may make oath to that effect, and the suit will then be entertained and rights will be accorded to him just as though he were paying the expense. If a person is able to deposit the costs, or give security therefor, it may be required, but, if he is unable to do so, he cannot be denied justice. ***Meeks v. Meeks*, 156 Miss. 638, 126 So. 189, 190 (1930).**

**See Mississippi Rule of Civil Procedure 3(c), Commencement of action:**

**Proceeding In Forma Pauperis.** A party may proceed in forma pauperis in accordance with sections 11-53-17 and 11-53-19 of the Mississippi Code Annotated. The court may, however, on the motion of any party, on the motion of the clerk of the court, or on its own initiative, examine the affiant as to the facts and circumstances of his pauperism.

Rule 3(c) allows indigents to sue without depositing security for costs; however, the indigent affiant may be examined as to affiant's financial condition and the court may, if the allegation of indigency is false, dismiss the action. *Advisory Committee Notes.*

**§ 11-53-19 Untrue allegation of poverty, dismissal:**

The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue.

It is contended on behalf of appellee that the action of the court in dismissing the case was authorized by section 948, Code 1906, which provides: "The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue." The judgment of the court in dismissing a cause under this statute must be based on testimony capable of being embodied in a bill of exceptions and made a part of the record in the case. Such a judgment is reviewable by this court on appeal. The question must be heard and determined on testimony adduced before the court in the regular way. This was not done. Therefore the court was in error in dismissing the case. *Feazell v. Soltzfus*, 98 Miss. 886, 54 So. 444, 444-45 (1911).

## **Jury Trials in Chancery Court**

### **§ 11-5-3 Issue tried by jury:**

The chancery court, in a controversy pending before it, and necessary and proper to be tried by a jury, shall cause the issue to be thus tried to be made up in writing. The jury shall be drawn in open court from the jury box used in the circuit court, in the presence of the clerk of the circuit court who shall attend with the box for that purpose. The number drawn shall not exceed twenty, and the slips containing the names shall be returned to the box. The clerk of the chancery court shall issue the venire facias to the sheriff, returnable as the court shall direct. If there be no jury box the jury may be obtained as provided for in the circuit court in such case. The sheriff and jurors, for failure to perform duty or to attend, shall be liable to like penalty as in the circuit court. The parties shall have the same right of challenge as in trials in the circuit court, and the jury may be completed in the same manner. The chancellor may instruct the jury in the same way that juries are instructed in the circuit court, and the parties shall have the same rights in respect thereto; the instructions shall be filed in the cause and become a part of the record, and the chancellor shall sign bills of exceptions as in the circuit court, and the court may grant new trials in proper cases.

Under certain circumstances, a chancellor must retain a jury to determine issues of fact. *See e.g.* Miss. Code Ann. § 91-7-19 (1972) (at request of either party to probate proceeding, a jury may decide whether writing propounded is a will of the alleged testator); Miss. Code Ann. § 91-7-29 (1972) (witnesses in trial of issue devisavit vel non shall be examined before a jury); *Fowler v. Fisher*, 353 So. 2d 497 (Miss. 1977) (verdict of jury is not merely advisory where required by statute). Furthermore, a chancellor always has the discretion to permit a jury to decide a factual question where necessary and appropriate. *Deposit Guar. Nat. Bank v. Cotten*, 420 So. 2d 242, 244 (Miss. 1982).

### **§ 11-5-5 Venue change in jury cases:**

The chancery court may award a change of venue for the trial of all issues to be tried by a jury pursuant to the procedure provided for in the Mississippi Rules of Civil Procedure. The clerk of the court from which the issue is to be removed, and the clerk of the court to which it is removed, respectively, shall, upon an order for a change of venue, discharge the duties directed to be performed by the clerks of circuit courts in such cases; and in such case the chancery court to which the venue is changed shall try the issue by a jury, and shall proceed and render decrees and finally dispose of the cause as if the suit had begun therein.

## Youth Court

### **§ 43-21-107 Creation in various counties:**

(2) A youth court division is hereby created as a division of the chancery court of each county in which no county court is maintained and any chancellor within a chancery court district shall be the judge of the youth court of that county within such chancery court district unless another judge is named by the senior chancellor of the county or chancery court district as provided by this chapter.

### **§ 43-21-111 Regular and special referees:**

(1) In any county not having a county court or family court the judge may appoint as provided in Section 43-21-123 regular or special referees who shall be attorneys at law and members of the bar in good standing to act in cases concerning children within the jurisdiction of the youth court, and a regular referee shall hold office until removed by the judge. The requirement that regular or special referees appointed pursuant to this subsection be attorneys shall apply only to regular or special referees who were not first appointed regular or special referees prior to July 1, 1991.

(2) Any referee appointed pursuant to subsection (1) of this section shall be required to receive judicial training approved by the Mississippi Judicial College and shall be required to receive regular annual continuing education in the field of juvenile justice. The amount of judicial training and annual continuing education which shall be satisfactory to fulfill the requirements of this section shall conform with the amount prescribed by the Rules and Regulations for Mandatory Continuing Judicial Education promulgated by the Supreme Court. The Administrative Office of Courts shall maintain a roll of referees appointed under this section, shall enforce the provisions of this subsection and shall maintain records on all such referees regarding such training. Should a referee miss two (2) consecutive training sessions sponsored or approved by the Mississippi Judicial College as required by this subsection or fail to attend one (1) such training session within six (6) months of their initial appointment as a referee, the referee shall be disqualified to serve and be immediately removed as a referee and another member of the bar shall be appointed as provided in this section.

(3) The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee. The judge may also delegate his own administrative responsibilities to the referee. . . .

**§ 43-21-151 Jurisdiction:**

(1) The youth court shall have exclusive original jurisdiction in all proceedings concerning a delinquent child, a child in need of supervision, a neglected child, an abused child or a dependent child except in the following circumstances:

(a) Any act attempted or committed by a child, which if committed by an adult would be punishable under state or federal law by life imprisonment or death, will be in the original jurisdiction of the circuit court;

(b) Any act attempted or committed by a child with the use of a deadly weapon, the carrying of which concealed is prohibited by Section 97-37-1, or a shotgun or a rifle, which would be a felony if committed by an adult, will be in the original jurisdiction of the circuit court; and

(c) When a charge of abuse of a child first arises in the course of a custody action between the parents of the child already pending in the chancery court and no notice of such abuse was provided prior to such chancery proceedings, the chancery court may proceed with the investigation, hearing and determination of such abuse charge as a part of its hearing and determination of the custody issue as between the parents, notwithstanding the other provisions of the Youth Court Law. The proceedings in chancery court on the abuse charge shall be confidential in the same manner as provided in youth court proceedings.

When a child is expelled from the public schools, the youth court shall be notified of the act of expulsion and the act or acts constituting the basis for expulsion.

(2) Jurisdiction of the child in the cause shall attach at the time of the offense and shall continue thereafter for that offense until the child's twentieth birthday, unless sooner terminated by order of the youth court. The youth court shall not have jurisdiction over offenses committed by a child on or after his eighteenth birthday.

(3) No child who has not reached his thirteenth birthday shall be held criminally responsible or criminally prosecuted for a misdemeanor or felony; however, the parent, guardian or custodian of such child may be civilly liable for any criminal acts of such child. No child under the jurisdiction of the youth court shall be held criminally responsible or criminally prosecuted by any court for any act designated as a delinquent act, unless jurisdiction is transferred to another court under Section 43-21-157.

(4) The youth court shall also have jurisdiction of offenses committed by a child which have been transferred to the youth court by an order of a circuit court of this

state having original jurisdiction of the offense, as provided by Section 43-21-159.

(5) The youth court shall regulate and approve the use of teen court as provided in Section 43-21-753.

(6) Nothing in this section shall prevent the circuit court from assuming jurisdiction over a youth who has committed an act of delinquency upon a youth court's ruling that a transfer is appropriate pursuant to Section 43-21-157.

***See Manual for Mississippi Youth Courts.***

### **Chancery Court Districts and Terms of Court**

**Mississippi Constitution, Article VI, § 152, Circuit and chancery court districts,** states:

The Legislature shall divide the state into an appropriate number of chancery court districts. . . .

#### **§ 9-5-3      Chancery court districts:**

(1) The state shall be divided into an appropriate number of chancery court districts, severally numbered and composed of the counties as set forth in the sections which follow. A court to be styled “The Chancery Court of the County of . . . .” shall be held in each county, and within each judicial district of a county having two (2) judicial districts, at least twice a year. Court shall be held in chancery court districts consisting of a single county on the same dates state agencies and political subdivisions are open for business excluding legal holidays. The dates upon which terms shall commence and the number of days for which terms shall continue in chancery court districts consisting of more than one (1) county shall be set by order of the chancellor in accordance with the provisions of subsection (2) of this section. A matter in court may extend past a term if the interest of justice so requires.

(2) An order establishing the commencement and continuation of terms of court for each of the counties within a chancery court district consisting of more than one (1) county shall be entered annually and not later than October 1 of the year immediately preceding the calendar year for which the terms of court are to become effective. Notice of the dates upon which terms of court shall commence and the number of days for which the terms shall continue in each of the counties within a chancery court district shall be posted in the office of the chancery clerk of each county within the district and mailed to the office of the Secretary of State for publication and distribution to all Mississippi Bar members. If an order is not timely entered, the terms of court for each of the counties within the chancery court district shall remain unchanged for the next calendar year.

(3) The number of chancellorships for each chancery court district shall be determined by the Legislature based upon the following criteria:

- (a) The population of the district;
- (b) The number of cases filed in the district;
- (c) The caseload of each chancellor in the district;
- (d) The geographic area of the district;
- (e) An analysis of the needs of the district by the court personnel of the district; and
- (f) Any other appropriate criteria.

(4) The Judicial College of the University of Mississippi Law Center and the Administrative Office of Courts shall determine the appropriate:

- (a) Specific data to be collected as a basis for applying the above criteria;
- (b) Method of collecting and maintaining the specified data; and
- (c) Method of assimilating the specified data.

(5) In a district having more than one (1) office of chancellor, there shall be no distinction whatsoever in the powers, duties and emoluments of those offices except that the chancellor who has been for the longest time continuously a chancellor of that court or, should no chancellor have served longer in office than the others, the chancellor who has been for the longest time a member of The Mississippi Bar shall be the senior chancellor. The senior chancellor shall have the right to assign causes and dockets and to set terms in districts consisting of more than one (1) county.

***See §§ 9-5-5 to -58 (listing the chancery court districts).***

***See § 9-5-255 Appointment of family masters.***



### **Chancery Court Judges**

**Mississippi Constitution, Article VI, § 152, Circuit and chancery court districts,** states:

The Legislature shall, by statute, establish certain criteria by which the number of judges in each district shall be determined, such criteria to be based on population, the number of cases filed and other appropriate data.

**Mississippi Constitution, Article VI, § 154, Qualifications for circuit or chancery court judges,** states:

No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state.

#### **§ 9-5-1      Terms of office; chancellors:**

A chancellor shall be elected for and from each of the chancery court districts as provided in this chapter and the listing of individual precincts shall be those precincts as they existed on October 1, 1990. He shall hold court in any other district with the consent of the chancellor thereof when in their opinion the public interest may be thereby promoted. The terms of all chancellors elected at the regular election for the year 1930 shall begin on the first day of January, 1931, and their terms of office shall continue for four (4) years. A chancellor shall be a resident of the district in which he serves but shall not be required to be a resident of a subdistrict if the district is divided into subdistricts.

### **Judicial Oath**

**Mississippi Constitution, Article VI, § 155 Judicial oath of office,** states:

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit:

I, \_\_\_\_\_, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God.

***See § 25-1-11 Filing of oath of office.***

## **Court Administration**

### **§ 9-1-5      Extension of court term:**

In order to utilize the services of a judge temporarily assigned to chancery or circuit court in a county, the chancery or circuit court judge is authorized to extend a term of his court in one (1) county in a district, even if it overlaps into a term of that court in another county in the same district, so long as the term of court in the county into which the extension runs shall not be pretermitted. . . . The word “county” wherever used herein shall be construed to mean “judicial district” in counties having two (2) judicial districts.

### **§ 9-1-9      Adjournment upon absence of judge:**

If the circuit judge or chancellor fail to attend at any term of the court, it shall stand adjourned from day to day until the third day, when, if the judge or chancellor shall not appear and open court, it shall stand adjourned without day; but, by virtue of a written order by the judge or chancellor, it may be adjourned by the clerk or sheriff to any day of the term, as the order may direct, and parties, witnesses and jurors must attend accordingly.

### **§ 9-1-29      Clerk's office controlled by court:**

Each court shall have control over all proceedings in the clerk's office, and such control shall be exercised in a manner consistent with the Mississippi Rules of Civil Procedure.

### **§ 9-1-33      Minutes of court:**

The minutes of the proceedings of the Supreme, circuit, chancery and county courts and the Court of Appeals shall be entered by the clerk of each, respectively, in the minute book of the court, against the next sitting of the court, if practicable, when the same shall be read in open court; and when corrected shall be signed--the minutes of the Supreme Court by the Chief Justice or presiding judge, of the Court of Appeals by the Chief Judge or presiding judge, of the circuit court by the circuit judge, of the chancery court by the chancellor, and of the county court by the county judge; and on the last day of the term, or within ten (10) days thereafter, the minutes shall be drawn up, read and signed.

Whenever by inadvertence said minutes and proceedings may remain unsigned or the judge of said court dies before signing the minutes, the succeeding judge or judges of said court may, in their discretion, examine into said unsigned minutes and ascertain as to the correctness thereof, and after same shall have been read in

open court, and if the court is of the opinion that same are true and correct, then the said minutes may be signed and adopted by said judge or judges.

**§ 9-1-36      Office operating allowance; support staff; definitions:**

(1) Each circuit judge and chancellor shall receive an office operating allowance for the expenses of operating the office of the judge, including retaining a law clerk, legal research, stenographic help, stationery, stamps, furniture, office equipment, telephone, office rent and other items and expenditures necessary and incident to maintaining the office of judge. The allowance shall be paid only to the extent of actual expenses incurred by the judge as itemized and certified by the judge to the Supreme Court in the amounts set forth in this subsection; however, the judge may expend sums in excess thereof from the compensation otherwise provided for his office. No part of this expense or allowance shall be used to pay an official court reporter for services rendered to said court.

(a) Until July 1, 2008, the office operating allowance under this subsection shall be not less than Four Thousand Dollars (\$4,000.00) nor more than Nine Thousand Dollars (\$9,000.00) per annum.

(b) From and after July 1, 2008, the office operating allowance under this subsection shall be Nine Thousand Dollars (\$9,000.00) per annum.

(2) In addition to the amounts provided for in subsection (1), there is hereby created a separate office allowance fund for the purpose of providing support staff to judges. This fund shall be managed by the Administrative Office of Courts.

(3) Each judge who desires to employ support staff after July 1, 1994, shall make application to the Administrative Office of Courts by submitting to the Administrative Office of Courts a proposed personnel plan setting forth what support staff is deemed necessary. The plan may be submitted by a single judge or by any combination of judges desiring to share support staff. In the process of the preparation of the plan, the judges, at their request, may receive advice, suggestions, recommendations and other assistance from the Administrative Office of Courts. The Administrative Office of Courts must approve the positions, job descriptions and salaries before the positions may be filled. The Administrative Office of Courts shall not approve any plan which does not first require the expenditure of the funds in the support staff fund for compensation of any of the support staff before expenditure is authorized of county funds for that purpose. Upon approval by the Administrative Office of Courts, the judge or judges may appoint the employees to the position or positions, and each employee so appointed will work at the will and pleasure of the judge or judges who appointed him but will be employees of the Administrative Office of Courts.

Upon approval by the Administrative Office of Courts, the appointment of any support staff shall be evidenced by the entry of an order on the minutes of the court. When support staff is appointed jointly by two (2) or more judges, the order setting forth any appointment shall be entered on the minutes of each participating court. . . .

**§ 9-13-1      Circuit and chancery court appointment:**

Each circuit judge and chancellor shall appoint a competent person as shorthand reporter in his district by an entry upon the minutes of the court of an order to that effect, dated and signed by him. The said shorthand reporter shall be known as the official court reporter of said district.

**§ 9-13-17      Appointment of additional court reporters:**

The circuit judge, chancellor, family court judge or county judge may, by an order spread upon the minutes and made a part of the records of the court, appoint an additional court reporter for a term or part of a term whose duties, qualifications and compensation shall be the same as is now provided by law for official court reporters. The additional court reporter shall be subject to the control of the judge or chancellor, as is now provided by law for official court reporters, and the judge or chancellor shall have the additional power to terminate the appointment of such additional court reporter, whenever in his opinion the necessity for such an additional court reporter ceases to exist, by placing upon the minutes of the court an order to that effect. The regular court reporter shall not draw any compensation while the assistant court reporter alone is serving; however, in the event the assistant court reporter is serving because of the illness of the regular court reporter, the court may authorize payment of said assistant court reporter from the Administrative Office of Courts without diminution of the salary of the regular court reporter, for a period not to exceed forty-five (45) days in any one (1) calendar year. However, in any circuit, chancery, county or family court district within the State of Mississippi, if the judge or chancellor shall determine that in order to relieve the continuously crowded docket in such district, or for other good cause shown, the appointment of an additional court reporter is necessary for the proper administration of justice, he may, with the advice and consent of the board of supervisors if the court district is composed of a single county and with the advice and consent of at least one-half (  $\frac{1}{2}$  ) of the boards of supervisors if the court district is composed of more than one (1) county, by an order spread upon the minutes and made a part of the records of the court, appoint an additional court reporter. The additional court reporter shall serve at the will and pleasure of the judge or chancellor, may be a resident of any county of the state, and shall be paid a salary designated by the judge or chancellor not to exceed the salary authorized by Section 9-13-19. The salary of the additional court reporter shall be

paid by the Administrative Office of Courts, as provided in Section 9-13-19; and mileage shall be paid to the additional court reporter by the county as provided in the same section. The office of such additional court reporter appointed under this section shall not be abolished or compensation reduced during the term of office of the appointing judge or chancellor without the consent and approval of the appointing judge or chancellor.

**§ 9-17-1      Creation of office; appointment; compensation:**

(1) The judges and chancellors of judicial districts, including chancery, circuit and county courts, may, in their discretion, jointly or independently, establish the office of court administrator in any county by an order entered on the minutes of each participating court in the county.

The establishment of the office of court administrator shall be accomplished by vote of a majority of the participating judges and chancellors in the county, and such court administrator shall be appointed by vote of a majority of the judges or chancellors and may be removed by a majority vote of the judges or chancellors. In case of a tie vote, the senior judge or senior chancellor shall cast two (2) votes.  
...

***See § 1-1-11 Distribution of sets purchased by state; electronic statutes access; CD-ROMS.***

***See § 1-1-58 Advance sheets of general laws.***

***See § 9-1-37 Stationery allowance.***

### **Continuing Judicial Education**

**Mandatory Continuing Judicial Education Rule 2, Scope and Exemptions**, states in pertinent part:

These rules shall apply to . . . Judges of the Circuit, Chancery, County . . . Courts.

**Mandatory Continuing Judicial Education Rule 3, CJE Requirement**, states:

The use of the term “judges” herein shall be deemed to include Senior Judges, Family Court Judges, Circuit Judges, Chancellors, County Court Judges, Youth Court Judges, including Youth Court Referees, Court of Appeals Judges, and Supreme Court Justices. Each judge and justice in the State of Mississippi shall attend, or complete an approved substitute for attendance, a minimum of twelve (12) actual hours of approved Continuing Judicial Education (CJE) during each successive twelve (12) month period (the “CJE year”) from and after August 1 of each year, of which one hour shall be in the area of legal ethics, professional responsibility, [or] professionalism, (the “ethics/professionalism hour”), except for Youth Court Referees and new judges as hereinafter provided, and provided the funding for said educational programs is available through the Mississippi Judicial College or state travel allowance. . . .

**Mandatory Continuing Judicial Education Rule 4, Credits**, states in pertinent part:

(b) A maximum of twelve (12) hours in excess of the minimum annual requirement may be carried forward for credit in the succeeding year, except those acquired from a Judge Advocate General program. However, no hours completed in the area of legal ethics, professional responsibility, professionalism shall be carried forward. . . .

**Mandatory Continuing Judicial Education Rule 5, Annual Report**, states:

On or before August 31 of each year, each judge and justice subject to CJE in the state, shall make a written report to the Mississippi Judicial College, in such form as the college shall prescribe, concerning his or her compliance with these rules accredited judicial education during the preceding CJE year.

**Mandatory Continuing Judicial Education Rule 6, Noncompliance and Sanctions**, states in pertinent part:

(a) As soon as practicable after October 1 of each year, the Mississippi Judicial College shall compile the following:

- (1) A list of those judges, or justices who have complied with these rules for the prior preceding CJE year ending July 31, as required by Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education.
- (2) A list of judges or justices who have not complied with these rules for the prior preceding CJE year ending July 31 indicating that they have not complied with the requirement of Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education.
- (3) Any request for waiver of these rules from any judge/justice.

(b) The above lists shall then be forwarded to the Committee On Mandatory Continuing Judicial Education who shall then notify, by certified mail, each judge/justice who has not complied with Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education within sixty (60) days, why the judge/justice should not be reported to the Supreme Court for sanction. Said judge/justice shall furnish the Committee with an affidavit:

- (1) Indicating that the judge/justice has complied with the requirement prior to expiration of the sixty (60) days, or
- (2) Setting forth a valid excuse for failure to comply with the requirements because of hardship or other good cause.

(c) At the expiration of sixty (60) days from the date of the Notice to Show Cause, the Committee shall notify the Supreme Court of Mississippi of each judge/justice who fails to file an affidavit satisfactory to the Committee On Mandatory Continuing Judicial Education as described in (b)(1) and (b)(2) above and may recommend appropriate sanctions to the Mississippi Supreme Court. The sanctions are to be determined by said Supreme Court. Said sanctions may include a private reprimand, public reprimand, and/or the publication of the name of said judge in the Mississippi Lawyer as not having satisfactorily completed mandatory judicial education, or other appropriate sanction.

(d) At any time after notice of noncompliance to the Supreme Court, a judge/justice may file with the Committee an affidavit indicating compliance with Rules 3 and 5, Rules for Mandatory Continuing Judicial Education; and if satisfactory to the Committee On Mandatory Continuing Judicial Education, it shall forthwith notify the Supreme Court and may recommend sanctions to be imposed by the Supreme Court.

### **Removal from Office**

**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance**, states:

On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for:

- (a) actual conviction of a felony in a court other than a court of the State of Mississippi;
- (b) willful misconduct in office;
- (c) willful and persistent failure to perform his duties;
- (d) habitual intemperance in the use of alcohol or other drugs; or
- (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute;

and may retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character. . . .

**Mississippi Constitution, Article VI, § 175, Liability and punishment of public officers**, provides:

All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.

#### **§ 25-5-1 Criminal convictions; mental competency:**

If any public officer, state, district, county or municipal, shall be convicted or enter a plea of guilty or nolo contendere in any court of this state or any other state or in any federal court of any felony other than manslaughter or any violation of the United States Internal Revenue Code, of corruption in office or peculation therein, or of gambling or dealing in futures with money coming to his hands by virtue of his office, any court of this state, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office; and the office of the defendant shall thereby become vacant. If any such officer be found by inquest to be of unsound mind during the term for which he was elected or appointed, or shall be removed from office by the judgment of a court of competent jurisdiction or otherwise lawfully, his office shall thereby be vacated; and in any such case the vacancy shall be filled as provided by law.

When any such officer is found guilty of a crime which is a felony under the laws of this state or which is punishable by imprisonment for one (1) year or more, other than manslaughter or any violation of the United States Internal Revenue



Code, in a federal court or a court of competent jurisdiction of any other state, the Attorney General of the State of Mississippi shall promptly enter a motion for removal from office in the Circuit Court of Hinds County in the case of a state officer, and in the circuit court of the county of residence in the case of a district, county or municipal officer. The court, or the judge in vacation, shall, upon notice and a proper hearing, issue an order removing such person from office and the vacancy shall be filled as provided by law.

### **Vacancy from Office**

#### **§ 9-1-105      Absence or disability:**

(1) Whenever any judicial officer is unwilling or unable to hear a case or unable to hold or attend any of the courts at the time and place required by law by reason of the physical disability or sickness of such judicial officer, by reason of the absence of such judicial officer from the state, by reason of the disqualification of such judicial officer pursuant to the provision of Section 165, Mississippi Constitution of 1890, or any provision of the Code of Judicial Conduct, or for any other reason, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a person as a special judge to hear the case or attend and hold a court.

(2) Upon the request of the Chief Judge of the Court of Appeals, the senior judge of a chancery or circuit court district, the senior judge of a county court, or upon his own motion, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, shall have the authority to appoint a special judge to serve on a temporary basis in a circuit, chancery or county court in the event of an emergency or overcrowded docket. It shall be the duty of any special judge so appointed to assist the court to which he is assigned in the disposition of causes so pending in such court for whatever period of time is designated by the Chief Justice. The Chief Justice, in his discretion, may appoint the special judge to hear particular cases, a particular type of case, or a particular portion of the court's docket. . . .

### **CHANCERY COURT JURISDICTION**

- All matters in equity
- Divorce & alimony
- Matters testamentary & of administration
- Minor's business
- Cases of idiocy, lunacy, & persons of unsound mind
- All cases of which the chancery court had jurisdiction  
when the Mississippi Constitution was enacted

**Miss. Const. art. VI, § 159**

- Suits to try title & to cancel deeds & other clouds upon real estate
- Suits to decree & to displace possession of real estate
- Suits to decree rents & compensation for improvements & taxes

**Miss. Const. art. VI, § 160**

Youth court jurisdiction by statute

**§§ 43-21-107 & -151**

## **CIRCUIT COURT JURISDICTION**

### **CIVIL**

Original jurisdiction in all civil matters  
not vested by the constitution in another court  
**Miss. Const. art, VI, § 156**

Appellate jurisdiction as prescribed by law  
**Miss. Const. art. VI, § 156 & § 9-7-81**

Actions with the amount in controversy over \$200.00  
**§ 9-7-81**

Actions not exclusively cognizable in another court  
**§ 9-7-81**

Eminent domain cases where there is no county court  
**§ 11-27-3**

### **CRIMINAL**

Original jurisdiction in all criminal matters  
not vested by the constitution in another court  
**Miss. Const. art. VI, § 156**

Prosecutions in the name of the state for  
“treason, felonies, crimes, and misdemeanors,”  
except those cognizable before another court  
**§ 9-7-81**

**COUNTY COURT JURISDICTION**

**CIVIL**

Concurrent with the justice court in all civil matters

**§ 9-9-21**

Concurrent with the circuit & chancery courts  
over all matters of law & equity  
with an amount in controversy up to \$200,000.00

**§ 9-9-21**

Exclusive jurisdiction over eminent domain,  
partition of personal property,  
& actions for unlawful entry & detainer

**§ 9-9-21**

Civil cases transferred from the circuit court

**§ 9-9-27**

**CRIMINAL**

Concurrent with the justice court in all criminal matters

**§ 9-9-21**

Criminal cases transferred from circuit court

**§ 9-9-21**

Non-capital felonies transferred from circuit court

**§ 9-9-27**

**YOUTH COURT**

Youth court jurisdiction by statute

**§ 43-21-107 & -151**

**JUSTICE COURT JURISDICTION**

**CIVIL**

Actions with the amount in controversy up to \$500.00  
“or such higher amount as may be prescribed by law”

**Miss. Const. art. VI, § 171**

Actions with the amount in controversy up to \$3,500.00

**§ 9-11-9**

Payment of court costs is jurisdictional

**§ 9-11-10**

**CRIMINAL**

Concurrent with the circuit court over all crimes  
where the punishment prescribed is not more than  
a fine & imprisonment in the county jail

**Miss. Const. art. VI, § 171 & § 99-33-1**

Criminal cases remanded by a circuit court grand jury

**§§ 99-33-1 & 99-33-13**

Preliminary hearings & initial appearances  
for criminal offenses committed within the county

**URCCC 6.03 & 6.04; URPJC 3.02**

**MUNICIPAL COURT JURISDICTION**

**CIVIL**

Actions filed pursuant to and as provided in  
Title 93, Chapter 21, Mississippi Code of 1972,  
the Protection from Domestic Abuse Act

**§ 21-23-7**

**CRIMINAL**

Actions for violations of the municipal ordinances  
& state misdemeanor laws made offenses against the municipality

**§ 21-23-7**

Preliminary hearings & initial appearances  
for criminal offenses committed within the municipality

**§ 21-23-7**

Criminal cases remanded by a circuit court grand jury

**§ 21-23-7**

**APPENDIX A**

**TO**

**CHAPTER 1**

**CONSTITUTIONAL AND  
STATUTORY OATHS**

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## **APPENDIX OF CONSTITUTIONAL & STATUTORY OATHS**

### **GRAND JURY OATHS**

#### **§ 13-5-45      Appointment of foreman:**

The court shall appoint one of the grand jurors to be foreman of the grand jury, to whom the following oath shall be administered in open court, in the presence of the rest of the grand jurors, to wit:

You, as foreman of this grand inquest, shall diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your fellows, and your own you will keep secret. You shall not present any person through malice, hatred or ill will, nor shall you leave any person unpresented through fear, favor or affection, or for any reward, hope or promise thereof, but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding. So help you God.

And the following oath shall be administered to the other jurors, to wit:

The same oath that your foreman has now taken before you on his part, you, and each of you, shall well and truly observe, and keep on your respective parts. So help you God.

### **PETIT JURY OATHS**

#### **§ 13-5-71      Petit juror oath:**

Petit jurors shall be sworn in the following form:

You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God.

#### **§ 11-27-17      Jury oath [Eminent domain cases]:**

When the jury shall be so impaneled, the jurors shall be sworn as follows:

I do solemnly swear or affirm that as a member of this jury I will discharge my duty honestly and faithfully, to the best of my ability, and that I will a true verdict render according to the evidence, without fear, favor, or affection, and that I will be governed by the instructions of the court. So help me God.

**§ 13-5-73 Capital case juror oath:**

The jurors in a capital case shall be sworn to:

[W]ell and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law.

**BAILIFF'S OATH**

**§ 13-5-73 Capital case juror oath:**

Bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court may prescribe for them.

**COURT REPORTER'S OATH**

**§ 9-13-3 Oath of office:**

Before entering into his office, the court reporter shall take, in open court, an oath that he will faithfully discharge the duties thereof; and the oath so taken shall be entered in the minutes of the court.

**INTERPRETER'S OATH**

**§ 13-1-313 Oath of true interpretation:**

Before participating in any proceedings subsequent to an appointment under the provisions of sections 13-1-301 et seq., an interpreter shall make an oath or affirmation that he will make a true interpretation in an understandable manner to the person for whom he is appointed and that he will repeat the statements of such persons in the English language to the best of his skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates.

## **JUDGE'S OATH**

### **Section 155    Judicial oath of office:**

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit:

I, \_\_\_\_\_, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God.

## **LEGISLATOR'S OATH**

### **Section 40    Oath of office:**

Members of the legislature, before entering upon the discharge of their duties, shall take the following oath:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and of the state of Mississippi; that I am not disqualified from holding office by the Constitution of this state; that I will faithfully discharge my duties as a legislator; that I will, as soon as practicable hereafter, carefully read (or have read to me) the Constitution of this state, and will endeavor to note, and as a legislator to execute, all the requirements thereof imposed on the legislature; and I will not vote for any measure or person because of a promise of any other member of this legislature to vote for any measure or person, or as a means of influencing him or them so to do. So help me God.

## **OTHER ELECTED OFFICIAL'S OATH**

### **Section 268    Oath of office:**

All officers elected or appointed to any office in this state, except judges and members of the legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof; that I am not disqualified from holding the office of \_\_\_\_\_; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God.

## **CHAPTER 2**

### **JUDICIAL ETHICS**

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## **CHAPTER 2**

### **JUDICIAL ETHICS**

#### **Code of Judicial Conduct**

On April 4, 2002, the Mississippi Supreme Court adopted the current Code of Judicial Conduct.

#### **Application of the Code of Judicial Conduct**

**A. Parties Affected.**

Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

**B. Part-time Judge.**

A part time judge shall not be subject to the restrictions and limitations of Sections 4C, 4D(2), 4F, and 4G, except as regards practice in the court in which the part-time judge serves [prohibition on practice of law], and 4H(1).

**C. Special Judge.**

A special judge shall not, except while serving as a judge, be subject to the restrictions and limitations of Sections 4A. A special judge shall not, at any time be subject to the restrictions and limitations of Sections, 4B, 4D, 4E, 4F, 4G, and 4H. A special judge, except while serving as a special judge or while a candidate for judicial office, shall not be subject to the restrictions of Canon 5.

**D. Magistrates, court commissioners, special masters and referees.**

Magistrates, court commissioners, special masters and referees shall not at any time be subject to the restrictions and limitations of Sections 4A, 4B, 4C(1), 4C(2) 4D, 4E, 4F, 4G, and 4H. Magistrates, court commissioners, special masters and referees, except while a candidate for judicial office, shall not be subject to the restrictions of Canon 5.

**E. Time for Compliance.**

A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(1), 4D(2) and 4E and shall comply with those Sections as soon as reasonably possible and shall do so in any event within the period of one year.

**F. Effective Date.**

The separate provisions of this Code shall govern acts, events and conduct of those subject to those provisions from and after the effective date of the adoption of each such provision. Acts, events and conduct which occur prior to the adoption of each provision shall be governed by the provisions of the Code effective at the time of such acts, events and conduct.

**Canon 1 A Judge Shall Uphold the Integrity and Independence of the Judiciary**

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective.

The Commission found that [the] Judge had violated Canon 1 . . . by failing to observe high standards of conduct when he committed the minor child to detention after recusing himself from the case and then entering an order appointing [another judge] to hear the case without authority.

***Mississippi Comm'n on Judicial Performance v. Osborne*, 16 So. 3d 16, 21 (Miss. 2009).**

Canon 1 charges a judge to observe high standards of conduct and to uphold the integrity, as well as the independency, of the judiciary.

***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1069 (Miss. 1999) (interpreting previous version of canon).**



**Canon 2      A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities**

- A.      A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 2A [and] 2B. . . . *Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).

Judge's actions relating to refunding the expungement fee violated Canons 2A, 3B(2), and 3B(8). *Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).

Canon 2 states that a judge should avoid both impropriety and the appearance of impropriety in all activities. It charges a judge to respect, as well as comply with, the law in all she does, thereby promoting public confidence in the integrity and impartiality of the judiciary. *Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1070 (Miss. 1999) (interpreting previous version of canon).

- B.      Judges shall not allow their family, social, or other relationships to influence the judges' judicial conduct or judgment. Judges shall not lend the prestige of their offices to advance the private interests of the judges or others; nor shall judges convey or permit others to convey the impression that they are in a special position to influence the judges. Judges shall not testify voluntarily as character witnesses.

*Note:* See the commentary concerning a judge testifying as a character witness.

In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 2A [and] 2B. . . . *Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).

- C.      A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion or national origin.

**Canon 3      A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

It is fundamental that judges should be sufficiently detached and unencumbered from any proclivity towards predisposition of any matter that may come before them. This is the pervading theme throughout the Code of Judicial Conduct and the theme of impartiality is an integral factor which permeates statutory and common law. ***Mississippi Comm'n on Jud. Perf. v. Jenkins*, 725 So. 2d 162, 168 (Miss. 1998) (interpreting previous version of canon).**

**A.      Judicial Duties in General.**

The judicial duties of judges take precedence over all their other activities. The judges' judicial duties include all the duties of their office prescribed by law. In the performance of these duties, the following standards apply:

In his official capacity, [the judge] executed an arrest warrant and other documents related to the criminal charges against [defendant], including an order setting bond. Thereafter, [the judge] served as counsel for [the defendant] on these same charges in the circuit court. By doing so, [the judge] violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 4D(1) of the Code of Judicial Conduct of Mississippi Judges. We find that [the judge's] conduct constituted willful misconduct and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. ***Mississippi Comm'n on Judicial Performance v. Pittman*, 993 So. 2d 816, 818 (Miss. 2008).**

**B.      Adjudicative Responsibilities.**

(1) A judge shall hear and decide all assigned matters within the judge's jurisdiction except those in which disqualification is required.

In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 3B(1). . . . ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

In its brief, the Commission explains that [the] Judge's . . . failure to adjudicate the domestic abuse cases properly by dismissing the matters without a hearing or order violated Canons 3B(2), 3B(7), and 3B(8) and Section 93-21-1. ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

Judge's actions relating to refunding the expungement fee violated Canons 2A, 3B(2), and 3B(8). ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

A judge is to be faithful to the law and to ignore outside influences. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1070 (Miss. 1999) (interpreting previous version of canon).**

(3) A judge shall require order and decorum in proceedings before the judge.

A judge is to maintain order in her courtroom. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**

(4) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control.

The Commission found that [the] Judge had violated Canons 2A and 3B(4) by incarcerating [an attorney] for expressing his First Amendment rights. The Commission stated that [the] Judge was “discourteous and intolerant” toward [the attorney] and that his actions created an impression that individuals with certain viewpoints are specially positioned to influence him. We agree that [the] Judge violated Canons 1, 2A, 3B(2), 3B(4), and 3B(8) of the Mississippi Code of Judicial Conduct. ***Mississippi Comm'n on Judicial Performance v. Littlejohn*, 62 So. 3d 968, 971 (Miss. 2011).**

A judge is to act courteously to anyone in her courtroom and to expect the same behavior from others subject to her control. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**

Elected members of the judiciary have a duty to conduct

themselves with respect for those they serve, including the court staff and the litigants that come before them. ***Mississippi Comm'n on Jud. Perf. v. Spencer*, 725 So. 2d 171, 178 (Miss. 1998) (interpreting previous version of canon).**

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 3B(5). . . . ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized: provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other

parties of the substance of the ex parte communication and allows an opportunity to respond.

Judge's ex parte communications with a litigant were clearly prohibited by Canon 3B(7), and such conduct has been found by this Court to constitute misconduct. ***Mississippi Comm'n on Judicial Performance v. Bradford*, 18 So. 3d 251, 254 (Miss. 2009).**

A judge must allow anyone with a legal interest in a matter to be heard in her court. The canon further bars the judge from engaging in ex parte communications concerning a matter pending before her court. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**

This Court realizes that it is difficult not to have ex parte communications because judges do not know the nature of their calls when they answer the phone. However, this problem can be alleviated by using clerks to screen calls, inquiring whether they pertain to a matter presently pending before the court. If so, the call could be directed to the county attorney, thereby avoiding any ex parte communications. For a judge to merely listen to another person involved in pending litigation is a violation Canon 3A(4). ***Mississippi Comm'n on Jud. Perf. v. Chinn*, 611 So. 2d 849, 852 (Miss. 1992) (interpreting previous version of canon).**

(b) Judges may obtain the advice of a disinterested expert on the law applicable to a proceeding before them if the judges give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle

matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

In its brief, the Commission explains that [the] Judge's . . . failure to adjudicate the domestic abuse cases properly by dismissing the matters without a hearing or order violated Canons 3B(2), 3B(7), and 3B(8) and Section 93-21-1. ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

Judge's actions relating to refunding the expungement fee violated Canons 2A, 3B(2), and 3B(8). ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(12) Except as may be authorized by rule or order of the Supreme Court, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

### **C. Administrative Responsibilities.**

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

Finally, Judge's actions in seeking the removal of the complainant from her job violated Canons 2B and 3C(1). *Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).

Finally, Canon 3C(1) provides “[a] judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.” [The] Judge did not “maintain professional competence in judicial administration.” *Mississippi Comm'n on Judicial Performance v. Sheffield*, 235 So. 3d 30, 34 (Miss. 2017).

A judge is to diligently discharge all administrative duties, as well

as to maintain professional competence in administering judicial matters. *Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not appoint a major donor to the judge's election campaign to a position if the judge knows or learns by means of a timely motion that the major donor has contributed to the judge's election campaign unless

- (a) the position is substantially uncompensated;
- (b) the person has been selected in rotation from a list of qualified and available persons compiled without regard to their having made political contributions; or
- (c) the judge or another presiding or administrative judge affirmatively finds that no other person is willing, competent and able to accept the position.

#### **D. Disciplinary Responsibilities.**

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional



Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

**E. Disqualification.**

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Canon 3E(1)(a), furthermore, requires that judges disqualify themselves when their impartiality might be questioned or when they have personal prejudice concerning a party. . . . There is no doubt that [the] Judge had personal knowledge of the evidentiary facts, and she exhibited bias and prejudice by executing the arrest warrant. *Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 601-02 (Miss. 2011).

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Canon 3E(1)(b) states that judges should disqualify themselves whenever the judge “served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter. . . .” [The] Judge served as the ex-wife's lawyer in a divorce and child-custody

proceeding against [the defendant] at the same time that the ex-wife submitted the affidavit that charged [the defendant] with child kidnapping. [The] Judge, therefore, should have disqualified herself from the criminal matter. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).**

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) is acting as a lawyer in the proceeding;
- (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) is to the judge's knowledge likely to be a material witness in the proceeding;

Canon 3E(1)(d) provides, in pertinent part, that judges should disqualify themselves whenever they are acting as a lawyer in the proceeding. . . . As already noted, [the] Judge served as the ex-wife's lawyer in the divorce and child-custody proceeding . . . And, as the ex-wife's attorney, [the] Judge had an interest that could have been substantially affected by the outcome of the criminal proceeding against [the defendant]. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).**

(2) Recusal of Judges from Lawsuits Involving Major Donors. A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

*Note:* A “major donor” is a donor who or which has, in the judge's most recent election campaign, made a contribution to the judge's campaign of (a) more than \$2,000 if the judge is a justice of the Supreme Court or judge of the Court of Appeals, or (b) more than \$1,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals.

**F. Remittal of Disqualification.**

A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of the judge's possible disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

**Canon 4      A Judge Shall So Conduct the Judge's Extra-judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations**

**A.      Extra-judicial Activities in General.**

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

These Canons apply to a judge's personal, as well as professional, conduct. His extrajudicial conduct toward an individual whom he most likely knew was mentally disabled demeaned the judicial office and cast reasonable doubt on [the judge's] capacity to act impartially, also violating Canon 4(A). *Mississippi Comm'n on Judicial Performance v. Weisenberger*, 201 So. 3d 444, 449 (Miss. 2016).

To be sure, we affirm our reverence for the judicial oath of office and the Canons which govern judicial conduct. This certainly includes Canon 4A(1), which requires judges to “conduct all extra-judicial activities so that they do not cast doubt on the judge's capacity to act impartially as a judge.” *Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1009 (Miss. 2004).

**B.      Avocational Activities.**

A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

For the reasons stated herein, we find the judge may not be sanctioned for his statements which are protected by the First Amendment to the United States Constitution. We reject the Commission's findings and recommendation, and we finally dismiss the Commission's complaint and this case with prejudice. *Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1016 (Miss. 2004).

**C. Governmental, Civic or Charitable Activities.**

(1) A judge shall not make an appearance before, or otherwise consult with, an executive or legislative body or official or a public hearing except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

In making this suggestion [that another judge who had not attended public meetings at which the instant case had been discussed should hear the case on remand,] we do not mean to imply the judges of this state, especially trial judges, should seclude themselves from the public. Trial judges have the duty of complete impartiality in the trial of any case, and responsibility to maintain complete independence and integrity in hearing and deciding any case. This does not mean they cannot be in attendance at a meeting of public officials, or give an audience to any one or more groups of citizens. Of course, if a judge learns beforehand that the purpose of some meeting would compromise the independence of his judicial conduct, he should not attend. Likewise, we do not doubt practically every judge has had occasion to remind people who seek their audience that they cannot discuss any pending case. If this government is to remain democratic, judges must have the independence to decide each case on its merits to the very best of their minds, hearts and conscience. The striving for this goal by any judge is not impeded, however, by courteously listening to citizens not seeking to influence his judicial decisions. A good judge is capable of quickly correcting any improper suggestion or erroneous impression of the judicial function. ***Clark v. State*, 409 So. 2d 1325, 1330 (Miss. 1982) (interpreting previous version of canon).**

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not

conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

**D. Financial Activities.**

(1) Judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper

performance of their judicial duties, exploit their judicial positions, or involve them in frequent transactions with lawyers or persons likely to come before the court on which the judges serve.

In his official capacity, [the judge] executed an arrest warrant and other documents related to the criminal charges against [defendant], including an order setting bond. Thereafter, [the judge] served as counsel for [the defendant] on these same charges in the circuit court. By doing so, [the judge] violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 4D(1) of the Code of Judicial Conduct of Mississippi Judges. We find that [the judge's] conduct constituted willful misconduct and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. *Mississippi Comm'n on Judicial Performance v. Pittman*, 993 So. 2d 816, 818 (Miss. 2008).

(2) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as a judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(3) Neither judges nor members of their families residing in their households should accept a gift, bequest, favor, or loan from anyone reflecting the expectation of judicial favor.

(4) Non-public information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

#### **E. Fiduciary Activities.**

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

**F. Service as Arbitrator or Mediator.**

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

**G. Practice of Law.**

(1) A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

(2) A judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not practice law in a representative capacity. Notwithstanding this prohibition, staff, court officials and others subject to the judge's direction may act pro se, and those otherwise licensed to practice law may, without compensation, give legal advice to and draft or review documents for members of their families.

**H. Compensation, Reimbursement and Reporting.**

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall comply with those provisions of law requiring the reporting of economic interest to the Mississippi Ethics Commission.



**I. Disclosure.**

Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.

**Canon 5 A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity**

**A. All Judges and Candidates**

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(2), a judge or a candidate for election to judicial office shall not:

- (a) act as a leader or hold an office in a political organization;
- (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
- (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other political functions.

(2) A judge shall resign from judicial office upon becoming a candidate either in a party primary or in a general election for a non-judicial office, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office:

- (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;
- (b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
- (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

**B. Candidates Seeking Appointment to Judicial or Other Governmental Office.**

(1) Candidates for appointment to judicial office or judges seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support their candidacies.

(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to the candidate's qualifications for the office;

(b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law:

(i) retain an office in a political organization,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other political functions.

**C. Judges and Candidates Subject to Public Election.**

(1) Judges holding an office filled by public election between competing candidates, or candidates for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings in their own behalf while candidates for election or re-election, identify themselves as members of political parties, and contribute to political parties or organizations.

Additionally, although [the] Judge admittedly attended political gathering, ordinarily a violation under 5A(1)(c), the record evinces only that he was there as a judicial candidate running for reelection. Section 5C(1) expressly permits incumbent judges to attend and speak to political gatherings on their own behalf while candidates for election or reelection. ***Mississippi Comm'n on Judicial Performance v. Osborne*, 11 So. 3d 107, 112 (Miss. 2009).**

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for the candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees shall not solicit or accept contributions and public support for the candidate's campaign earlier than 60 days before the qualifying deadline or later than 120 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(3) Candidates shall instruct their campaign committees at the start of the

campaign not to accept campaign contributions for any election that exceed those limitations placed on contributions by individuals, political action committees and corporations by law.

(4) A candidate and the candidate's committee shall timely comply with all provisions of law requiring the disclosure and reporting of contributions, loans and extensions of credit.

**D. Incumbent Judges.**

A judge shall not engage in any political activity except as authorized under any other Section of this Code, on behalf of measures to improve the law, the legal system or the administration of justice, or as expressly authorized by law.

**E. Applicability.**

Canon 5 generally applies to all incumbent judges and judicial candidates. Successful candidates, whether or not incumbents, are subject to judicial discipline for their campaign conduct; unsuccessful candidates who are lawyers are subject to lawyer discipline for their campaign conduct. Lawyers who are candidates for judicial office are subject to Rule 8.2(b) of the Mississippi Rules of Professional Conduct. However, the provisions of Canon 5F below shall not apply to elections for the offices of justice court judge and municipal judge.

**F. Special Committee--Proceedings and Authority.**

In every year in which an election is held for Supreme Court, Court of Appeals, chancery court, circuit court or county court judge in this state and at such other times as the Supreme Court may deem appropriate, a Special Committee on Judicial Election Campaign Intervention ("Special Committee") shall be created whose responsibility shall be to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The committee shall consist of five (5) members. The Chief Justice of the Supreme Court, the Governor, the Lieutenant Governor, the Speaker of the House of Representatives of the Mississippi Legislature and the chair of the Commission on Judicial Performance (Commission) shall each appoint one member. Those appointed by the Chief Justice, the Governor and the chair of the Commission shall be attorneys licensed to practice in the state. No person shall be appointed to serve as a member of a Special Committee for the year in which such person is a candidate for judicial office. Should the Chief Justice expect to be a candidate for judicial office during the year for which a Special Committee is to be appointed the Chief Justice shall declare such expectation, and in such event, the appointment which otherwise would have been made by the Chief Justice shall be

made by the next senior justice of the Supreme Court not seeking judicial office in such year. Likewise, should the Governor, Lieutenant Governor, Speaker of the House of Representatives or chair of the Commission expect to seek judicial office during such year, that official shall declare such expectation, and the appointment which otherwise would have been made by such appointing authority shall be made, respectively: by the Lieutenant Governor if the Governor expects to seek such an office; by the President Pro Tem of the Senate if the Lieutenant Governor expects to seek such an office; by the Speaker Pro Tem of the House of Representatives if the Speaker expects to seek such an office; and by the vice-chair of the Commission if the chair expects to seek such an office. Any action taken by the Special Committee shall require a majority vote. Each Special Committee shall be appointed no later March 1 in the year of their service, and it shall continue in existence for ninety (90) days following such judicial elections or for so long thereafter as is necessary to consider matters submitted to it within such time. The Commission shall provide administrative support to the Special Committee. Should any appointing authority fail to make an appointment, three members shall constitute a sufficient number to conduct the business of the Special Committee. The objective of the Special Committee shall be to alleviate unethical and unfair campaign practices in judicial elections, and to that end, the Special Committee shall have the following authority:

(1) Within ten (10) days of the effective date of this rule or within the ten (10) days after formally announcing and/or officially qualifying for election or re-election to any judicial office in this state, whichever is later, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with an appropriate mailing address and telephone number, to the Commission. Upon receipt of such notice, the Special Committee shall, through the Commission, cause to be distributed to all such candidates by certified mail-return receipt requested copies of the following: Canon 5 of the Code of Judicial Conduct; summaries of any previous opinions issued by the Special Committee, Special Committees organized for prior elections, or the Supreme Court of Mississippi, which relate in any way to campaign conduct and practices; and a form acknowledgment, which each candidate shall promptly return to the Commission and therein certify that the candidate has read and understands the materials forwarded and agrees to be bound by such standards during the course of the campaign. A failure to comply with this section shall constitute a per se violation of this Section authorizing the Committee to immediately publicize such failure to all candidates in such race and to all appropriate media outlets. In the event of a question relating to conduct during a judicial campaign, judicial candidates, their campaign organizations, and all independent persons, committees and organizations are encouraged to seek an opinion from the Special Committee before such conduct occurs.

(2) Opinions as to the propriety of any act or conduct by a judicial candidate, a candidate's campaign organization or an independent person, committee or organization conducting activities which impact on the election and as to the construction or application of Canon 5 may be provided by the Special Committee upon request from any judicial candidate, campaign organization or an independent person, committee or organization. If the Special Committee finds the question of limited significance, it may provide an informal opinion to the questioner. If, however, it finds the questions of sufficient general interest and importance, it may render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form. Furthermore, the Special Committee may issue formal opinions on its own motion under such circumstances, as it finds appropriate. The Special Committee may decline to issue an opinion when a majority of the Special Committee members determine that it would be inadvisable to respond to the request and to have so confirmed in writing their reasoning to the person who requested the opinion. All formal opinions of the Special Committee shall be filed with the Supreme Court and shall be a matter of public record except for the names of the persons involved, which shall be excised. Both formal and informal opinions shall be advisory only; however, the Commission on Judicial Performance, the Supreme Court and all other regulatory and enforcement authorities shall consider reliance by a judicial candidate upon the Special Committee opinion in any disciplinary or enforcement proceeding.

(3) Upon receipt of information facially indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the same by e-mail or facsimile, if available, and U.S. mail to the Special Committee members and said Committee shall:

(a) seek, from the informing party and/or the subject of the information, such further information on the allegations as it deems necessary;

(b) conduct such additional investigation as the Committee may deem necessary;

(c) determine whether the allegations warrant speedy intervention and, if so, immediately issue a confidential cease-and-desist request to the candidate and/or organization or independent committee or organization believed to be engaging in unethical and/or unfair campaign practices. If the Committee determines that the unethical and/or unfair campaign practice is of a serious and damaging nature, the Committee may, in its

discretion, disregard the issuance of a cease-and-desist request and immediately take action authorized by the provisions of paragraph (3)(d)(i) and (ii), hereafter described. If the allegations of the complaint do not warrant intervention, the Committee shall dismiss the same and so notify the complaining party.

(d) If a cease-and-desist request is disregarded or if the unethical or unfair campaign practices otherwise continue, the Committee is further authorized:

- (i) to immediately release to all appropriate media outlets, as well as the reporting party and the person and/or organization against whom the information is submitted, a public statement setting out the violations believed to exist, or, in the case of independent persons, committees or organizations, the actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5. In the event that the violations or actions have continued after the imposition of the cease and desist request, the media release shall also include a statement that the candidate and/or organization or independent person, committee or organization has failed to honor the cease-and-desist request, and
- (ii) to refer the matter to the Commission on Judicial Performance or to any other appropriate regulatory or enforcement authority for such action as may be appropriate under the applicable rules.

(4) All proceedings under this Rule shall be informal and non-adversarial, and the Special Committee shall act on all requests within ten (10) days of receipt, either in person, by facsimile, by U.S. mail, or by telephone. In any event, the Special Committee shall act as soon as possible taking into consideration the exigencies of the circumstances and, as to requests received during the last ten (10) days of the campaign, shall act within thirty-six (36) hours.

(5) Except as herein specifically authorized, the proceedings of the Special Committee shall remain confidential, and in no event shall the Special Committee have the authority to institute disciplinary action against any candidate for judicial office, which power is specifically reserved to the Commission on Judicial Performance under applicable rules.

(6) The Committee shall after conclusion of the election distribute to the Commission on Judicial Performance copies of all information and all proceedings relating thereto.

(7) This Canon 5F shall apply to all candidates for judicial offices of the Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts, be they incumbent judges or not, and to the families and campaign/solicitation committees of all such candidates. Persons who seek to have their name placed on the ballot as candidates for such judicial offices and the judicial candidates' election committee chairpersons, or the chairperson's designee, shall no later than 20 days after the qualifying date for candidates in the year in which they seek to run complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Committee. Within ten days of completing the course, candidates shall certify to Committee that they have completed the course and understand fully the requirements of Mississippi law and the Code of Judicial Conduct concerning campaign practices for judicial office. Candidates without opposition are exempt from attending the course.



## Mississippi Commission on Judicial Performance

### Purpose

**Mississippi Commission on Judicial Performance Rule 1B** states:

The Commission was created in 1979 by the Mississippi Legislature and the voters of the State of Mississippi by constitutional amendment. The Commission shall enforce the standards of judicial conduct, inquire into judicial disability and conduct, protect the public from judicial misconduct and disabled judges, and protect the judiciary from unfounded allegations. All proceedings before the Commission shall be of a civil nature, not criminal, as the purpose of the Commission is to be rehabilitative and educational as well as disciplinary.

The Commission's duties, function, and purpose are set forth by constitutional provision, general statutory law, and the Rules of the Commission. The purpose of the Commission is rehabilitative, educational, and disciplinary, and the proceedings are civil in nature.

***Mississippi Comm'n on Jud. Perf. v. Byers*, 757 So. 2d 961, 965 (Miss. 2000) (quoting 1998 Mississippi Commission on Judicial Performance Annual Report).**

### Jurisdiction

**Mississippi Commission on Judicial Performance Rule 2** states:

The Commission shall consider conduct of a judge or the physical or mental condition of a judge. In the absence of fraud, corrupt motive, or bad faith, the Commission shall not consider allegations against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. . . . Notwithstanding that a judge has resigned his office, the Commission shall retain jurisdiction over that judge if prior to his resignation the Commission has initiated an inquiry into the conduct of the judge.

A review of the complaint process reveals that the Commission has jurisdiction over every judge of any court in existence in the State of Mississippi. ***Mississippi Comm'n on Jud. Perf. v. Byers*, 757 So. 2d 961, 965 (Miss. 2000) (quoting 1998 Mississippi Commission on Judicial Performance Annual Report).**

### **Members of the Commission**

**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance**, states:

There shall be a commission on judicial performance of the State of Mississippi, to be composed of seven (7) members;

- three (3) of whom shall be judges of courts of record in the state which are trial courts of original jurisdiction, other than justice courts;
- one (1) member shall be a justice court judge;
- two (2) lay persons who reside in the state and who have never held judicial office or been members of the bar of Mississippi; and
- one (1) practicing attorney who has practiced law in the state for at least ten (10) years.

All judicial members are to be appointed by the judiciary of the State of Mississippi as provided by law. Restrictions on the members of the commission may be imposed by statute. Members of the commission on judicial performance not subject to impeachment shall be subject to removal from the commission by two-thirds (2/3) vote of the supreme court sitting en banc.

#### **§ 9-19-1      Membership of commission:**

The Commission on Judicial Performance shall consist of the following members:

- (a) One (1) circuit court judge to be appointed by the Chief Justice of the Supreme Court of Mississippi upon the recommendation of the Governor;
- (b) One (1) chancellor to be appointed by the Chief Justice of the Supreme Court of Mississippi upon the recommendation of the Lieutenant Governor;
- (c) One (1) county court judge to be appointed by the Chief Justice of the Supreme Court of Mississippi upon the recommendation of the Speaker of the House;
- (d) One (1) justice court judge to be appointed by the Chief Justice of the Supreme Court of Mississippi;
- (e) One (1) practicing attorney to be appointed by the Chief Justice upon the recommendation of the Governing Board of The Mississippi Bar; and
- (f) Two (2) lay persons who shall not be residents of the same Supreme Court District to be appointed by the Chief Justice of the Supreme Court of Mississippi.

An alternate for each member shall be selected at the time and in the manner prescribed for initial appointments in each representative class to replace those members who might be disqualified or absent.

**Prohibited Conduct by Judges**

**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance**, states:

On recommendation of the commission on judicial performance, the supreme court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for:

- (a) actual conviction of a felony in a court other than a court of the State of Mississippi;
- (b) willful misconduct in office;
- (c) willful and persistent failure to perform his duties;
- (d) habitual intemperance in the use of alcohol or other drugs; or
- (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute. . . .

The language of § 177A and the interpretations of that language by this Court are sufficient to put men [and women] of common intelligence on notice of what type of conduct is prohibited. ***Mississippi Comm’n on Jud. Perf. v. Russell*, 691 So. 2d 929, 942 (Miss. 1997).**

We find and hold today that, where the Commission finds judicial misconduct within one of the five categories under § 177A, failure to report such findings to this Court, and disposal of the violation by agreement, settlement, or memorandum of understanding between the respondent and the Commission, are beyond the Commission's constitutional authority. ***Mississippi Comm’n on Jud. Perf. v. Martin*, 995 So. 2d 727, 730 (Miss. 2008).**

**Commission on Judicial Performance Rule 6A** states:

A. Grounds for Discipline and Retirement. The grounds for discipline and retirement, as prescribed by the Constitution, are:

- (1) Actual conviction of a felony in a court other than a court of the State of Mississippi;
- (2) Willful misconduct in office;
- (3) Willful and persistent failure to perform his duties;
- (4) Habitual intemperance in the use of alcohol or other drugs;
- (5) Conduct prejudicial to the administration of justice which brings the judicial office into disrepute;

- (6) Physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character;
- (7) Any willful violation of law constituting a serious misdemeanor or felony;
- (8) Any violation of the code of judicial conduct and
- (9) Any violation of the rules of professional conduct as adopted by the Supreme Court.

***See Mississippi Constitution, Article VI, § 175*** (removal for conviction of misdemeanor in office and neglect of duty); **§ 25-5-1** (removal for criminal convictions and mental competency).

### **Willful Misconduct**

This Court has held that willful misconduct in office is:

the improper or wrong use of power of his office by a judge acting intentionally or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith.

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice which brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute.

***Mississippi Comm'n on Judicial Performance v. Harris*, 131 So. 3d 1137, 1142 (Miss. 2013).**

Willful misconduct in office is the improper or wrongful use of power of his office by a judge acting intentionally, or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. ***Mississippi Comm'n on Jud. Perf. v. Boykin*, 763 So. 2d 872, 874-75 (Miss. 2000) (citations omitted).**

Necessarily, the term [willful misconduct] would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are

not necessary to a finding of bad faith. ***Mississippi Comm’n on Jud. Perf. v. Chinn*, 611 So. 2d 849, 851 (Miss. 1992) (citation omitted).**

A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. ***Mississippi Comm’n on Jud. Perf. v. Boykin*, 763 So. 2d 872, 874-75 (Miss. 2000) (citations omitted).**

This Court has defined bad faith as “a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercises of his authority constitutes bad faith.” ***Mississippi Comm’n on Jud. Perf. v. Russell*, 691 So. 2d 929, 936 (Miss. 1997).**

### **Conduct Prejudicial to the Administration of Justice**

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute. ***Mississippi Comm’n on Jud. Perf. v. Boykin*, 763 So. 2d 872, 874-75 (Miss. 2000) (citations omitted).**

Conduct which falls short of reaffirming one’s fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. It includes conduct which would justify a reasonable man in believing that a result achieved by a judge was achieved because of his position and prestige, and conduct which would appear to an objective observer to be not only un-judicial but prejudicial to public esteem for the judicial office. It depends not so much on the judge’s motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. The judicial office refers not to the judge as an individual, but, rather, to the judiciary. Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less grave than willful misconduct in office. ***Mississippi Comm’n on Jud. Perf. v. Russell*, 691 So. 2d 929, 942 (Miss. 1997) (citations omitted).**

[A] judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner so as to bring the judicial office into disrepute. The result is the same regardless of whether bad faith or negligence and ignorance are involved and [it] warrants sanctions. ***Mississippi Comm’n on Jud. Perf. v. Atkinson*, 645 So. 2d 1331, 1335 (Miss. 1994) (citations omitted).**

There is no simple, black-letter definition of conduct prejudicial to the administration of justice which brings the judicial office into disrepute. [Quoting the Maryland Supreme Court, the court wrote:] “Precisely what “conduct prejudicial to the proper administration of justice” is or may be, in any or all circumstances, we shall not undertake to say. Indeed, a comprehensive, universally applicable definition may never evolve but it is unlikely we shall ever have much trouble recognizing and identifying such conduct whenever the constituent facts are presented.” *In re Baker*, 535 So. 2d 47, 50 (Miss. 1988).

A sitting judge is charged with knowing and carrying out the law of the state in which she sits. This disregard of state law, whether done intentionally or mistakenly, most certainly brings the integrity and independence of the office into question. *Mississippi Comm’n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999).

### **Procedures & Rules of the Mississippi Commission on Judicial Performance**

#### **§ 9-19-23 Rules:**

The commission on judicial performance shall make rules implementing this chapter, including rules of practice and procedure concerning receiving, processing and handling of complaints or inquiries and for hearings of the commission, a committee of the commission, its master or its factfinder, and the supreme court, to be approved by the supreme court.

### **Confidentiality of the Proceedings**

**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance**, states:

All proceedings before the commission shall be confidential, except upon unanimous vote of the commission. After a recommendation of removal or public reprimand of any judge is filed with the clerk of the supreme court, the charges and recommendations of the commission shall be made public. . . .

**Mississippi Commission on Judicial Performance Rule 4** states:

**A. All Proceedings.** All proceedings before the Commission shall be confidential, except upon unanimous vote, as prescribed in § 177A. Confidentiality shall attach upon the initiation of an inquiry and shall include all records, files, and reports of the Commission. All proceedings before the Supreme Court and any final decisions made by the Supreme Court shall be made public as in other cases at law. However, an appeal from a private admonishment by the

Commission shall be confidential unless on appeal the Supreme Court imposes sanctions harsher than the private admonishment.

**B. Disclosure.** By unanimous vote, the Commission may waive confidentiality and disclose such information deemed appropriate by the Commission. Such action may be taken upon the Commission's own motion or upon written request of the judge. . . .

***See § 9-19-19 Confidentiality of proceedings before commission*** (All commission members, staff, witnesses or any other person privy to any hearing before the commission shall take an oath of secrecy concerning all proceedings before the commission, violation of which shall be punishable as contempt.).

### **Initial Inquiry**

**Mississippi Commission on Judicial Performance Rule 5** states:

**A. Initiation of Inquiry.** Upon receipt of proper information regarding a judge's conduct or physical or mental condition, the Commission shall initiate a confidential inquiry to determine whether the matter is within the Commission's jurisdiction. On its own motion, the Commission may make inquiry concerning a judge's conduct or physical or mental condition, and may file a formal complaint based upon the results of such inquiry on its own motion.

**B. Preliminary Inquiry.** Upon receipt of such information, the executive director shall make a prompt, discreet, and confidential preliminary inquiry and evaluation under guidelines approved by the Commission. The executive director shall then make a report to the Commission. After such report, the Commission shall dismiss complaints which are not within the Commission's jurisdiction, relate only to claimed errors of law or fact, or are unfounded. The Complainant shall be informed in writing of the Commission's action.

**C. Notice to Judge.** The Commission shall not notify a judge of any initial complaint dismissed after preliminary inquiry, unless otherwise determined by the Commission. When the initial complaint is not dismissed, within ninety (90) days of its receipt the judge shall be notified of the investigation and nature of the charge. Failure to make timely notification shall not be grounds for dismissal of any investigation or proceeding. Such notice shall be in writing and may be transmitted by a member of the Commission, the executive director, any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record. When a judge has been notified of an investigation and the Commission has dismissed the matter, the judge shall

be so notified and the file shall be closed.

**D. Sworn Complaint or Statement in Lieu of Complaint.** If the initial complaint is not dismissed, the complainant shall be asked to file a detailed, signed, sworn complaint against the judge. The sworn complaint shall state the names and addresses of the complainant and the judge, the facts constituting the alleged misconduct, and, so far as is known, whether the same or a similar complaint by the complainant against the judge has ever been made to the Commission. A sworn complaint may be waived by a two-thirds ( 2/3 ) vote of the Commission; a sworn complaint shall not be required in an inquiry initiated by the Commission on its own motion.

**E. Informal Conference.** The Commission may request the judge to attend an informal conference concerning the matters relating to his judicial performance.

**F. Right to Counsel.** At all stages of the Commission's proceedings, the judge shall be entitled to counsel.

**G. Subpoena.** The subpoena power granted the Commission by law shall apply at any stage of the investigation or any proceedings. The judge shall be entitled to subpoenae for any formal hearing. All subpoenae shall be on the form prescribed by the Commission, and the Commission shall have the power to enforce process.

**H. Earwigging Prohibited.** No person shall discuss or attempt to discuss with or in the presence or hearing of a member anything concerning an inquiry or proceeding then pending with or likely to be considered by the Commission, except in accordance with these rules. Any person knowingly violating this or any other rule of the Commission may be guilty of contempt.

***Compare § 9-19-21 Powers and duties of commission:***

- (1) The commission shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge as witness, and to provide for the inspection of documents, books, accounts and other records.
- (2) If the commission, after investigation of a complaint, determines that there is sufficient evidence to warrant a hearing to determine whether or not there has been a violation under § 177A, the commission may employ counsel to prepare and present the complaint to the commission, a committee of the commission, its master or its factfinder, and to represent the commission before the supreme court.
- (3) The commission shall make transcripts of all hearings that are



conducted under subsection (2) of this section. Such transcripts shall serve as a record in proceedings before the supreme court.

(4) On request of the speaker of the house of representatives, the president of the senate or the governor, the commission shall make available information for use in consideration of impeachment or recall election, respectively.

(5) No records pertaining to complaints determined by the commission to be outside its jurisdiction shall be retained over twelve (12) months after such determination by the commission.

**Possible Dispositions by the Mississippi Commission on Judicial Performance**

**Mississippi Commission on Judicial Performance Rule 6B** states:

**B. Disposition.** The Commission shall dispose of the case in one (1) of the following ways:

(1) If it finds that there has been no misconduct, the case shall be dismissed.

(2) If it fails to find grounds for discipline under Section 177A of the Mississippi Constitution, but nevertheless finds that there has been conduct for which a private admonishment constitutes an adequate response, it shall issue the admonishment. The complainant shall be notified that the matter has been resolved. The Commission shall notify the Chief Justice of the Supreme Court of its action.

(3) The Commission may enter into a memorandum of understanding with the judge concerning his future conduct or submission to professional treatment or counseling.

(4) If it is determined that probable cause exists to require a formal hearing, it shall so notify the judge by service of a notice and a formal complaint.

Although the Commission generally does not impose disciplinary sanctions, but rather makes findings and recommendations for submission to the Supreme Court, it may, under Rule 6, dismiss cases or impose the lesser sanction of a private admonishment, without action by the Supreme Court. In the case of private admonishment, the Commission will notify the Chief Justice of the Supreme Court of its action. **Miss. Comm'n Jud. Perf. R. 8 cmt.**

### **Formal Complaint**

**Mississippi Commission on Judicial Performance Rule 6C** states:

**C. Formal Complaint.** The formal complaint shall be entitled “BEFORE THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE, INQUIRY CONCERNING A JUDGE, NO. \_\_\_\_\_.” The formal complaint shall identify any complainant and shall specify in ordinary and concise language the charges against the judge. The notice shall advise the judge of his right to file a written, sworn answer to the charges against him within thirty (30) days after service of the notice upon him. The notice and formal complaint shall be served upon the judge by personal service by a member of the Commission, the executive director, or by any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record.

### **Judge’s Answer**

**Mississippi Commission on Judicial Performance Rule 6D** states:

**D. Answer.** Within thirty (30) days after service of the notice and the formal complaint, the judge may file with the Commission a sworn answer or motions. The formal complaint and answer shall constitute the pleadings. Thereafter, no further motions or pleadings may be filed unless the Commission shall first grant leave.

### **Temporary Suspension of a Judge**

**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance,** states:

The commission may, with two-thirds (2/3) of the members concurring, recommend to the Supreme Court the temporary suspension of any judge against whom formal charges are pending.

**Mississippi Commission on Judicial Performance Rule 7** states:

Upon the filing of a formal complaint, the Commission may, in its discretion, issue its order directed to the judge to show good cause before the Commission why the Commission should not recommend to the Supreme Court that he be suspended from office while the inquiry is pending. The order to show cause shall be returnable before the Commission at a designated place and at a time certain, at which place and time the Commission shall consider the question of suspension. Either after issuing its order to show cause or without such order to show cause, the Commission may recommend to the Supreme Court that the judge be

suspended from performing the duties of his office, pending final determination of the inquiry. If the Commission recommends suspension, such recommendation and a transcript of all proceedings of the Commission shall be immediately forwarded to the Clerk of the Supreme Court. An interim suspension shall not preclude further action by the Commission.

**§ 9-19-13      Disqualification of judge during proceedings:**

Except as otherwise provided in Section 25-3-36(7), on recommendation of the commission on judicial performance, the Supreme Court may disqualify a judge from exercising any judicial function, without loss of salary, during pendency of proceedings before the commission or in the supreme court. If so disqualified, a special judge shall be appointed to perform his duties, as provided by law.

**Formal Hearing**

**Mississippi Commission on Judicial Performance Rule 8** states:

**A. Scheduling of Hearing.** The Commission shall schedule a formal hearing concerning the charges. The hearing shall be held no sooner than five (5) days after filing of an answer or after the deadline for filing of the answer if no answer is filed. Notice of the hearing shall be sent to the judge at his last known residence of record or to his attorney. At the date set for the formal hearing, the hearing shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel. The failure of the judge to answer or appear may be taken as evidence of the facts alleged in the formal complaint.

**B. Discovery and Procedure.** In all formal proceedings the Mississippi Rules of Civil Procedure shall be applicable except as otherwise provided in these rules. The sole parties to formal proceedings shall be the Commission and the judge.

**C. Factfinder.** The formal hearing shall be conducted before the entire Commission or before a committee of the Commission, a master or a factfinder designated by the Commission.

**D. Conduct of Hearing.** Facts requiring action of the Commission shall be established by clear and convincing evidence. The Mississippi Rules of Evidence shall apply to any formal hearing. All witnesses shall take an oath or affirmation to tell the truth. All Commission members, staff, witnesses, counsel, or any other person privy to any hearing before the Commission shall take an oath of secrecy concerning all proceedings before the Commission, violation of which shall be punishable as contempt. The Commission shall employ a member of the Mississippi State Bar to prepare and present the formal complaint to the

Commission and otherwise act as counsel and to represent the Commission before the Supreme Court or direct the Executive Director to so represent the Commission as counsel. The Commission shall designate one (1) of its judicial or attorney members to preside over each formal hearing. He shall dispose of all preliminary matters and shall rule on procedural and evidentiary matters during the course of the hearing. The judge shall have the right to present evidence and to produce and cross-examine witnesses. The judge shall be limited to two (2) character witnesses who may testify at the formal hearing; he may submit the affidavits of any other character witnesses he deems appropriate. The hearing shall be recorded by a reporter employed by the Commission. . . .

. . . .

**I. Witness Fees.** All witnesses shall receive fees and expenses in the statutorily allowable amount. Expenses of witnesses shall be borne by the party calling them. When the physical or mental disability of the judge is in issue, the Commission may reimburse the judge for the reasonable fees of any physician rendering a report or testifying at a Commission hearing. If the judge is exonerated of the charges against him and the Commission determines that the imposition of costs and expert witness fees would work a financial hardship or injustice upon him, the Commission may order that part or all of those costs and fees be reimbursed.

### *Findings of Fact and Recommendations*

Mississippi Commission on Judicial Performance Rule 8 states:

**E. Determination.** If the full Commission has held the formal hearing, it shall promptly prepare its findings of fact and any recommendations. When a committee, master, or factfinder has held the formal hearing, its findings of fact and recommendations shall be filed with the Commission within thirty (30) days after the hearing's conclusion; provided, however, the Commission may grant additional time for the preparation of such findings and recommendations. The executive director shall promptly deliver to the judge or his legal representative and to the Commission counsel a copy of the transcript of the proceedings and a copy of the findings and recommendations. Within ten (10) days from receipt of such copies, the judge and Commission counsel may submit written objections to the findings and recommendations. The Commission shall review the findings and recommendations, the written objections, and the transcript; and it may accept, modify, or reject, in whole or in part, the findings and recommendations and may make additional findings of fact and recommendations.

The findings of the Commission must be based upon clear and convincing evidence. *Mississippi Comm'n on Jud. Perf. v. Brown*, 761 So. 2d 182, 184 (Miss. 2000) (citation omitted).

**F. Commission Recommendation.** The Commission recommendations to the Supreme Court for discipline may include removal from office, suspension, fine, public censure or reprimand, or retirement. In addition, the Commission may privately admonish a judge as provided by law. The Commission findings and recommendation and the numerical vote shall be recorded; all other Commission action shall remain confidential.

**G. Dissent.** If any member dissents from a recommendation as to discipline or retirement, the dissenting recommendation shall also be transmitted to the Supreme Court. Only the dissent, with the number of dissenters shall be transmitted; the names of the individual dissenters shall remain confidential.

**H. No Discipline Recommended.** If two-thirds ( 2/3 ) of the members of the Commission fail to recommend discipline or retirement, the case shall be dismissed.

### **Private Admonishment**

**Mississippi Commission on Judicial Performance Rule 6B(2)** states:

(2) If it fails to find grounds for discipline under Section 177A of the Mississippi Constitution, but nevertheless finds that there has been conduct for which a private admonishment constitutes an adequate response, it shall issue the admonishment. The complainant shall be notified that the matter has been resolved. The Commission shall notify the Chief Justice of the Supreme Court of its action.

#### **§ 9-19-11      Right to privately admonish:**

The commission on judicial performance may privately admonish a justice or judge found to have been engaged in improper action or a dereliction of duty affecting the administration of justice; subject to review in the supreme court; provided, however, that all appeals from private admonishments shall remain confidential.

### **Appeal of Private Admonishment**

**Mississippi Commission on Judicial Performance Rule 10F** states:

**F. Private Admonishments.** If a judge desires to appeal a private admonishment, he shall file a notice of appeal with the Commission within thirty (30) days from the issuance of such admonishment. The Commission shall promptly file with the Clerk of the Supreme Court the record and its admonishment. The judge shall be the appellant and the Commission the appellee. An appeal from a private admonishment issued by the Commission shall follow the same procedures as other Commission matters except that such appeal shall remain confidential, as provided by law.

## Supreme Court Review

**Mississippi Commission on Judicial Performance Rule 10** states:

**A. Filing and Service.** The Commission shall promptly file the record, its findings and recommendations, and any dissents with the Clerk of the Supreme Court and shall immediately serve copies thereof upon the judge.

**B. Procedure.** The Mississippi Rules of Appellate Procedure shall be applicable for all Commission proceedings before the Supreme Court, except as otherwise provided in these rules.

**C. Preference Cases.** The Supreme Court shall treat all Commission matters as preference cases, to be determined with reasonable expedition.

**D. Briefs.** When the Commission has recommended the interim suspension of a judge, the Commission, as petitioner, and the judge, as respondent, shall file simultaneous briefs with the Supreme Court within seven (7) days after the filing of the Commission's recommendations with the Clerk of the Supreme Court. No reply briefs shall be filed. In other cases the Commission, as petitioner, and the judge, as respondent, shall file simultaneous briefs with the Supreme Court within thirty (30) days after the filing of the Commission's recommendations with the Clerk of the Supreme Court. No reply briefs shall be filed.

**E. Decision.** Based upon a review of the entire record, the Supreme Court shall prepare and publish a written opinion and judgment directing such disciplinary action, if any, as it finds just and proper. The Supreme Court may accept, reject, or modify, in whole or in part, the findings and recommendation of the Commission. In the event that more than one (1) recommendation for discipline of the judge is filed, the Supreme Court may render a single decision or impose a single sanction with respect to all recommendations.

Rule 10(e) states that the Supreme Court shall review the entire record then prepare a written opinion and judgment directing any disciplinary action it deems proper. *Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999).

### **Standard of Review of Commission's Findings**

In reviewing judicial misconduct cases, this Court conducts an “independent inquiry of the record,” and in doing so, “accord[s] careful consideration [of] the findings of fact and recommendations of the Commission, or its committee, which has had an opportunity to observe the demeanor of the witnesses.” ***Mississippi Comm'n on Jud. Perf. v. Littlejohn*, 62 So. 3d 968, 970 (Miss. 2011) (citations omitted).**

### **Sanctioning Authority**

This Court must render an independent judgment, as we are vested with the “sole power to impose sanctions in judicial misconduct cases.” ***Mississippi Comm'n on Jud. Perf. v. Patton*, 57 So. 3d 626, 629 (Miss. 2011) (citations omitted).**

### **Factors Used to Determine the Appropriate Sanctions for Misconduct**

The imposition of sanctions is a matter left solely to the discretion of this Court. ***Mississippi Comm'n on Jud. Perf. v. Bishop*, 761 So. 2d 195, 198 (Miss. 2000) (citations omitted).**

We have stated that the sanction should recognize the misconduct, deter and discourage similar behavior, preserve the dignity and reputation of the judiciary and protect the public. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1072 (Miss. 1999) (citation omitted).**

In an effort to clarify the standard by which we determine the appropriate sanction in a judicial misconduct case, this Court modifies *Gibson* and its progeny to the extent that Mississippi law considers “moral turpitude” as a factor in determining the appropriateness of sanctions. Instead, this Court will examine the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it. In examining the extent to which the conduct was willful, we will examine “whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently.” “[M]isconduct that is the result of deliberation is generally more serious than that of a spontaneous nature.” For example, spontaneous conduct, such as provoked conduct, may fall on one end of the spectrum, and may indicate a lesser sanction. Planned, premeditated conduct may fall on the opposite end of the spectrum, indicating the appropriateness of a harsher sanction. Conduct that is knowing and/or deliberate, but not the result of premeditation, may fall between spontaneous and premeditated conduct. Certainly, the analysis of the extent of willfulness will allow for consideration of acts of dishonesty. Furthermore, the inappropriateness



of the action may also be considered under the aggravating circumstances factor. When analyzing the extent to which the conduct exploited the judge's position to satisfy personal desires, we will examine factors such as whether the judge received money, received favors, or otherwise acted in a manner indicative of any improper personal motivation. *Mississippi Comm'n on Jud. Perf. v. Skinner*, 119 So. 3d 294, 306-07 (Miss. 2013) (citations omitted).

To determine which sanction will be the most appropriate in judicial misconduct proceedings, the court will look to the following factors:

- (1) The length and character of the judge's public service;
- (2) Whether there is any prior case law on point;
- (3) The magnitude of the offense and the harm suffered;
- (4) Whether the misconduct is an isolated incident or evidences a pattern of conduct;
- (5) Whether moral turpitude was involved; and
- (6) The presence or absence of mitigating or aggravating circumstances.

*Mississippi Comm'n on Jud. Perf. v. Gibson*, 883 So. 2d 1155, 1157-58 (Miss. 2004) *overruled in part on other grounds by Mississippi Comm'n on Jud. Perf. v. Boone*, 60 So. 3d 172, 177 (Miss. 2011).

When dealing with judicial misconduct, this Court has recognized that the sanction should fit the offense. *Mississippi Comm'n on Jud. Perf. v. Chinn*, 611 So. 2d 849, 856 (Miss. 1992) (citations omitted).

In determining whether a reprimand should be public, this Court considers [the above listed] mitigating factors which weigh in favor of confidential, private action. *Mississippi Comm'n on Jud. Perf. v. Atkinson*, 645 So. 2d 1331, 1336 (Miss. 1994) (citations omitted).

### **Sanctions Available**

**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance**, states:

On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state. . . .

## Removal

The Mississippi Commission on Judicial Performance recommends to this Court that former Madison County Justice Court Judge . . . be removed from office after finding by clear and convincing evidence that [the judge] physically and verbally assaulted a mentally disabled individual. . . . Because of the egregious nature of [the judge's] actions, this Court agrees with the Commission's recommendation and removes [the judge] from office. *Mississippi Comm'n on Judicial Performance v. Weisenberger*, 201 So. 3d 444, 446 (Miss. 2016).

Based upon the seriousness of his admitted criminal acts and judicial misconduct, [the judge] shall be removed from office. *Mississippi Comm'n on Judicial Performance v. DeLaughter*, 29 So. 3d 750, 755 (Miss. 2010).

We have considered that removal from office [is an] appropriate sanction for the most egregious cases of judicial misconduct. *Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1073 (Miss. 1999).

In determining whether removal is an appropriate sanction, this Court looks to Mississippi cases in which that sanction has been imposed to determine whether the conduct in the present case is equally egregious. This Court will remove a judge from office when the misconduct involved warrants such action. *Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 330 (Miss. 1998) (citation omitted).

[R]emoval of judges has usually involved repeated or systematic abuses of their judicial office. As a general rule, this Court will not remove a judge from office for a first offense, absent a showing of personal gain. *Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998) (citation omitted).

[Removal may be ordered where the judge] has engaged in a long-standing course of misconduct. . . . *Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998) (citation omitted).

[T]he court [has] declined to remove a judge from office for a first offense where there was no evidence that the respondent had acted with malice or other improper motive and where he had not benefitted from the conduct in question. *Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998) (citation omitted).

This Court has removed judges from public office for failure to report public monies coming into their hands. *Mississippi Comm'n on Jud. Perf. v. Coleman*, 553 So. 2d 513, 516 (Miss. 1989).

### **Suspension**

We have considered suspension from office without pay [is an] appropriate sanction for the most egregious cases of judicial misconduct. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1073 (Miss. 1999).**

### **Public Reprimand**

In determining whether a reprimand should be public, this Court will consider mitigating factors which weigh in favor of confidential, private action. Those factors are:

- (1) the length and character of the judge's public service;
- (2) any positive contributions made by the judge to the courts and the community;
- (3) the lack of prior judicial precedent on the incident in issue;
- (4) the commitment to fairness and innovative procedural form on the part of the judge;
- (5) the magnitude of the offense;
- (6) the number of persons affected;
- (7) whether "moral turpitude" was involved.

***Mississippi Comm'n on Judicial Performance v. Carr*, 786 So. 2d 1055, 1059 (Miss. 2001).**

The fact that [a judge] acted in knowing or careless indifference to these laws weighs heavily in favor of a public reprimand. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1072 (Miss. 1999).**

### **Private Reprimand**

This Court declined to issue a public reprimand, finding a private reprimand was the appropriate sanction under the facts as presented and "the isolated nature of the offense" in light of the mitigating factors. ***Mississippi Comm'n on Jud. Perf. v. Atkinson*, 645 So. 2d 1331, 1336 (Miss. 1994) (citations omitted).**

The court stated that a private reprimand was appropriate "because [the offender's] conduct was not premeditated or planned, but a spontaneous, albeit incorrect, judgment call intended to . . . uncover the truth." ***Attorney L.S. v. Mississippi Bar*, 649 So. 2d 810, 815 (Miss. 1994) (citation omitted) (a bar disciplinary proceeding).**

The court gave a private reprimand because [the offender's] candor and humility in admitting misconduct were mitigating factors. *Attorney L.S. v. Mississippi Bar*, 649 So. 2d 810, 815 (Miss. 1994) (citation omitted) (a bar disciplinary proceeding).

### **Retirement of a Judge**

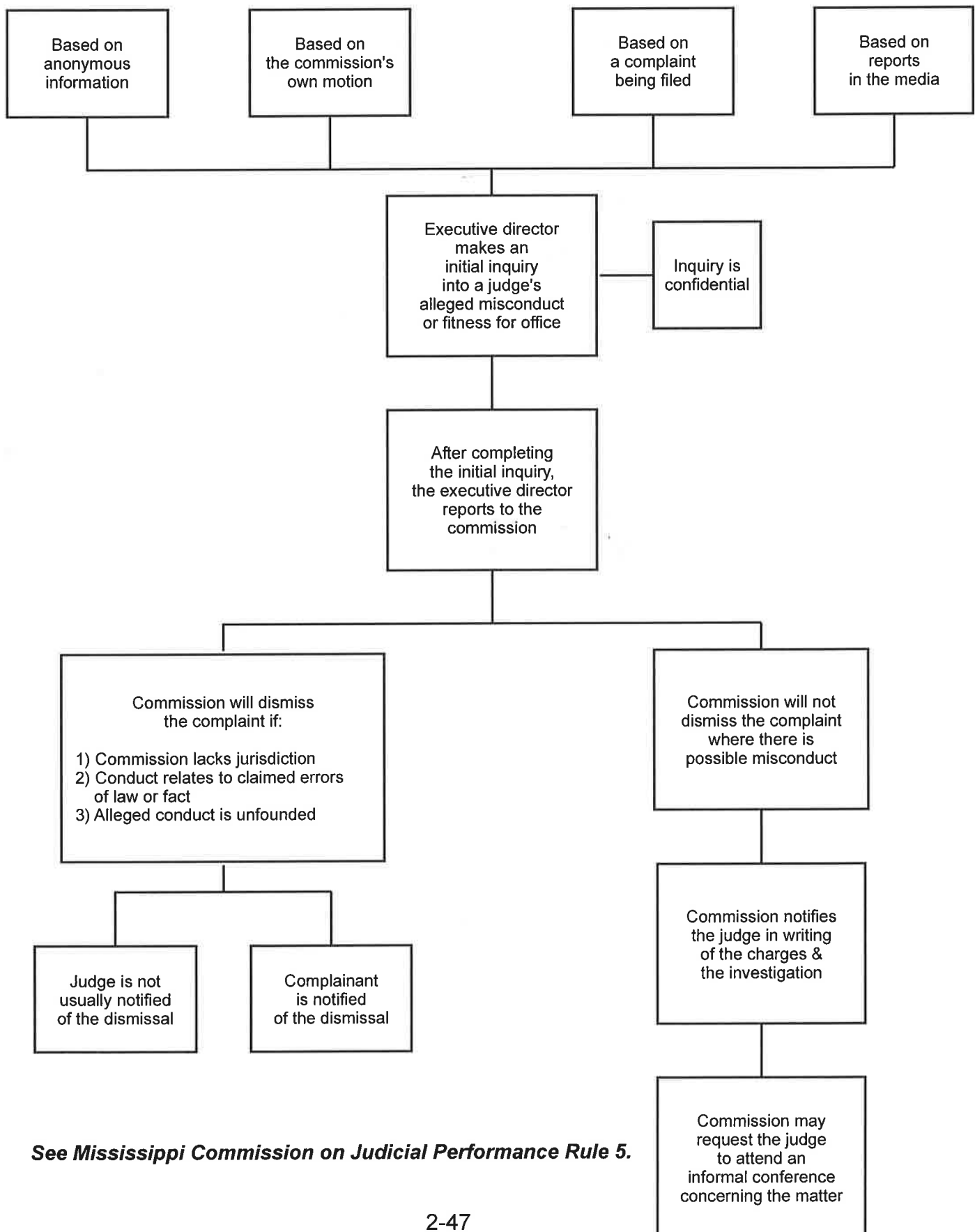
**Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance**, states:

On recommendation of the commission on judicial performance, the Supreme Court may . . . retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character.

#### **§ 9-19-15      Disability or retirement of judge:**

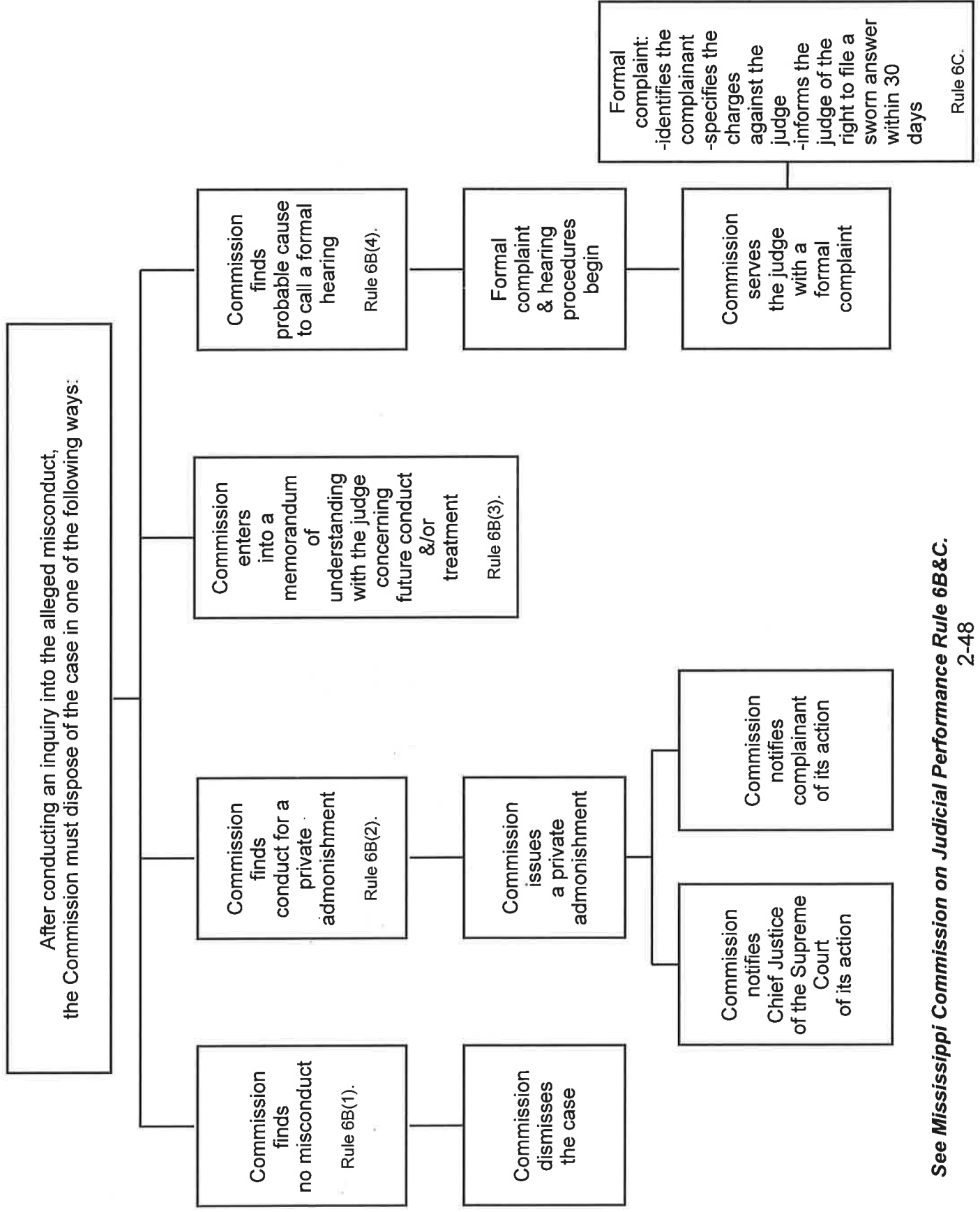
A justice or judge retired by the Supreme Court or the seven-member tribunal shall be considered to have retired voluntarily. The Supreme Court's finding of disability shall satisfy any certification of disability required by applicable retirement and disability law.

## **Initial Inquiry by the Mississippi Commission on Judicial Performance**

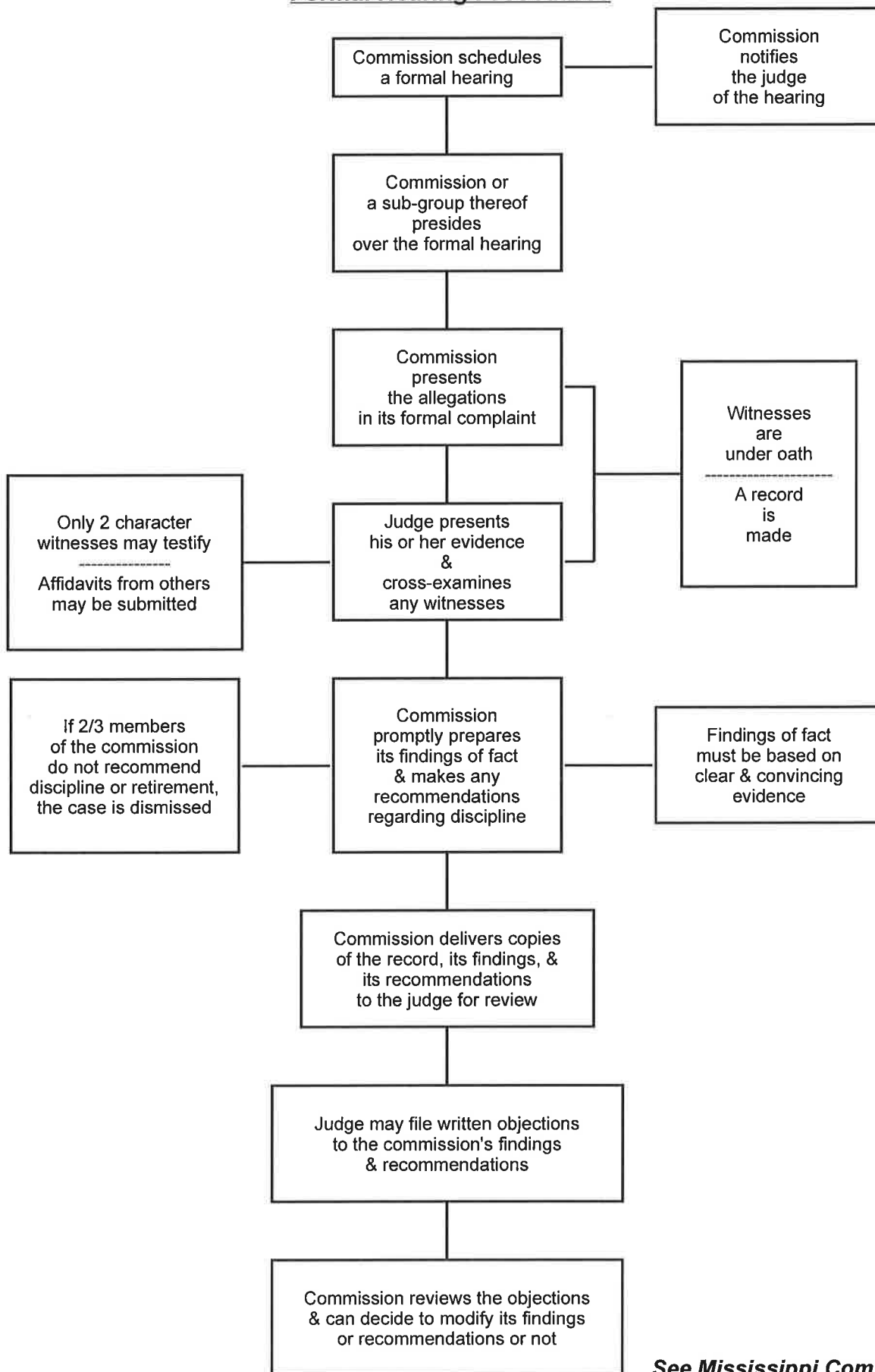


**See Mississippi Commission on Judicial Performance Rule 5.**

Possible Dispositions by the Mississippi Commission on Judicial Performance

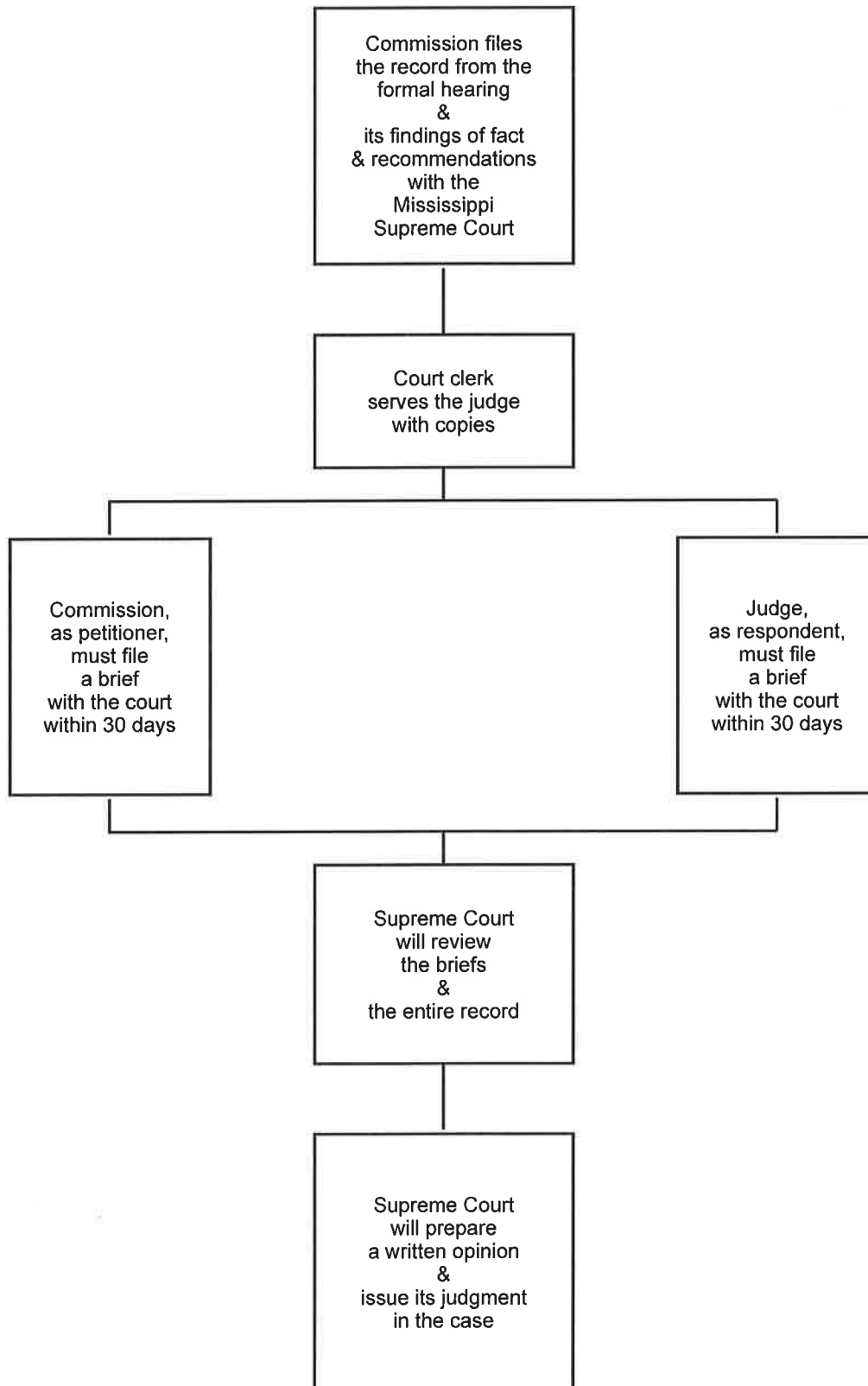


### Formal Hearing Procedures



**See Mississippi Commission  
on Judicial Performance Rule 8.**

**Supreme Court Review of Commission's Findings & Recommendations**



***See Mississippi Commission on Judicial Performance Rule 10.***



**Procedural Safeguards for Judges**  
**in**  
**Judicial Performance Proceedings**

- Notice of charges
- Opportunity to be heard
- Right to counsel
- Right to subpoena power for formal hearing
- Right to present evidence
- Right to cross-examine witnesses
- Opportunity to file objections to commission's findings

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Judicial Sanctions Ordered by the Mississippi Supreme Court				
Sanction	Court Judge	Conduct Warranting Sanctions	Citation	
Removal, fine, & court costs	Justice	Judge physically and verbally assaulted a mentally disabled individual.	<i>MCJP v. Weisenberger</i> , 201 So. 3d 444 (Miss. 2016).	
Removal, fine, & court costs	Justice	Judge lent prestige of office to assist a friend; deprived drug-court participant of right to counsel of her choosing; kept drug-court participants in program longer than statutorily permitted; improperly enrolled participants from other jurisdictions in drug court; and deprived drug-court participants of their due process rights.	<i>MCJP v. Thompson</i> , 169 So. 3d 857 (Miss. 2015).	
Removal, fine, & court costs	Youth	Judge deliberately and unlawfully incarcerated eleven citizens without affording them due process.	<i>MCJP v. Darby</i> , 143 So. 3d 564 (Miss. 2014).	
Removal & court costs	Chancery	Judge pled guilty to the felony of obstruction of justice in federal court. (Judge had resigned from office at the time of the opinion).	<i>MCJP v. Walker</i> , 172 So. 3d 1165 (Miss. 2015).	
Removal & court costs	Circuit	Judge pled guilty to felonies in federal court. (Judge had resigned from office at the time of the opinion).	<i>MCJP v. DeLaughter</i> , 29 So. 3d 750 (Miss. 2010).	
Removal & court costs	County	Judge recused himself from a case and then continued to issue orders in the case; once a judge recuses himself/herself from a case, the judge can not take further action in the case; there was prior judicial misconduct on the part of the judge. (Judge had resigned from office at the time of the opinion).	<i>MCJP v. Osborne</i> , 16 So. 3d 16 (Miss. 2009).	

Removal	Justice	Judge used his position to have charges against the judge's son dismissed.	<i>MCJP v. Brown</i> , 918 So. 2d 1247 (Miss. 2005).
Removal	Justice	Judge engaged in numerous ex parte communications with litigants and allegedly made sexual advances toward several females.	<i>MCJP v. Lewis</i> , 913 So. 2d 266 (Miss. 2005).
Removal	Justice	Judge accepted payments of fines payable to justice court; improperly dismissed charges; misused contempt powers (24 counts of judicial misconduct).	<i>MCJP v. Willard</i> , 788 So. 2d 736 (Miss. 2001).
Removal	Chancery	Judge became involved in legal proceedings to which he would ultimately be acting as the judge.	<i>MCJP v. Jenkins</i> , 725 So. 2d 162 (Miss. 1998).
Removal	Justice	Judge had 25 counts of personal and professional misconduct including ex parte communications, exhibiting a hostile demeanor towards people, failure to properly perform his duties, and claims of sexual harassment.	<i>MCJP v. Spencer</i> , 725 So. 2d 171 (Miss. 1998).
Removal	Justice	Judge entered order without authority; improperly handled DUI case; accepted money without authority; executed judgment without authority; engaged in ticket fixing; engaged in ex parte communications, & obstructed the judicial process.	<i>MCJP v. Dodds</i> , 680 So. 2d 180 (Miss. 1996).
Removal	Justice	Judge became socially involved with person who appeared in her court as a defendant; knew the defendant was a fugitive from another state & participated in fugitive's criminal case after extradition.	<i>MCJP v. Milling</i> , 651 So. 2d 531 (Miss. 1995).

Removal	Justice	Judge engaged in ticket fixing; failed to sentence criminals in accordance with statute; dismissed misdemeanor cases not in accordance with statute; & interfered with rotation of cases assigned to other judges in an attempt to influence other judges.	<i>MCJP v. Chinn</i> , 611 So. 2d 849 (Miss. 1992).
Removal	Justice	Judge allowed clerks & other officials to dismiss traffic tickets without an adjudication; failed to timely sign dockets; & dismissed traffic tickets in exchange for information on other criminal activity.	<i>MCJP v. Hopkins</i> , 590 So. 2d 857 (Miss. 1991).
Removal	Justice	Judge adjudicated approximately 28 DUI convictions & 552 routine traffic convictions without reporting them to Commissioner of Public Safety.	<i>In re Quick</i> , 553 So. 2d 522 (Miss. 1989).
Removal	Justice	Judge used criminal process to collect fees & fines; failed to properly account for the fines; converted the fines to his own use.	<i>MCJP v. Coleman</i> , 553 So. 2d 513 (Miss. 1989).
Removal	Justice	Judge engaged in ticket fixing; summarily adjudicated criminal defendants as not guilty on basis of ex parte communications or other un-docketed reasons; submitted improperly changed court abstracts to Department of Public Safety; used official influence to seek favorable consideration by judges of other courts for tickets issued to individual defendants; & used justice court personnel & supplies to carry out this course of conduct.	<i>In re Hearn</i> , 542 So. 2d 901 (Miss. 1989).
Removal	County	Judge failed to keep records & make reports; imposed excessive fines; & utilized prisoners for personal & county work.	<i>In re Collins</i> , 524 So. 2d 553 (Miss. 1988).

Removal	Justice	Judge converted money which came into his hands by virtue of office to his own use & falsified court records to cover his misconduct.	<i>In re Stewart</i> , 490 So. 2d 882 (Miss. 1986).
Removal	Justice	Judge received & collected criminal fines, penalties, costs & assessments on behalf of county & failed to report & pay sums over to county.	<i>In re Garner</i> , 466 So. 2d 884 (Miss. 1985) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Removal	Justice	Judge converted money from civil litigants for his own use.	<i>In re Brown</i> , 458 So. 2d 681 (Miss. 1984).
Removal	Justice	Judge committed perjury; failed to remedy deficiency in regard to issuance of garnishments; & failed to refund garnishment costs which had been deposited but as to which no garnishment had been issued.	<i>In re Anderson</i> , 451 So. 2d 232 (Miss. 1984).
Removal	Justice	Judge charged traffic violators a greater sum as a fine than that officially reported.	<i>In re Anderson</i> , 412 So. 2d 743 (Miss. 1982).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge committed judicial misconduct by sentencing a defendant to the work center after the defendant had appealed his conviction to a higher court and had then paid his court fine.	<i>MCJP v. Sheffield</i> , 235 So. 3d 30 (Miss. 2017).

Suspension without pay, public reprimand, fine & court costs	Justice	Judge improperly stated to the defendant that the judge may have to use his gun on the defendant due to the defendant's habit of placing his hands in his pockets. Judge also made disparaging comments about the defendant's mother's parenting skills.	<i>MCJP v. Vess</i> , 227 So. 3d 952 (Miss. 2017).
Suspension without pay, public reprimand, fine & court costs	Chancery	Judge improperly signed ex parte orders and contributed to the mismanagement of a ward's estate.	<i>MCJP v. Shoemaker</i> , 191 So. 3d 1211 (Miss. 2016).
Suspension without pay, public reprimand, fine & court costs	Chancery	Judge abused contempt powers and illegally incarcerated litigant who had appealed and paid a supersedeas bond to stay payment of court's judgment.	<i>MCJP v. Littlejohn</i> , 172 So. 3d 1157 (Miss. 2015).
Suspension without pay, public reprimand, fine & court costs	County	Judge had presided over several cases involving six minor siblings where the judge had issued a no-contact order between the father and the children; subsequently, the judge recused himself from all proceedings involving the parties; although the judge had recused himself from the proceedings and based on ex parte communications, he issued bench warrants for the arrests of the parents for contempt of court for violation of the no-contact order and ordered them held without bond.	<i>MCJP v. Skinner</i> , 119 So. 3d 294 (Miss. 2013).

Suspension without pay, public reprimand, fine & court costs	Justice	Judge communicated with the sheriff's office during a criminal investigation at a time when there was no case pending before him; signed an order where there was no case pending before him and engaged in ex parte communications concerning the matter; non-adjudicated a minor in violation of Mississippi Code Annotated § 63-11-30(3), at the request of the minor and her father; engaged in ex parte communications with the minor and her father; failed to give notice to prosecuting authorities; and interfered in a case that was assigned to another justice court judge; reduced a defendant's bond which had been set by another justice court judge; dismissed eleven (11) cases of no proof of insurance in a four (4) month period after the respective defendants supplied proof of insurance that was obtained after the fact; improperly involved himself in a domestic civil matter; engaged in improper ex parte communications with a litigant involved in the domestic dispute; and improperly attempted to aid the litigant by asking an officer to assist the litigant.	<i>MCJP v. Thompson</i> , 80 So. 3d 86 (Miss. 2012).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge executed a felony arrest warrant based on an affidavit submitted by the judge's own client.	<i>MCJP v. Bustin</i> , 71 So. 3d 598 (Miss. 2011).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge engaged in "ticket-fixing" and had ex parte communications.	<i>MCJP v. McKenzie</i> , 63 So. 3d 1219 (Miss. 2011).



Suspension without pay, public reprimand, fine & court costs	County	Judge engaged in ex parte communications; misused his contempt power; failed to properly notice hearings; granted relief not requested; and issued a search warrant without legal authority.	<i>MCJP v. Patton</i> , 57 So. 3d 626 (Miss. 2011).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge touched a deputy clerk in an inappropriate manner and had in the past made inappropriate remarks.	<i>MCJP v. Brown</i> , 37 So. 3d 14 (Miss. 2010).
Suspension without pay, public reprimand, fine & court costs	Justice & Municipal	Judge, with deputies, went to the home of the complainant to inquire about missing sections of a fence that had been removed from a cemetery; judge subsequently ordered the complainant to return the fences or face prosecution; despite the fact that no charges were ever pending concerning the pieces of fence, the judge informed the complainant that a warrant had been issued for her arrest.	<i>MCJP v. Carr</i> , 990 So. 2d 763 (Miss. 2008) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Suspension without pay, public reprimand, & fine	Justice	Judge initiated improper ex parte communications to investigate a pending civil matter; failed to comply with the statutory limitations of money judgments in justice court; and retaliated against a complainant who filed a complaint with the Commission on Judicial Performance.	<i>MCJP v. Bozeman</i> , 302 So. 3d 1217 (Miss. 2020).
Suspension without pay, public reprimand, & fine	Justice	Judge committed judicial misconduct by contacting two law enforcement investigators; engaging in sua sponte actions on behalf of a defendant; and speaking with a defendant's mother.	<i>MCJP v. Sutton</i> , 275 So. 3d 1062 (Miss. 2019).
Suspension without pay, public reprimand & court costs	Justice	Judge failed to properly adjudicate criminal matters assigned to him; engaged in ticket-fixing; and dismissed criminal charges against multiple defendants in exchange for simultaneous payments to a "drug fund" established and maintained by the police chief.	<i>MCJP v. Smith</i> , 109 So. 3d 95 (Miss. 2013).

Suspension without pay, public reprimand & court costs	Justice	Judge improperly attempted to contact a judge in another jurisdiction concerning a pending criminal matter involving a friend's family member.	<i>MCJP v. Dearman</i> , 73 So. 3d 1140 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	<p>Judge interfered with the prosecution of a case against a defendant who was charged with a crime against the judge's relative; interfered with the defendant's attempt to post bond; disrupted a Board of Supervisors' meeting to complain about the sheriff's actions relating to the defendant's bond, which caused a disturbance and an interruption of the Board of Supervisors' business; interfered with the defendant's attempts to hire legal counsel by discouraging attorneys from representing the defendant, thereby attempting to deny the defendant his constitutional right to counsel and to a fair criminal proceeding; and stated on the record in a proceeding in circuit court "my advice to them [a victim of a crime] would be do not use the court, handle it themselves."</p> <p>Judge was also accused of willful misconduct for "passing to the file" DUI charges based on written motions filed by the county prosecutor; these actions were allegedly in violation of Mississippi Code § 63-11-39 and § 99-15-26.</p> <p>However, the Mississippi Supreme Court found no sanctionable conduct and dismissed that count against the judge with prejudice.</p>	<i>MCJP v. McGee</i> , 71 So. 3d 578 (Miss. 2011).

Suspension without pay, public reprimand & court costs	Justice	Judge refused to sign a search warrant referencing an acquaintance's computer; ordered that the acquaintance's handcuffs and shackles be removed during her initial appearance; on a second charge against the acquaintance, the judge engaged in ex parte communications with the acquaintance's husband; attempted to have the acquaintance released from jail; and became emotionally upset when the acquaintance was brought before the judge.	<i>MCJP v. Cowart</i> , 71 So. 3d 590 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge sua sponte reduced bonds and charges without proper motion; conditioned the reduction on church attendance; exceeded her authority by altering bonds after a defendant had been released on bond or had waived preliminary hearing, or after a preliminary hearing had been conducted; permitted others to create the impression that they were in a special position to influence her as a judge; initiated and invited ex parte communications; and presided at her nephew's initial appearance.	<i>MCJP v. Dearman</i> , 66 So. 3d 112 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge had ex parte communications with a defendant and a police officer and improperly reduced a court fine.	<i>MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge waited to rule on certain criminal cases pending the outcome of an unrelated case in chancery court; obtained ex parte information by attending the chancery court proceeding; engaged in ex parte communications; held a defendant without bond for a non-capital offense; improperly reduced a defendant's bond; refused to reduce a defendant's bond based on ex parte information concerning threats made against the judge; and allowed testimony about the alleged threats during the defendant's hearing.	<i>MCJP v. Anderson</i> , 32 So. 3d 1180 (Miss. 2010).

Suspension without pay, public reprimand & court costs	Justice	Judge had a conflict of interest in a case and did not properly recuse himself from the proceedings; judge, who had been on the bench approximately 29 years, “had a fundamental lack of understanding of legal principles in connection with the recusal process.”	<i>MCJP v. Hartzog</i> , 32 So. 3d 1188 (Miss. 2010).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications with a party and ruled in that party’s favor; continued cases without a motion being made to do so by either party; dismissed a DUI case without allowing the prosecutor to call a witness; attempted to get cases assigned to another judge dismissed, among other instances of judicial misconduct.	<i>MCJP v. Bradford</i> , 18 So. 3d 251 (Miss. 2009).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications with a party concerning a pending matter; offered legal advice to the party; & used his influence as a judge to advance the private interests of others.	<i>MCJP v. Fowlkes</i> , 967 So. 2d 12 (Miss. 2007).
Suspension without pay, public reprimand & court costs	Justice	Judge did not allow a defendant in a trespass proceeding to present any evidence on his behalf; sua sponte issued a warrant for the re-arrest of a defendant who had posted bond set by the judge; sua sponte revoked a defendant’s probation without following proper procedures; after finding a defendant not guilty of DUI 1 <sup>st</sup> , ordered the defendant not to drive for 2 years; improperly issued arrest warrants; improperly set aside court orders issued by another judge; and improperly amended a charge against a defendant.	<i>MCJP v. Roberts</i> , 952 So. 2d 934 (Miss. 2007).
Suspension without pay, public reprimand & court costs	Justice	Judge interfered with a criminal prosecution by having the sheriff contact the arresting officer to have him not attend court on the trial date so that a DUI charge could be dismissed for failure to prosecute; such action was deemed the “epitome of judicial misconduct exhibiting moral turpitude.”	<i>MCJP v. Sanford</i> , 941 So. 2d 209 (Miss. 2006).

Suspension without pay, public reprimand & court costs	Justice	Judge repeatedly engaged in ex parte communications and set aside judgments.	<i>MCJP v. Britton</i> , 936 So. 2d 898 (Miss. 2006).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications, remanded charges, and presided over a case where there was a conflict of interest.	<i>MCJP v. Cowart</i> , 936 So. 2d 343 (Miss. 2005).
Suspension without pay, public reprimand & court costs	Justice	Judge failed to render timely decisions; failure to give notice to parties of court orders.	<i>MCJP v. McPhail</i> , 874 So. 2d 441 (Miss. 2004).
Suspension, public reprimand & court costs	Municipal	Judge “passed” numerous traffic tickets to the files without requiring the defendants to appear in court.	<i>MCJP v. Gordon</i> , 955 So. 2d 300 (Miss. 2007).
Suspension, fine & public reprimand	Justice	Judge became involved in dispute between friend/distant relative & third party; wrote insufficient funds check; & failed to file reports of campaign contributions or expenditures as required by law.	<i>MCJP v. Franklin</i> , 704 So. 2d 89 (Miss. 1997).
Suspension, fine & public reprimand	Justice	Judge ordered or allowed an alteration of court dockets, & he improperly purchased replevined property.	<i>In re Mullen</i> , 530 So. 2d 175 (Miss. 1988).

Suspension without pay & court costs	County	While speaking to a political organization, the judge made a number of inflammatory, racial remarks which were not deemed to be protected political speech; judges are however permitted to speak at political gatherings on their own behalf while candidates for re-election.	<i>MCJP v. Osborne</i> , 11 So. 3d 107 (Miss. 2009).
Suspension without pay & court costs	County	Judge intervened on behalf of a family member in a vehicle repossession & used his judicial office in a manner to impede a quick & peaceful resolution to the matter.	<i>MCJP v. Osborne</i> , 977 So. 2d 314 (Miss. 2008).
Suspension & fine	Justice	Judge had jailer park his vehicle across from house of minor who had made allegations against judge in order to intimidate minor & her family, & judge interjected himself in a meeting between student & principal & used his position as judge to intimidate the student.	<i>MCJP v. Bishop</i> , 761 So. 2d 195 (Miss. 2000).
Suspension & fine	Justice	Judge assaulted a litigant in the courtroom & used profane language at the defendant during the altercation.	<i>MCJP v. Guest</i> , 717 So. 2d 325 (Miss. 1998).
Suspension & fine	Justice	Judge dismissed charges pursuant to ex parte communications with defendant and defendant's aunt; prior discipline of judge involved political activity & attempting to have another justice court judge dismiss a person's traffic violation.	<i>MCJP v. Peyton</i> , 645 So. 2d 954 (Miss. 1994) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).

Suspension & court costs	Justice	Judge conducted ex parte bond hearings; assigned his daughter as public defender; improperly set aside judgment.	<i>MCJP v. Peyton</i> , 812 So. 2d 204 (Miss. 2002).
Suspension	Youth	Judge granted ex parte order changing child custody.	<i>MCJP v. Perdue</i> , 853 So. 2d 85 (Miss. 2003).
Suspension (Interim)	Circuit	Judge engaged in ex parte communications; suspension pending resolution of formal complaints.	<i>MCJP v. Delaughter</i> , 35 So. 3d 1208 (Miss. 2008).
Suspension (Interim)	Justice	Judge had 2 pending felony indictments; suspension was pending resolution of the indictments.	<i>MCJP v. Hartzog</i> , 822 So. 2d 941 (Miss. 2002).
Suspension	Municipal	Judge pled guilty to felony in federal district court, & was convicted of alcohol-related misdemeanors; judge was suspended from office as municipal judge pro tempore as long as he served as mayor, which was analogous to removal.	<i>MCJP v. Thomas</i> , 549 So. 2d 962 (Miss. 1989).
Public censure	Supreme	Judge conducted himself in a manner prejudicial to the administration of justice which brought the judicial office into disrepute.	<i>MCJP v. McRae</i> , 700 So. 2d 1331 (Miss. Const. Tribunal 1997).
Public censure	Justice	Judge remained active in a political party following his election to bench.	<i>MCJP v. Peyton</i> , 555 So. 2d 1036 (Miss. 1990).

Public reprimand, fine & court costs	Justice	Judge failed to give notice to a litigant that she would face an eviction and an increase in the amount of the judgment against her; granted unrequested relief; acted with ignorance or disregard of the law; entered an unsupported judgment which caused direct harm to the a litigant; and gave legal advice to a litigant.	<i>MCJP v. Roberts</i> , 227 So. 3d 938 (Miss. 2017).
Public reprimand, fine & court costs	Chancery	Judge abused his contempt powers, failed to recuse himself from contempt proceedings, and prevented those he charged with contempt from presenting any defense.	<i>MCJP v. Harris</i> , 131 So. 3d 1137 (Miss. 2013).
Public reprimand, fine & court costs	Circuit	Judge failed to disclose a conflict to the parties in a civil lawsuit and failed to rule on counsel's motion to recuse made after the conflict was discovered.	<i>MCJP v. Bowen</i> , 123 So. 3d 381 (Miss. 2013).
Public reprimand, fine & court costs	Municipal	Judge attempted to use his judicial office to advance the private interests of his tenant, and by extension, his own private financial interests as landlord. Judge was also impatient and discourteous and abused his contempt power when arguing with a probation officer.	<i>MCJP v. Fowlkes</i> , 121 So. 3d 904 (Miss. 2013).
Public reprimand, fine & court costs	Circuit	Judge was confrontational and discourteous to two (2) attorneys, a bail bondsman, and a litigant appearing before him in court and wrongfully imposed contempt of court sanctions against the two (2) attorneys and the bail bondsman.	<i>MCJP v. Smith</i> , 78 So. 3d 889 (Miss. 2011).
Public reprimand, fine & court costs	Youth	Judge wrongfully imposed criminal contempt of court sanctions against a party without affording her due process rights.	<i>MCJP v. Darby</i> , 75 So. 3d 1037 (Miss. 2011).



Public reprimand, fine & court costs	Justice	Judge engaged in ex parte communications; allowed the defendant's mother to enter a plea on behalf of her daughter; did not treat parties with courtesy; wrote a note on behalf of a party to her employer.	<i>MCJP v. Vess</i> , 10 So. 3d 486 (Miss. 2009).
Public reprimand, fine & court costs	Justice	Judge had unlawfully denied bond and entered court orders which exceeded the authority of the court. (Judge no longer in office at the time of the opinion).	<i>MCJP v. Boland</i> , 998 So. 2d 380 (Miss. 2008) <i>overruled by</i> <i>MCJP v. Osborne</i> , 11 So. 3d 107 (Miss. 2009).
Public reprimand, fine & court costs	Justice	Judge wrote checks in excess of \$330,000 from a closed account.	<i>MCJP v. Hartzog</i> , 904 So. 2d 981 (Miss. 2004) <i>overruled in part on</i> <i>other grounds by</i> <i>MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand, fine & court costs	Justice	Judge improperly suspended fines in 13 cases and improperly suspended state assessments in 4 cases.	<i>MCJP v. Sheffield</i> , 883 So. 2d 546 (Miss. 2004).

Public reprimand, fine & court costs	Municipal	Judge improperly set aside judgments entered by previous judge, without any notice or hearing.	<i>MCJP v. Gibson</i> , 883 So. 2d 1155 (Miss. 2004) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand, fine & court costs	Justice	Judge improperly dismissed cases and dismissed speeding tickets.	<i>MCJP v. Williams</i> , 880 So. 2d 343 (Miss. 2004).
Public reprimand, fine & court costs	Municipal	Judge improperly used his judicial office for benefit in private practice; showed improper demeanor towards litigants and court personnel.	<i>MCJP v. Gunter</i> , 797 So. 2d 988 (Miss. 2001).
Public reprimand, fine & court costs	Justice	Judge engaged in ex parte communications; dismissed tickets based on ex parte communications; failed to conduct hearings on court matters.	<i>MCJP v. Warren</i> , 791 So. 2d 194 (Miss. 2001).
Public reprimand, fine & court costs	Circuit	Judge improperly released prisoners & engaged in ex parte communications.	<i>MCJP v. Russell</i> , 724 So. 2d 873 & 691 So. 2d 929 (Miss. 1997).
Public reprimand & fine	Justice	Judge rescinded an arrest warrant, which had been signed by another judge, in a criminal proceeding in which the judge was a party, thereby prejudicing the administration of justice and bringing the judicial office into disrepute.	<i>MCJP v. Burton</i> , 268 So. 3d 565 (Miss. 2019).

Public reprimand & fine	Justice	Judge conducted hearings in more than 25 civil cases, held the cases in abeyance, and then failed to rule on the cases, and the judge granted judgment to a party without conducting a hearing on the merits.	<i>MCJP v. McGee</i> , 266 So. 3d 1003 (Miss. 2019).
Public reprimand & fine	Justice	Judge engaged in ticket fixing & in ex parte communications with defendants.	<i>MCJP v. Boykin</i> , 763 So. 2d 872 (Miss. 2000).
Public reprimand & fine	Justice	Judge reduced charges of DUI to disorderly conduct or DUI first offenses.	<i>MCJP v. Jones</i> , 735 So. 2d 385 (Miss. 1999).
Public reprimand & fine	Circuit	Judge suspended sentence of former client & placed another inmate on probation after his conviction & sentence had been affirmed.	<i>MCJP v. Sanders</i> , 708 So. 2d 866 (Miss. 1998).
Public reprimand & fine	Municipal	Judge pointed a loaded weapon at individuals who were believed to be trespassing on neighboring land; fired shots at tires of individuals' vehicle; & placed handcuffs on & temporarily detained individuals.	<i>MCJP v. Whitten</i> , 687 So. 2d 744 (Miss. 1997).
Public reprimand & fine	Justice	Judge reduced 3 citations for DUI in violation of statute precluding such reductions; assessed fines in excess of statutory maximum in 6 criminal cases, failed to require affidavits in 4 criminal cases; issued orders without authority; & allowed cameras in courtroom.	<i>MCJP v. Emmanuel</i> , 688 So. 2d 222 (Miss. 1997).
Public reprimand & fine	Municipal	Judge violated judicial canon requiring judge to resign his office when he became a candidate in general election for non-judicial office.	<i>MCJP v. Haltom</i> , 681 So. 2d 1332 (Miss. 1996).

Public reprimand & fine	Justice	Judge dismissed numerous speeding & traffic tickets & engaged in ex parte communications.	<i>MCJP v. Bowen</i> , 662 So. 2d 551 (Miss. 1995).
Public reprimand & fine	Justice	Judge altered final judgment on his own volition because of ex parte communications.	<i>MCJP v. Underwood</i> , 644 So. 2d 458 (Miss. 1994).
Public reprimand & fine	Justice	Judge violated judicial canon requiring judge to resign his office when he became a candidate in general election for non-judicial office.	<i>MCJP v. Ishee</i> , 627 So. 2d 283 (Miss. 1993).
Public reprimand & fine	Justice	Judge engaged in ticket fixing & in ex parte communications concerning charges.	<i>MCJP v. Gunn</i> , 614 So. 2d 387 (Miss. 1993) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & fine	Justice	Judge dismissed traffic offenses at request of persons with no prosecutorial responsibility; allowed clerical personnel to adjudicate criminal cases; & allowed traffic tickets to be adjudicated by highway patrol officers &/or court clerk or deputy clerk.	<i>In re Seal</i> , 585 So. 2d 741 (Miss. 1991).
Public reprimand & fine	Justice	Judge improperly dismissed nonmoving violations; assessed excessive fees, charges, & costs; & failed to properly docket cases.	<i>MCJP v. Cowart</i> , 566 So. 2d 1251 (Miss. 1990).

Public reprimand & fine	Justice	Judge interfered with administration of police officers; improperly questioned rape victim; failed to pay traffic fine; failed to properly register automobile; & publicly supported bond issue.	<i>In re Chambliss</i> , 516 So. 2d 506 (Miss. 1987).
Public reprimand & fine	Justice	Judge had found defendants not guilty without a trial after being contacted by other officials; had unlawfully entered a JNOV; had interfered with the assignment of cases; had unlawfully handled bad check cases; and had improperly assessed constable fees.	<i>In re Hearn</i> , 515 So. 2d 1225 (Miss. 1987).
Public reprimand & fine	Justice	Judge used criminal process or threat of criminal process to collect "bad checks"; failed to properly docket & process "bad check" cases on criminal or civil docket; failed to collect civil court costs in advance; failed to keep required records; & collected court costs from county for cases which were never docketed.	<i>In re Odom</i> , 444 So. 2d 835 (Miss. 1984).
Public reprimand & fine	Justice	Judge failed to properly docket & use lawful procedure to collect on "bad check" claims.	<i>In re Lambert</i> , 421 So. 2d 1023 (Miss. 1982).
Public reprimand & fine	Justice	Judge failed to use lawful procedure to collect on "bad check" claims.	<i>In re Branan</i> , 419 So. 2d 145 (Miss. 1982).
Public reprimand & court costs	Municipal	Judge made improper statements on social media and in a newspaper interview; improperly ordered participants into a drug court program; and exhibited discourteous conduct in the courtroom.	<i>MCJP v. Clinkscales</i> , 192 So. 3d 997 (Miss. 2016).

Public reprimand & court costs	Justice	Judge had ex parte communication with a defendant about his pending criminal case; failed to disclose such ex parte communication to the prosecutor; dismissed the charges against the defendant without a hearing and without any motion to dismiss by the prosecutor; and falsified court records.	<i>MCJP v. Carver</i> , 107 So. 3d 964 (Miss. 2013).
Public reprimand & court costs	Chancery	Judge misused contempt powers by holding an attorney in criminal contempt of court for failing to say the Pledge of Allegiance in open court.	<i>MCJP v. Littlejohn</i> , 62 So. 3d 968 (Miss. 2011).
Public reprimand & court costs	County	Judge repeatedly failed to issue orders in court proceedings.	<i>MCJP v. Agin</i> , 17 So. 3d 578 (Miss. 2009).
Public reprimand & court costs	Municipal	Judge had presided over a legal proceeding concerning a defendant, i.e, had signed the warrant for his arrest, and then represented the defendant against the same criminal charges.	<i>MCJP v. Pittman</i> , 993 So. 2d 816 (Miss. 2008).
Public reprimand & court costs	Justice	Judge made a number of inappropriate and offensive remarks while attending a seminar in her capacity as a judge; her offensive remarks were not protected by the First Amendment. (Judge no longer in office at the time of the opinion).	<i>MCJP v. Boland</i> , 975 So. 2d 882 (Miss. 2008).
Public reprimand & court costs	County	Judge had failed repeatedly to issue rulings in cases pending before him.	<i>MCJP v. Agin</i> , 987 So. 2d 418 (Miss. 2008).

Public reprimand & court costs	Justice	Judge conducted ex parte communications with a party and ordered a stay of his own order; in another case, the judge failed to dispose of a pending case.	<i>MCJP v. Sutton</i> , 985 So. 2d 322 (Miss. 2008) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Justice	Judge became involved in a court matter by attempting to talk to a fellow justice court judge about the court matter & subsequently told a justice court deputy clerk not to issue an arrest warrant, which had been signed by the other justice court judge.	<i>MCJP v. Thompson</i> , 972 So. 2d 582 (Miss. 2008) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Municipal	Judge received a DUI – 1 <sup>st</sup> Offense to which he pled guilty; judge payed the fine and complied with all sentencing conditions; judge also self-reported his charge to the MCJP.	<i>MCJP v. Westfaul</i> , 962 So. 2d 555 (Miss. 2007).

Public reprimand & court costs	Justice	Judge reinstated his grandson's license and intervened on his behalf in a sentencing matter.	<i>MCJP v. Cole</i> , 932 So. 2d 9 (Miss. 2006) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Chancery	Judge failed to pay vendors for items purchased even after he was reimbursed for the purchases by the State.	<i>MCJP v. Teel</i> , 863 So. 2d 973 (Miss. 2004).
Public reprimand & court costs	Justice	Judge conducted ex parte communications about dismissal of charges.	<i>MCJP v. Blakeney</i> , 848 So. 2d 824 (Miss. 2003).
Public reprimand & court costs	Justice	Judge found a defendant guilty of the crime charged without giving her the opportunity to defend herself.	<i>MCJP v. Wells</i> , 794 So. 2d 1030 (Miss. 2001).
Public reprimand & court costs	Justice	Judge allowed media to videotape court proceedings.	<i>MCJP v. Carr</i> , 786 So. 2d 1055 (Miss. 2001).
Public reprimand & court costs	Justice	Judge dismissed charges & then reinstated them; exceeded jurisdiction of the court.	<i>MCJP v. Neal</i> , 774 So. 2d 414 (Miss. 2000).



Public reprimand & court costs	Municipal	Not stated.	<i>MCJP v. White</i> , 660 So. 2d 226 (Miss. 1995).
Public reprimand & reinstatement	County	Judge improperly filed 6 new complaints on behalf of clients after appointment to the bench.	<i>MCJP v. Osborne</i> , 876 So. 2d 324 (Miss. 2004).
Public reprimand	Justice	Judge was improperly involved in her relatives' cases; failed to adjudicate domestic abuse cases properly by dismissing the matters without a hearing or order; refunded an expungement fee; and sought removal of the complainant from her job.	<i>MCJP v. Curry</i> , 249 So. 3d 369 (Miss. 2018).
Public reprimand	Chancery	Judge improperly issued subpoenas and admitted that he had failed to comply with the law.	<i>MCJP v. Buffington</i> , 55 So. 3d 167 (Miss. 2011).
Public reprimand	Justice	Judge refused to return handgun to a defendant who was not charged.	<i>MCJP v. Lewis</i> , 830 So. 2d 1138 (Miss. 2002).
Public reprimand	Justice	Judge made ex parte communications about pending cases; remanded cases to the file which were assigned to another judge.	<i>MCJP v. Lewis</i> , 801 So. 2d 704 (Miss. 2001).
Public reprimand	Justice	Judge made ex parte contacts with another judge who was assigned to his son's DUI case; contacted arresting officer; & contacted that officer's supervisor.	<i>MCJP v. Brown</i> , 761 So. 2d 182 (Miss. 2000).

Public reprimand	Circuit	Judge abused court's contempt powers, among other misconduct.	<i>MCJP v. Byers</i> , 757 So. 2d 961 (Miss. 2000).
Public reprimand	Circuit	Judge abused court's contempt powers against circuit clerk, & unlawfully expunged felony convictions of 2 criminal defendants.	<i>MCJP v. Sanders</i> , 749 So. 2d 1062 (Miss. 1999).
Public reprimand	Court of Appeals	Judge committed offense of DUI.	<i>MCJP v. Thomas</i> , 722 So. 2d 629 (Miss. 1998).
Public reprimand	Justice	Judge attempted to limit a litigant's rights to execute upon a judgment & then vacated the judgment without notice or hearing.	<i>MCJP v. Fisher</i> , 706 So. 2d 1107 (Miss. 1998).
Public reprimand	Justice	Judge had ex parte communications with defendant, defendant's mother, arresting officer, & prosecuting attorney; judge interfered with a defendant's bonding process.	<i>MCJP v. Vess</i> , 692 So. 2d 80 (Miss. 1997).
Public reprimand	Municipal	Judge incarcerated a defendant without notice or hearing; sentenced another defendant to more jail time than allowed by law; & found same defendant guilty of perjury based upon judge's own affidavit & warrant.	<i>MCJP v. Fletcher</i> , 686 So. 2d 1075 (Miss. 1997).
Public reprimand	Not stated	Not stated.	<i>MCJP v. Jenkins</i> , 677 So. 2d 171 (Miss. 1996).
Public reprimand	Justice	Judge notarized deed with a false acknowledgment & entered orders in cases not pending before judge's court.	<i>MCJP v. Hartzog</i> , 646 So. 2d 1319 (Miss. 1994).

Public reprimand	Municipal	Judge set accused's bail while serving as municipal judge & thereafter sought to reduce bail while acting as practicing attorney representing accused.	<i>MCJP v. Atkinson</i> , 645 So. 2d 1331 (Miss. 1994).
Public reprimand	Justice	Not stated.	<i>MCJP v. Vess</i> , 637 So. 2d 882 (Miss. 1994).
Public reprimand	Justice	Judge failed to pay hospital account & issued arrest warrant in dispute between a car dealer and customer which was not properly before the court.	<i>MCJP v. Cantrell</i> , 624 So. 2d 94 (Miss. 1993).
Public reprimand	Justice	Not stated.	<i>MCJP v. Riley</i> , 572 So. 2d 875 (Miss. 1990).
Public reprimand	Justice	Judge held an unsuccessful litigant in contempt of court.	<i>MCJP v. Walker</i> , 565 So. 2d 1117 (Miss. 1990).
Public reprimand	Justice	Judge had defendant in an eviction proceeding unlawfully jailed and in another proceeding, entered an order granting relief from a temporary restraining order which had been granted by another justice court judge.	<i>In re Bailey</i> , 541 So. 2d 1036 (Miss. 1989).
Public reprimand	Justice	Judge disrupted court proceedings; made accusations of impropriety against another judge & wildlife officers; & acted on behalf of a criminal defendant.	<i>In re Cooksey</i> , 515 So. 2d 957 (Miss. 1987).
Private reprimand	Justice	Judge improperly sentenced a defendant (sentence was the result of a plea bargain).	<i>MCJP v. T.T.</i> , 922 So. 2d 781 (Miss. 2006).

Private reprimand	Justice	Judge allowed a photograph to be taken during a court proceeding and had failed to wear a robe during a court proceeding.	<i>MCJP v. Blakeney</i> , 905 So. 2d 521 (Miss. 2004).
Private reprimand	Chancery	Judge had excessive delays in rendering opinions and orders in 6 cases before the court.	<i>MCJP v. U.U.</i> , 875 So. 2d 1083 (Miss. 2004).
Private reprimand	Justice	Judge's participation in drafting petition against law enforcement officer was willful misconduct.	<i>MCJP v. S.S.</i> , 834 So. 2d 31 (Miss. 2003).
Private reprimand	Municipal	Judge ordered probationers to marry as a condition of probation, & set bond for his own client.	<i>MCJP v. A Municipal Court Judge</i> , 755 So. 2d 1062 (Miss. 2000).
Private reprimand	Justice	Judge commented to clerk that clerk "checked out" all the men that came into the office & that clerk also "checked out" the judge.	<i>MCJP v. R.R.</i> , 732 So. 2d 224 (Miss. 1999).
Private reprimand	Justice	Judge collected fines in lieu of court clerk & dismissed cases upon representations by offender without hearing the State's side.	<i>MCJP v. A Justice Court Judge</i> , 580 So. 2d 1259 (Miss. 1991).
Private reprimand	Justice	Judge requested assistance for a person charged with a traffic violation in another court, but this was an isolated instance occurring shortly after election to his first term.	<i>MCJP v. Peyton</i> , 555 So. 2d 1036 (Miss. 1990).

Private reprimand	Chancery	Judge called a litigant involved in an action pending before the judge & solicited his political support, but other mitigating circumstances existed.	<i>In re Baker</i> , 535 So. 2d 47 (Miss. 1988).
Private admonishment	Justice	Judge was prohibited from serving as a justice court judge and a part-time police officer as this was a violation of the separation of powers, and he failed to issue garnishment writs even though he had collected the filing fees.	<i>In re Anderson</i> , 447 So. 2d 1275 (Miss. 1984).
No sanction & dismissal of proceedings	Justice	<p>Judge was accused of willful misconduct for “passing to the file” sixteen (16) DUI charges based on written motions filed by the county prosecutor; these actions were allegedly in violation of Mississippi Code § 63-11-39.</p> <p>After reviewing the language in § 63-11-39, the Mississippi Supreme Court found that passing the DUI charges to the file was not in fact a reduction in the charges. Therefore, the Court held that the proposed sanctions were not warranted, and it dismissed the complaint against the judge with prejudice.</p>	<i>MCJP v. Little</i> , 72 So. 3d 501 (Miss. 2011).
No sanction & dismissal of proceedings	Justice	Judge improperly denied bond to a criminal defendant but her actions did not show a willful desire to disregard the state constitution.	<i>MCJP v. Martin</i> , 921 So. 2d 1258 (Miss. 2005).
No sanction & dismissal of proceedings	Justice	Judge may exercise his or her protected free speech rights, under certain circumstances, without violating the Code of Judicial Conduct.	<i>MCJP v. Wilkerson</i> , 876 So. 2d 1006 (Miss. 2004).

Dismissal of interim suspension because suspension was moot as judge had resigned from office	Justice	An order for interim suspension had been granted by the Supreme Court; the judge and the commission entered into a memorandum of understanding and sought the interim suspension to be vacated; the Supreme Court denied the motion; the judge resigned from office; on rehearing, the Supreme Court held that a memorandum of understanding is not an allowed disposition if misconduct has been found.	<i>MCJP v. Martin</i> , 995 So. 2d 727 (Miss. 2008).
Dismissal of interim suspension because judge complied with judicial education requirements	Justice	Judge, who had failed to attend annual training by the Mississippi Judicial College, was suspended pending his compliance with the mandatory judicial education training requirements.	<i>In re Cadle</i> , 466 So. 2d 79 (Miss. 1985).
Commission recommendation affirmed by the Mississippi Supreme Court	Municipal	Mississippi Supreme Court affirmed the recommendation of the Commission on Judicial Performance that municipal court judges should be suspended from serving as judges as long as they are either mayor or mayor pro tempore of their respective municipalities, as this creates an unavoidable conflict of interest in holding the dual offices of mayor and municipal judge.	<i>In re Grant</i> , 631 So. 2d 758 (Miss. 1994), <i>overruled by</i> <i>Myers v. City of McComb</i> , 943 So. 2d 1 (Miss. 2006).
Agreed Statement of Facts and Recommendations approved by Supreme Court	Circuit	Judge, who had resigned from office, joined with the Commission in an Agreed Statement of Facts and Recommendations filed with the Supreme Court; if judge violated agreement, he would be subject to removal.	<i>In re Maples</i> , 611 So. 2d 211 (Miss. 1992).

## **CHAPTER 3**

### **DISQUALIFICATION & RECUSAL**

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## **CHAPTER 3**

### **DISQUALIFICATION & RECUSAL**

Disqualification is something that incapacitates, disables, or makes one ineligible; esp., a bias or conflict of interest that prevents a judge . . . from impartially hearing a case. . . . *Black's Law Dictionary* (10th ed. 2014).

Recusal is the removal of oneself as judge . . . in a particular matter, esp. because of a conflict of interest. *Black's Law Dictionary* (10th ed. 2014).

#### **Basis for Disqualification/Recusal**

**Mississippi Constitution, Article VI, § 165, Disqualification of Judges**, provides:

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. . . .

It has been held that the interest which disqualifies a judge under the constitution must be a pecuniary or property interest, or one affecting his individual rights. *McLendon v. State*, 191 So. 821, 822 (Miss. 1939).

When a judge is not disqualified under § 165 of the Mississippi Constitution, or [Miss. Code Ann.] § 9-1-11, the propriety of his or her sitting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion. *Williams v. State*, 971 So. 2d 581, 593 (Miss. 2007) (citation omitted).

#### **§ 9-1-11 Interest or relationship:**

The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties.

A judge may also be disqualified under § 9-1-11 which, in addition to requiring disqualification for relation of the judge by affinity or consanguinity, requires disqualification where the judge may have been counsel. *Upton v. McKenzie*, 761 So. 2d 167, 172 n.1 (Miss. 2000).

**Canon 3      A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

**E.      Disqualification.**

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Canon 3E(1)(a), furthermore, requires that judges disqualify themselves when their impartiality might be questioned or when they have personal prejudice concerning a party. . . . There is no doubt that [the] Judge had personal knowledge of the evidentiary facts, and she exhibited bias and prejudice by executing the arrest warrant. *Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 601-02 (Miss. 2011).

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Canon 3E(1)(b) states that judges should disqualify themselves whenever the judge “served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter. . . .” [The] Judge served as the ex-wife's lawyer in a divorce and child-custody proceeding against [the defendant] at the same time that the ex-wife submitted the affidavit that charged [the defendant] with child kidnapping. [The] Judge, therefore, should have disqualified herself from the criminal matter. *Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).

A judge is disqualified from ruling on a motion for post-conviction relief when the judge participated in the prosecution of the underlying conviction. . . . and his recusal was required. *Holmes v. State*, 966 So. 2d 858, 862 (Miss. Ct. App. 2007).

(c) the judge knows that the judge, individually or as a fiduciary, or the

judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) is acting as a lawyer in the proceeding;
- (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) is to the judge's knowledge likely to be a material witness in the proceeding;

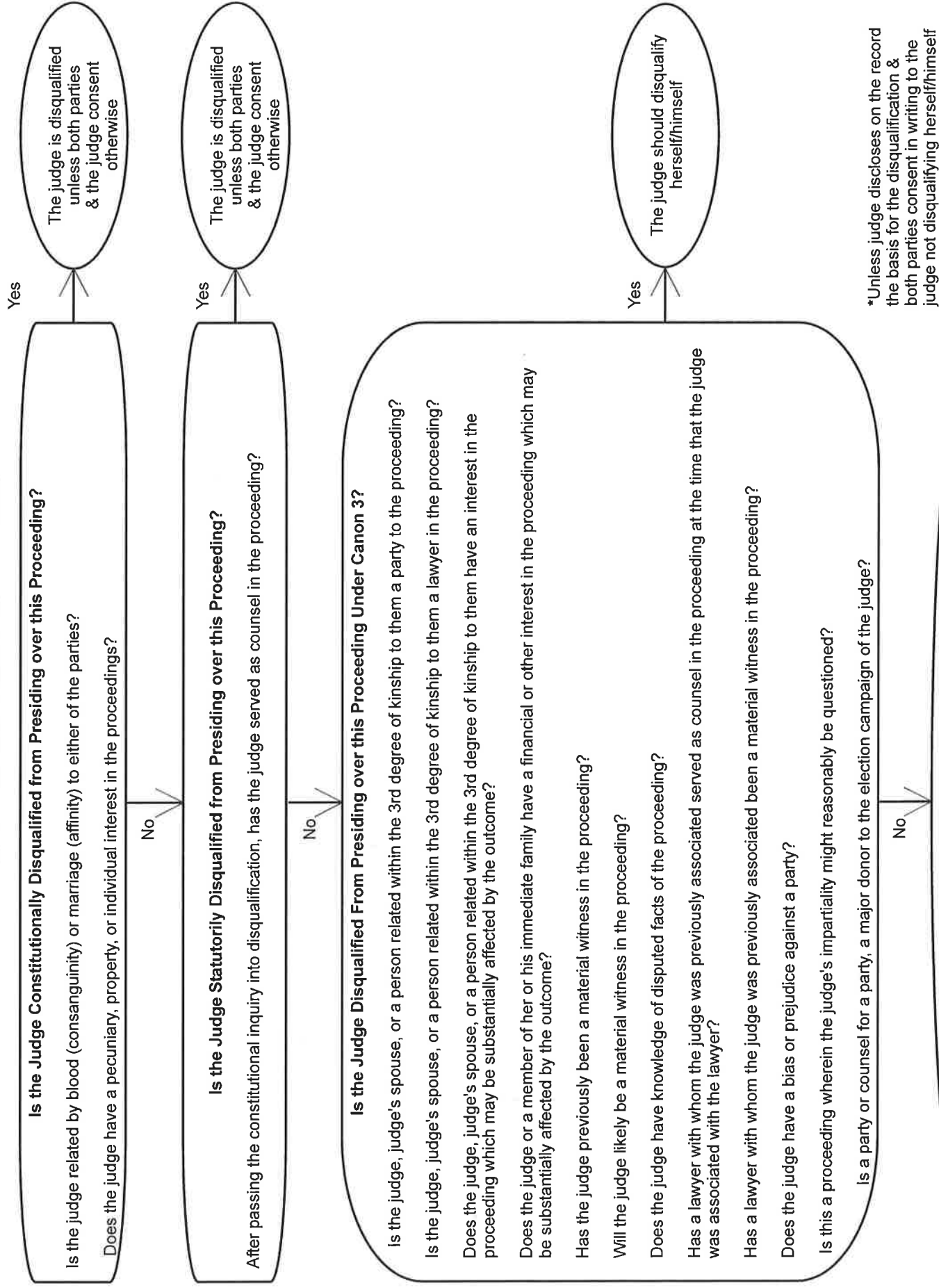
Canon 3E(1)(d) provides, in pertinent part, that judges should disqualify themselves whenever they are acting as a lawyer in the proceeding. . . . As already noted, [the] Judge served as the ex-wife's lawyer in the divorce and child-custody proceeding . . . And, as the ex-wife's attorney, [the] Judge had an interest that could have been substantially affected by the outcome of the criminal proceeding against [the defendant]. *Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).

(2) Recusal of Judges from Lawsuits Involving Major Donors.

A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

The Canon enjoys the status of law such that we enforce it rigorously, notwithstanding the lack of a litigant's specific demand. *Green v. State*, 631 So. 2d 167, 177 (Miss. 1994).

## Quick Reference for Disqualification



\*Unless judge discloses on the record the basis for the disqualification & both parties consent in writing to the judge not disqualifying herself/himself

## **Motion for Recusal**

### **Mississippi Rule of Civil Procedure 16A Motions for Recusal of Judges:**

Motions seeking the recusal of judges shall be timely filed with the trial judge and shall be governed by procedures set forth in the Uniform Rules of Circuit and County Court Practice and the Uniform Rules of Chancery Court Practice.

Judge of a court who has cause to recuse himself must pass on question of his disqualification, and it is incumbent on challenging party to bring to attention of court, under rules of evidence, facts on which such disqualification rests. *Hitt v. State*, 149 Miss. 718, 115 So. 879, 879 (1928).

### **Chancery Court Judges**

**Uniform Chancery Court Rule 1.11, Motions for Recusal of Judges**, states:

Any party may move for the recusal of a judge of the chancery court if it appears that the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

### **Circuit and County Court Judges**

**Uniform Civil Rule of Circuit and County Court 1.15, Motions For Recusal of Judges**, states:

Any party may move for the recusal of a judge of the circuit or county court if it appears that the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall

be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

### **Appellate Review**

#### **Mississippi Rule of Appellate Procedure 48B, Proceedings on Motion for Disqualification of Trial Judge, states:**

If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, the filing party may within 14 days following the judge's ruling, or 14 days following the expiration of the 30 days allowed for ruling, seek review of the judge's action by the Supreme Court. A true copy of any order entered by the subject judge on the question of recusal and transcript of any hearing thereon shall be submitted with the petition in the Supreme Court. The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Otherwise, procedure in the Supreme Court shall be in accordance with M.R.A.P. 21. Appointment of another judge to hear the case shall be made as otherwise provided by law.

The law in Mississippi pertaining to the recusal of a judge has been amply addressed. Under Canon 3E(1) of the Code of Judicial Conduct, judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances. But the decision whether to recuse is committed to the discretion of the trial judge, and we will reverse only if that discretion is abused. Furthermore, we presume that the trial judge is qualified, impartial, and unbiased, and the party arguing that recusal was required must rebut that presumption. *In re B.A.H.*, 225 So. 3d 1220, 1233 (Miss. Ct. App. 2016).

The decision to disqualify, however, remains in the discretion of the trial

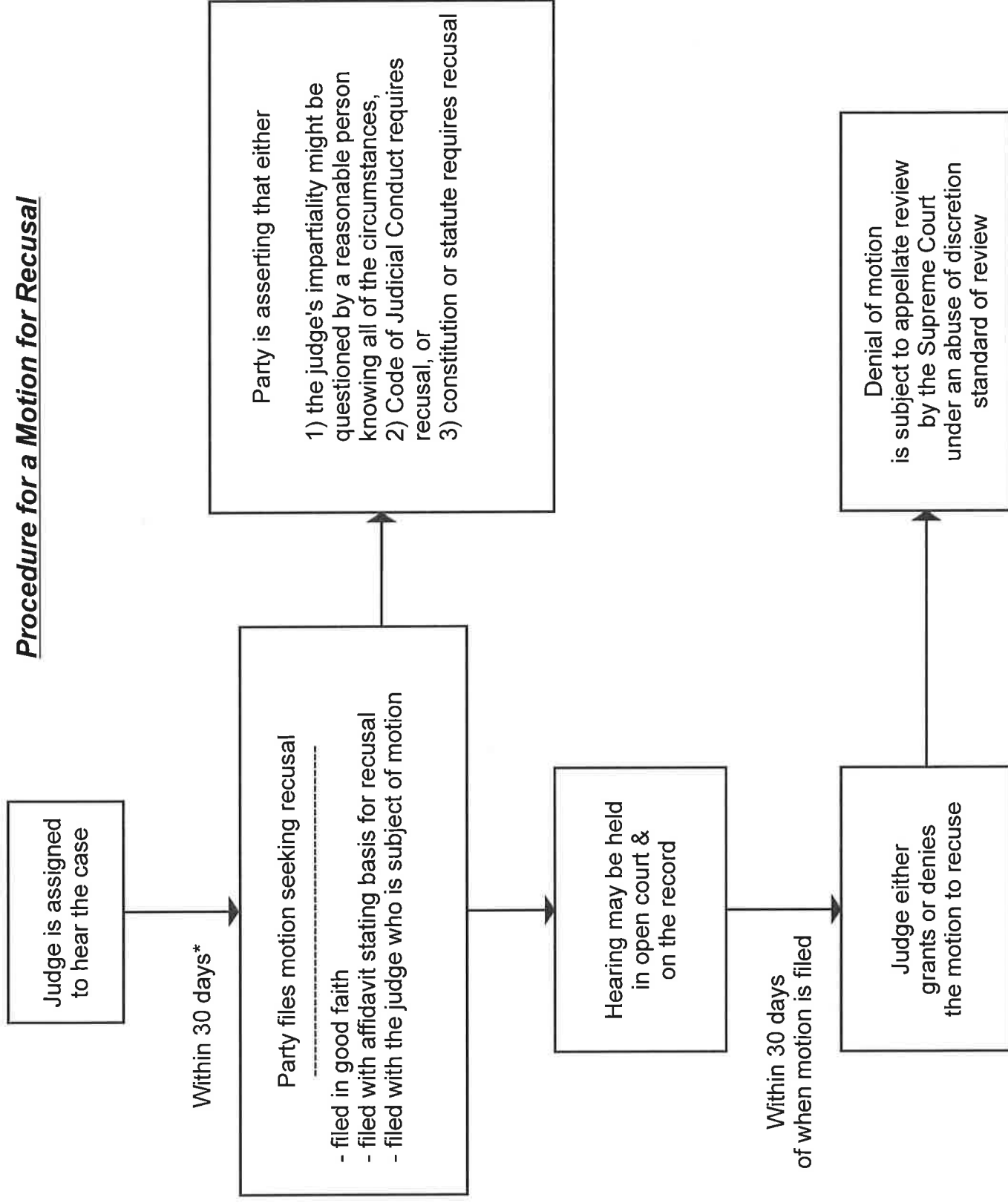
judge, and this Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. ***King v. State*, 897 So. 2d 981, 988 (Miss. Ct. App. 2004) (citation omitted).**

Furthermore, impartiality is not apparent simply because a trial judge has presided over a previous criminal proceeding against the defendant. ***King v. State*, 897 So. 2d 981, 988 (Miss. Ct. App. 2004).**

***Issue Must be Presented to the Trial Judge for Appellate Review***

The [defendant] asks this Court to recuse the circuit judge because of bias evidenced by statements made in her order to compel discovery and in a response made to this Court. The [defendant] alleges that the circuit judge's language and phrases give the appearance that she considers that the [defendant] is liable for [the defendant's employee's] actions. We find that this issue is premature and not ripe for review because the circuit court has neither considered nor ruled upon such a motion. ***Mississippi United Methodist Conference v. Brown*, 911 So. 2d 478, 482 (Miss. 2005).**

**Procedure for a Motion for Recusal**



\*Or within 30 days of when party discovers grounds for recusal



## **When a Judge Should Recuse Herself/himself**

### **Presumption**

It is presumed that a judge who has been sworn to administer impartial justice is unbiased and qualified to hear the case. ***Burnham v. Stevens*, 734 So. 2d 256, 262 (Miss. Ct. App. 1999).**

### **Rebutting the Presumption**

For a party to overcome the presumption, the party must produce evidence of a reasonable doubt about the validity of the presumption. Reasonable doubt may be found when there is a question of whether a reasonable person, knowing all of the circumstances, would harbor doubts about the judge's impartiality. Said another way, “[t]he presumption is overcome only by showing beyond a reasonable doubt that the judge was biased or unqualified.” ***Kinney v. S. Mississippi Planning & Dev. Dist., Inc.*, 202 So. 3d 187, 194 (Miss. 2016) (citations omitted).**

### **Test**

[I]n viewing all circumstances, recusal is required only where the judge's conduct would lead a reasonable person, knowing all the circumstances, to conclude that the “prejudice is of such a degree that it adversely affects the client.” ***In re Blake*, 912 So. 2d 907, 917 (Miss. 2005).**

The proper standard is that recusal is required when the evidence produces a reasonable doubt as to the judge's impartiality. ***Dodson v. Singing River Hosp. Sys.*, 839 So. 2d 530, 533 (Miss. 2003).**

It is an objective test to determine when a judge should recuse himself. A judge is required to disqualify himself or herself “if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.” ***Frierson v. State*, 606 So. 2d 604, 606 (Miss. 1992).**

We make the point that this test is an objective one. . . . The issue is not any wrongdoing on the part of the trial judge, but how this situation appears to the general public and the litigants whose cause comes before this judge. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation. . . . ***Jenkins v. Forrest County Gen. Hosp.*, 542 So. 2d 1180, 1181-82 (Miss. 1988) (citations omitted).**

### **Standard of Review for Disqualification or Recusal**

The standard of review in a recusal case is as follows:

This Court applies an objective standard in deciding whether a judge should have disqualified himself. A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application. On appeal, a trial judge is presumed to be qualified and unbiased and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption. In determining whether a judge should have recused himself, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining party.

***Peters v. State*, 920 So. 2d 1050, 1058 (Miss. Ct. App. 2006).**

In considering recusal motions, this Court will not look exclusively at the incidences complained of, but must take into account all of circumstances. We agree with a court from a sister state that, in viewing all circumstances, recusal is required only where the judge's conduct would lead a reasonable person, knowing all the circumstances, to conclude that the “prejudice is of such a degree that it adversely affects the client.” ***In re Blake*, 912 So. 2d 907, 917 (Miss. 2005) (citations omitted).**

### **Standard of Review in Proceedings on a Motion for Disqualification of Trial Judge**

[T]he Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. **Miss. R. App. Pro. 48B.**

## *Special Issues Concerning Recusal*

### *Consent to a Judge Presiding Who Is Disqualified*

**Canon 3F Remittal of Disqualification** provides:

A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of his disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

However, conflicts that would normally require disqualification can be waived “by the consent of the judge and of the parties. *Wright v. State*, **228 So. 3d 915, 920 (Miss. Ct. App. 2017)**, *cert. denied*, **223 So. 3d 788 (Miss. 2017)**).

In his order denying Holmes's motion to recuse, Judge relied upon Holmes's waiver of the conflict of interest regarding Judge's presiding over his guilty plea hearing. The supreme court has held that, under the statutory provision for waiver of disqualification, a criminal defendant may effectively waive the conflict presented by the acceptance of his guilty plea by a judge who was the district attorney who brought the charges against him. The issue of whether Holmes's waiver effectively barred his subsequent challenge to Judge's acceptance of his guilty plea is not presently before this Court, as that is a matter for adjudication by the substitute judge appointed to rule on Holmes's PCR. But, assuming Holmes effectively waived Judge's disqualification to preside over his guilty plea hearing, the waiver did not extend to Holmes's motion for post-conviction relief. . . . When Holmes filed his PCR with the court, an entirely new legal proceeding was commenced. In that new proceeding, Holmes did not seek to waive Judge's disqualification but instead moved to recuse Judge. As we have held, Judge was disqualified from ruling on Holmes's motion for post-conviction relief and his recusal was required. We reverse and remand this case for the appointment of a substitute judge before whom further proceedings may be had. *Holmes v. State*, **966 So. 2d 858, 861-62 (Miss. Ct. App. 2007)** (citation omitted).

The defendant argues that his conviction should be reversed because one of his attorneys is the trial judge's brother-in-law. He contends that the trial

judge violated Canon 3 C(1)(d). Alternatively, the defendant contends that the trial judge could have heard the case had he followed the procedure outlined in Canon 3 D. Prior to trial, the defendant informed the judge that he wished to retain the services of the judge's brother-in-law in selecting a jury. The trial judge, pursuant to the Canons of Judicial Conduct, informed the parties that counsel was his brother-in-law. Thereafter, the defendant and his trial attorneys indicated that they did not have any problem with the trial judge presiding in spite of the fact that the defendant was represented in part by the trial judge's brother-in-law. Accordingly, neither the defendant nor his attorneys raised an objection to the trial judge serving and all agreed to sign an order allowing the judge's continued service. . . . In the case sub judice, we find that the parties clearly agreed to the trial judge's continued service. . . . We hold that the trial judge's failure to recuse himself sua sponte was not an abuse of discretion. ***Dowbak v. State*, 666 So. 2d 1377, 1388-89 (Miss. 1996).**

## Contempt Proceedings

Lastly, Canon 3E(1)(a) requires a judge to recuse himself in proceedings in which his impartiality might reasonably be questioned because the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Similarly, Canon 3(B)(1) requires a judge to hear and decide all cases, except those in which disqualification is required. This Court has held that it is “necessary” for a person charged with constructive contempt “to be tried by another judge” because “the trial judge has substantial personal involvement in the prosecution.” Judge was personally involved in the litigation that formed the basis for the contempt citations. Judge was the citing judge, so he was required to recuse himself from the show-cause hearing. *Mississippi Comm'n on Judicial Performance v. Harris*, 131 So. 3d 1137, 1143-44 (Miss. 2013).

This Court has provided that:

[I]n cases of indirect or constructive criminal contempt, where the trial judge has substantial personal involvement in the prosecution, the accused condemner must be tried by another judge. [E]xamples of substantial personal involvement in the prosecution warranting recusal include cases where the trial judge acts as a one-man grand jury; where the trial judge is instrumental in the initiation of the constructive-contempt proceedings; and where the trial judge acts as prosecutor and judge.

This Court repeatedly has found that a judge who initiates constructive contempt proceedings has substantial personal involvement and must recuse himself. It is undisputed that the chancellor initiated the contempt proceedings when he issued show-cause orders requiring that Appellants appear and demonstrate why they should not be held in contempt. As the proceedings were for constructive criminal contempt, we conclude that the chancellor was required to recuse himself from conducting them. His failure to do so violated Appellants' due-process rights and warrants reversal of the contempt judgments. *Corr v. State*, 97 So. 3d 1211, 1215 (Miss. 2012) (citations omitted).

As noted, a person charged with constructive criminal contempt is afforded certain procedural safeguards. The citing judge must recuse himself from conducting the contempt proceedings involving the charges. [I]t is necessary for that individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. In *Williamson*, this Court reversed and remanded finding that it was improper for the citing judge to preside where he was a material witness. Based on *Williamson*, Cooper Tire is entitled to have proceedings before a different judge. *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 869 (Miss. 2004) (citations omitted).

[The trial judge] made his decision [to find the defendant in contempt] based on acts that took place outside of his presence. It is necessary for the individual to be tried by another judge in cases of constructive criminal contempt where the trial judge has substantial personal involvement in the prosecution [of the contempt proceeding]. . . . Because [the trial judge] was instrumental in the initiation of the constructive contempt proceedings, this Court holds that he should not have heard the contempt proceedings. He should have turned over those proceedings to another judge. *Terry v. State*, 718 So. 2d 1097, 1104-05 (Miss. 1998).

**Mississippi Rule of Criminal Procedure 32.3 Indirect Criminal Contempt; Commencement; Prosecution**, states:

**(a) Nature of the Proceedings.** All criminal contempts not adjudicated pursuant to Rule 32.2 shall be prosecuted by means of a written motion or on the court's own initiative.

**(b) Disqualification of the Judge.** Indirect criminal contempt charges shall be heard by a judge other than the trial judge.

Section (b) requires that a new judge hold a hearing to determine the guilt of the contemnor, as well as to impose punishment, whenever the nature of the contemptuous conduct involves indirect criminal contempt. *See Mississippi Comm'n on Jud. Performance v. Harris*, 131 So. 3d 1137, 1142 n.6 (Miss. 2013); *Corr v. State*, 97 So. 3d 1211, 1216 (Miss. 2012). *But see Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1994) (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971)) (“[d]irect contempt may be handled by the sitting judge instantly, although it is wise for a judge faced with personal attacks who waits till the end of the proceedings to have another judge take his place”).  
**M.R.Cr.P. 32.3 cmt.**

**Mississippi Rule of Criminal Procedure 32.5. Further Proceedings**, states:

**(b) When Judge Disqualified.** A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

### **No Prospective Recusal**

For reasons we need not discuss here, it has not been this Court's practice to grant prospective recusal, and we decline to do so now. We shall review any request for recusal [of a trial judge] in future cases on a case-by-case basis. ***In re Blake*, 912 So. 2d 907, 918 (Miss. 2005).**

### **Presiding Over the Previous Trial is Not a Basis For Disqualification on Remand**

It is not unusual for a judge to sit on successive trials following mistrials or to hear on remand a case where he previously has heard and ruled on the evidence. ***Garrison v. State*, 726 So. 2d 1144, 1151 (Miss. 1998).**

If a trial judge is disqualified merely because he has previously presided at the trial of a case involving the same evidence and transaction, then it would be necessary for him to stand aside and turn the duties of his office over to a special judge in every case in which there has been a mistrial, in every case where on appeal a new trial has been ordered, in every case where he himself has granted a new trial, and in every case growing out of the same transaction or based upon the same facts. We decline to adopt such a rule. ***Adams v. State*, 72 So. 2d 211, 241 (Miss. 1954).**

### **Participation in Prosecuting a Case Disqualifies the Judge from any Matter Involving that Case**

Where one actively engages in any way in the prosecution and conviction of one accused of a crime, he is disqualified from sitting as a judge in any matter which involves that conviction. ***Banana v. State*, 638 So. 2d 1329, 1330 (Miss. 1994).**

### **Waiver of Issue that Judge Should Recuse Herself/Himself**

[The defendant] failed to object or file a motion asking for the judge to recuse himself. This argument was not raised until his appeal, which procedurally bars [the defendant] from arguing the issue in this case. Over the years, this Court has been quick to point out that it will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion. Where the party knew of the grounds for the motion or with the exercise of reasonable diligence may have discovered those grounds, and where that party does not move timely prior to trial, the point will be deemed waived. This Court has consistently held that failing to object to a trial judge's appearance in a case can result in a waiver. ***Tubwell v. Grant*, 760 So. 2d 687, 689 (Miss. 2000).**

### **An Exception to the General Rule**

The right to recusal may be waived. Once a party knows of, "or with the exercise of reasonable diligence may have discovered" possible grounds, that party should then move for recusal. Generally, failure to do so will be considered implied consent to have the judge go forward in the case. There is, however, an exception to this rule. When recusal is based on the fact that the judge at one time served a prosecutorial role in the same case, an appellate court can hear the matter sua sponte. It can be heard even if expressly waived in the lower court. This is because the duty to avoid the appearance of impropriety overrides any waiver. Therefore, we hold that [the defendant's] objection will be heard in this appeal. ***Ryals v. State*, 914 So. 2d 285, 286 (Miss. Ct. App. 2005).**



Cases Where Recusal Was Required or Where the Judge Should Have Recused Herself/Himself			
Citation	Court Judge	Circumstances Requiring Recusal	
<i>Terrell v. State</i> , 166 So. 3d 549 (Miss. Ct. App. 2015).	Circuit	Judge's substantial involvement in initiating contempt proceedings and comments made during the proceedings create doubts about his impartiality.	
<i>Mississippi Comm'n on Judicial Performance v. Harris</i> , 131 So. 3d 1137 (Miss. 2013).	Chancery	Judge must comply with <i>Cooper Tire v. McGill</i> , which held that a person charged with constructive criminal contempt is entitled to procedural safeguards, including recusal of the citing judge.	
<i>In re McDonald</i> , 98 So. 3d 1040 (Miss. 2012).	Chancery	Since the judge initiated the constructive criminal contempt proceedings, he was required to recuse and have the hearings conducted by another judge.	
<i>Corr v. State</i> , 97 So. 3d 1211 (Miss. 2012).	Chancery	The chancellor initiated the contempt proceedings when he issued show-cause orders requiring that Appellants appear and demonstrate why they should not be held in contempt. As the proceedings were for constructive criminal contempt, the chancellor was required to recuse himself from conducting them. His failure to do so violated the Appellants' due-process rights and warranted reversal of the contempt judgments.	
<i>Miller v. State</i> , 94 So. 3d 1120 (Miss. 2012).	Circuit	Where the judge had been the youth-court prosecutor in a proceeding in which the child victim was removed from her mother's care, where the proceeding involved the same victim, same offenses, and the same perpetrator as in the instant case, and where the court in the proceeding had determined that the defendant was responsible for the victim's care and had abused her, the judge should have recused himself from presiding over the criminal trial based on the same offenses.	

<i>Graves v. State</i> , 66 So. 3d 148 (Miss. 2011).	Circuit	Where the judge has found an attorney to be in criminal contempt for matters that occurred in part outside the judge's presence, that same judge should have recused himself from presiding over the later criminal contempt hearing.
<i>Mississippi Commission on Judicial Performance v. Hartzog</i> , 32 So. 3d 1188 (Miss. 2010).	Justice	Judge had a conflict of interest with both parties to a court proceeding for eviction and should have timely and properly recused himself.
<i>In re Spencer</i> , 985 So. 2d 330 (Miss. 2008).	Chancery	Judge who instigated the contempt of court charge and had a "substantial personal involvement" in the proceeding should have recused herself from presiding over the contempt of court charge.
<i>Holmes v. State</i> , 966 So. 2d 858 (Miss. Ct. App. 2007).	Circuit	Although defendant expressly waived any conflict of interest in the trial judge, a former assistant district attorney, accepting the defendant's plea and imposing sentence, the trial judge should have recused himself from ruling on the same defendant's subsequent PCR petition.
<i>Mississippi United Methodist Conference v. Brown</i> , 929 So. 2d 907 (Miss. 2006).	Circuit	After reviewing the wording of the trial judge's discovery order, the trial judge's response to a party's motion for recusal, and her order denying recusal, the supreme court concluded that a reasonable person, knowing all the circumstances, would conclude that the trial judge could not sit as an impartial administrator of justice because the trial judge had written that the party had been untruthful to the court and indicated that the judge had concluded that the defendant was at fault.
<i>Payton v. State</i> , 937 So. 2d 462 (Miss. Ct. App. 2006).	Circuit	Judge who had previously recused himself from the defendant's case because of circumstances with the defendant's attorney should not have re-sentenced the defendant on remand; a special judge appointed by the Supreme Court should have re-sentenced the defendant.

<i>Brent v. State</i> , 929 So. 2d 952 (Miss. 2005).	Circuit	The trial judge had previously served as a county court judge and had signed the search warrant which led to the arrest of the defendant; at trial, the defendant argued that the search warrant was invalid, leading the trial judge in his capacity as trial court judge to determine whether his prior granting of the search warrant was proper; despite the trial judge's statements that he held no bias against the defendant, the supreme court concluded that not only might a reasonable person harbor doubts about the impartiality of the judge in this situation, any reasonable person should have such doubts.
<i>Ryals v. State</i> , 914 So. 2d 285 (Miss. Ct. App. 2005).	Circuit	The trial judge had served in a prosecutorial role in the underlying criminal case.
<i>In re Blake</i> , 912 So. 2d 907 (Miss. 2005).	Circuit	On-the-record proceedings indicated hostility by the trial judge towards an attorney who had 7 cases pending before the same trial judge, leading the supreme court to find that a reasonable person aware of all the circumstances would question whether the attorney's clients could get a fair hearing in the judge's court.
<i>Cooper Tire &amp; Rubber Co. v. McGill</i> , 890 So. 2d 859 (Miss. 2004).	Circuit	The citing trial judge must recuse himself from conducting the contempt proceedings involving the charges. It is necessary for that individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. It was improper for the citing judge to preside where he was a material witness.
<i>Dodson v. Singing River Hospital Sys.</i> , 839 So. 2d 530 (Miss. 2003).	Circuit	Judge had a long-standing relationship with one party's counsel, and had in fact recused himself from another case where the same counsel was involved.

<i>In re Williamson</i> , 838 So. 2d 226 (Miss. 2002).	Circuit	Judge had found attorneys to be in constructive criminal contempt, but because the judge was a necessary fact witness to the contempt proceedings, he should have recused himself.
<i>Steiner v. Steiner</i> , 788 So. 2d 771 (Miss. 2001).	Chancery	Judges had long-standing practice of recusal from divorce proceedings in which an attorney who regularly practiced before them was a party to the divorce.
<i>McDonald v. State</i> , 784 So. 2d 261 (Miss. Ct. App. 2001).	Circuit	Judge who was a district attorney when the defendant was indicted should have recused himself to avoid even the appearance of a conflict despite the fact that the defendant orally waived his right to request a recusal.
<i>Jackson v. State</i> , 778 So. 2d 786 (Miss. Ct. App. 2001).	Circuit	Even though failure to recuse was ruled not to be manifest error, the better course of action would have been recusal where the judge was the district attorney when the defendant was indicted on previous charges but not the instant case.
<i>McGee v. State</i> , 820 So. 2d 700 (Miss. Ct. App. 2000).	Circuit	Judge knew information pertaining to the case.
<i>Beyer v. Easterling</i> , 738 So. 2d 221 (Miss. 1999).	Circuit	Judge should recuse himself to avoid appearance of impropriety where counsel for one party had practiced before the judge for many years.
<i>Terry v. State</i> , 718 So. 2d 1097 (Miss. 1998).	Circuit	Judge who initiated constructive contempt proceedings should have recused herself from presiding over the proceeding.
<i>Mississippi Comm'n on Judicial Performance v. Sanders</i> , 708 So. 2d 866 (Miss. 1998).	Circuit	Judge who previously represented the defendant was disqualified from presiding over any matters pertaining to that defendant.
<i>Aetna Cas. &amp; Sur. Co. v. Berry</i> , 669 So. 2d 56 (Miss. 1996), overruled on other grounds by <i>Owens v. Mississippi Farm Bureau Cas. Ins. Co.</i> , 910 So. 2d 1065 (Miss. 2005).	Chancery	Judge should have recused himself where party's counsel represented the judge in his divorce proceeding & was very involved in the judge's re-election campaign.

<i>Banana v. State</i> , 638 So. 2d 1329 (Miss. 1994).	Circuit	Judge who was district attorney when defendant was indicted was disqualified from presiding over the post-conviction motion.
<i>Davis v. Neshoba County Gen. Hosp.</i> , 611 So. 2d 904 (Miss. 1992).	Circuit	Judge who had previously served as counsel for a party should have recused himself.
<i>Frierson v. State</i> , 606 So. 2d 604 (Miss. 1992).	Circuit	Judge who was district attorney when defendant was indicted was disqualified from presiding over the trial.
<i>Collins v. Dixie Transp., Inc.</i> , 543 So. 2d 160 (Miss. 1989).	Circuit	Judge participated as a witness in the proceeding.
<i>Jenkins v. Forrest County Gen. Hosp.</i> , 542 So. 2d 1180 (Miss. 1988).	Circuit	Judge's brother was senior partner in law firm representing a party & members of community affected by the outcome had supported judge's election.
<i>Clark v. State</i> , 409 So. 2d 1325 (Miss. 1982).	Circuit	Judge was exposed to discussions about pending cases.
<i>Boydston v. State</i> , 244 So. 2d 732 (Miss. 1971).	Circuit	Judge should have recused himself where there was ill will between judge & defendant, who had unsuccessfully attempted to defeat the judge in an election.
<i>Black v. State</i> , 187 So. 2d 815 (Miss. 1966).	Circuit	Judge was disqualified where prosecuting witness was a close relative of the judge.
<i>Yazoo &amp; M.V.R. Co. v. Kirk</i> , 58 So. 710 (Miss. 1912).	Circuit	Judge was disqualified to sit in a case where the plaintiff's attorneys were the judge's son and brother-in-law.

Cases Where Recusal Was Not Required		
Citation	Court Judge	Circumstances Not Requiring Recusal
<i>Taylor v. Petrie</i> , 41 So. 3d 724 (Miss. Ct. App. 2010).	Circuit	Where the defendant's claims regarding recusal were based on the fact that the judge had denied several of defendant's motions in the course of the proceedings and the defendant had not offered any other evidence of possible bias, the judge was not required to recuse himself from the proceedings.
<i>Gray v. State</i> , 37 So. 3d 104 (Miss. Ct. App. 2010).	Circuit	Judge who was district attorney in 1988 when defendant was convicted of a prior felony, without more involvement, was not required to recuse himself from PCR proceedings.
<i>Scott v. State</i> , 8 So. 3d 855 (Miss. 2008).	Circuit	Judge was not required to recuse herself after learning about a criminal defendant's confession from the defendant's attorney where the information was learned in her role as "gatekeeper."
<i>Bateman v. Gray</i> , 963 So. 2d 1284 (Miss. Ct. App. 2007).	Circuit	Judge was not required to recuse himself where the only allegation of bias was that he had eaten meals at a lodge owned by a party's relative.
<i>Christie v. State</i> , 915 So. 2d 1073 (Miss. Ct. App. 2005).	Circuit	Judge who informed the defendant at sentencing that plea bargaining did not occur in his district was not required to recuse himself from sentencing the defendant.
<i>Hill v. State</i> , 919 So. 2d 142 (Miss. Ct. App. 2005).	Circuit	Judge was not required to recuse himself where he knew the victim's daughter, but did not have a close, personal friendship with her.
<i>Copeland v. Copeland</i> , 904 So. 2d 1066 (Miss. 2004).	Chancery	Where attorney for one party had merely introduced the judge and other political candidates at a community campaign rally, the judge was not required to recuse himself.

<i>Alderson v. Alderson</i> , 810 So. 2d 627 (Miss. Ct. App. 2002).	Chancery	Judge was not required to recuse himself even though he knew the father of a husband involved in a divorce proceeding before him.
<i>King v. State</i> , 821 So. 2d 864 (Miss. Ct. App. 2002).	Circuit	While in private practice the judge had represented a civil client who had been sued by the defendant in the instant criminal proceeding.
<i>Bishop v. State</i> , 812 So. 2d 934 (Miss. 2002).	Circuit	Judge who only ruled on pre-trial motions was not required to recuse himself even though judge had represented the defendant as a public defendant.  Recusal would have been proper as well.
<i>Vinson v. Benson</i> , 805 So. 2d 571 (Miss. Ct. App. 2001).	Chancery	Judge was not required to recuse himself just because the judge had issued a restraining order against a party to the proceeding in a previous case.
<i>Vance v. State</i> , 799 So. 2d 100 (Miss. Ct. App. 2001).	Circuit	Judge was not required to recuse himself even though he previously presided over the plea hearing which was the subject of the defendant's current post-conviction motion.
<i>Taylor v. State</i> , 789 So. 2d 787 (Miss. 2001).	Circuit	Judge was not required to recuse herself even though a potential witness in the case was a court employee.  The supreme court did find this circumstance "somewhat troubling."
<i>Farmer v. State</i> , 770 So. 2d 953 (Miss. 2000).	Circuit	Judge who heard guilty plea which was later overturned was qualified to sit for subsequent trial absent some showing of actual prejudice or bias.

<i>Foster v. Foster</i> , 788 So. 2d 779 (Miss. Ct. App. 2000).	Chancery	Guardian ad litem communicated to the judge in the form of her reports that were required to be filed with the court; her communications were proper & the judge had no reason to recuse himself.
<i>Summers ex rel. Dawson v. St. Andrew's Episcopal Sch.</i> , 759 So. 2d 1203 (Miss. 2000).	Circuit	Judge, when practicing law, had examined the party's expert as a witness in a trial occurring some 8-10 years prior to the instant proceeding.
<i>Walker v. State</i> , 759 So. 2d 422 (Miss. Ct. App. 1999).	Circuit	No proof that the judge was biased against the defendant.
<i>Steed v. State</i> , 752 So. 2d 1056 (Miss. Ct. App. 1999).	Circuit	Judge presided over a prior civil action in which defendant was a party; this did not demonstrate bias or prejudice which required recusal.
<i>Norton v. Norton</i> , 742 So. 2d 126 (Miss. 1999).	Chancery	Sanctions levied against party's attorney were not clear evidence of bias requiring recusal.
<i>Wallace v. State</i> , 741 So. 2d 938 (Miss. Ct. App. 1999).	Circuit	Judge, who signed search warrant leading to arrest, was not required to recuse himself. <i>But see Brent v. State</i> , 929 So. 2d 952 (Miss. Ct. App. 2005).
<i>Jones v. State</i> , 740 So. 2d 904 (Miss. 1999).	Circuit	Defendant failed to rebut presumption that judge was impartial although judge instructed defense counsel to "shut up," outside the presence of the jury.



<i>Beyer v. Easterling</i> , 738 So. 2d 221 (Miss. 1999).	Circuit	Fact that a lawyer has practiced before a judge for a long period of time does not necessarily require recusal.
<i>McBride v. Meridian Pub. Improvement Corp.</i> , 730 So. 2d 548 (Miss. 1999).	Chancery	Judge was not required to recuse herself from proceedings to attack validity of agreement entered into by city, even though judge had previously worked for firm representing city and had been associated with another firm representing city & where the judge's work had not involved projects at issue.
<i>Proby v. State</i> , 726 So. 2d 264 (Miss. 1998).	Circuit	Judge was not required to recuse himself after defendant discovered that judge had worked for district attorney's office when defendant was convicted of earlier drug charge that prosecutor intended to use for sentence enhancement where judge was unbiased and impartial during trial, & prior conviction was not used for enhancement purposes.
<i>Walls v. Spell</i> , 722 So. 2d 566 (Miss. 1998).	Chancery	Judge was not disqualified because the judge's son was the county attorney in which the defendant faced criminal charges for the same transaction.
<i>Evans v. State</i> , 725 So. 2d 613 (Miss. 1997).	Circuit	Fact that defendant filed a civil rights lawsuit against the judge does not require recusal absent evidence of judge's bias.
<i>McFarland v. State</i> , 707 So. 2d 166 (Miss. 1997).	Circuit	Judge was not required to recuse himself in election fraud case just because he was an elected official of county in question.

<i>Hunter v. State</i> , 684 So. 2d 625 (Miss. 1996).	Circuit	Although judge's former law firm had represented victim in divorce action & judge's nephew represented victim's estate & victim's daughter, & victim's daughter was witness against defendant at trial, judge did nothing in presiding over trial which indicated prejudice to defendant.
<i>Evans v. State</i> , 725 So. 2d 613 (Miss. 1997).	Circuit	A judge does not have to recuse himself or herself where a prisoner has merely filed a civil lawsuit, in <i>forma pauperis</i> , and the judge is a defendant in that lawsuit.  Circumstances may require recusal if the evidence demonstrates that the trial judge is biased.

Situations Which May Require Recusal		
<i>Waters v. Gnemi</i> , 907 So. 2d 307 (Miss. 2005).	Circuit	A circuit court judge may preside over a general election contest; however, " <i>sua sponte</i> recusals are not uncommon in general election contest."

**CHAPTER 4**  
**COURT DECORUM**  
**&**  
**MAINTAINING CONTROL OVER THE COURT’S PROCEEDINGS**

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**CHAPTER 4**  
**COURT DECORUM**  
**&**  
**MAINTAINING CONTROL OVER THE COURT’S PROCEEDINGS**

**Court Decorum**

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970).

A judge shall require order and decorum in proceedings before the judge. **Miss. Code of Jud. Conduct Canon 3B(3).**

**Uniform Chancery Court Rule 1.01:**

All proceedings in the Chancery Court, whether in term time or in vacation, shall be conducted with due formality and in an orderly and dignified manner. No drinks, food, gum or smoking shall be permitted. The counsel, parties, and witnesses, must be respectful to the court and to each other. Bickering or wrangling between counsel or between counsel and witness will not be tolerated. Applause or demonstration or approval or disapproval, and the use of profane or indecent language are prohibited. Counsel, in examining witnesses, in reading from brief or opinion and in all presentations, to the Court, shall stand unless specifically excused from doing so by the Court. Counsel shall in formal hearings address the Court in the historic manner of “Your Honor” and/or “May it please the Court.” The dignity and the respect of the Court shall be preserved at all times. In the interest of security, all persons entering the courtroom may be searched for weapons.

**Uniform Civil Rule of Circuit and County Court Practice 1.02:**

The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. The wearing of a robe is discretionary where court facilities make it infeasible. Each officer of the court shall be responsible for the promotion of respect for the court.

**Mississippi Rule of Civil Procedure 77(b):**

All trials upon the merits shall be conducted in open court, except as otherwise provided by statute.

## **Punctuality**

### **Uniform Chancery Court Rule 1.05:**

When any civil action has been set for, or adjourned to, a particular day or hour, all officers, parties, witnesses and solicitors whose presence is necessary for the trial shall be present promptly at the time set. Any negligent or willful failure to obey this rule shall be punished by contempt.

### **Uniform Civil Rule of Circuit and County Court Practice 3.01:**

Every person whose presence is required for the conduct of the business of the court shall be prompt in attendance. Any attorney or party who subpoenas an expert witness to testify shall inform the court of the presence of such witness at the time of such witness' initial appearance.

We are well aware that most of this state's lawyers practice in many courts and that conflicting trial settings are a not infrequent occurrence. Where a lawyer receives a second setting on a date when he already has a prior court commitment, it is incumbent upon that lawyer to notify the second court immediately of the first setting and secure a rescheduling of the second matter. We have made it clear that, in the unlikely event the judge presiding over the court making the second setting does not respect the prior setting, we will afford relief. *Alviers v. City of Bay St. Louis*, 576 So. 2d 1256, 1258 (Miss. 1991).

## **Judge's Demeanor**

### **Mississippi Code of Judicial Conduct Canon 3B(4)-(5):**

Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control.

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. *Cmt.*

Elected members of the Judiciary have a duty to conduct themselves with respect for those they serve, including the court staff and the litigants that come before them. *Mississippi Comm'n on Jud. Perf. v. Spencer*, 725 So. 2d 171, 178 (Miss. 1998).

Furthermore, all officers of the court should comport themselves in a manner that instills public trust and confidence in the decisions rendered. *Cavett v. State*, 717 So. 2d 722, 725 (Miss. 1998).

In commenting upon the influence a trial judge has on the jury during trial, this Court has previously said: It is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party. *Young v. State*, 679 So. 2d 198, 204 (Miss. 1996).

Finally, we must address a remark of the judge threatening defense counsel with the jailhouse while the jury was present. We are inclined to be sympathetic with the judge, and understand why an exhibition of temper may have occurred. The trial judge on several occasions had admonished defense counsel about continuing ineffectual and repetitive cross examination of the State's witnesses which he had again called for the defense, stating to him in no uncertain terms that he was providing the State with evidence that was inadmissible and detrimental to his client. Nevertheless, defense counsel persisted and finally, stated colloquially, the judge "lost his cool" and advised defense counsel that he was going to spend some time as a guest of the county government. Under the circumstances, we understand the reason for the judge's conduct; however, we cannot approve it because of its possible effect on the jury. *Waldrop v. State*, 506 So. 2d 273, 276 (Miss. 1987).

### **Inherent Authority & Power to Control Court Proceedings**

A court's power to maintain control over the proceedings before it is not grounded in its punitive jurisdiction, but in the necessary and inherent power to regulate its proceedings. ***Knott v. State*, 731 So. 2d 573, 576 (Miss. 1999) (citation omitted).**

We agree with the learned trial judge that all courts possess the inherent authority to control the proceedings before them including the conduct of the participants. ***Aeroglide Corp. v. Whitehead*, 433 So. 2d 952, 953 (Miss. 1983).**

In *Ladner v. Ladner*, 436 So.2d 1366, 1370 (Miss.1983), we held that even where there is no specific statutory authority for imposing sanctions, courts have an inherent power to protect the integrity of their processes, and may impose sanctions in order to do so. ***Selleck v. S.F. Cockrell Trucking, Inc.*, 517 So. 2d 558, 560 (Miss. 1987).**

Not only may willful and intentional conduct be sanctioned, but courts have the inherent power to impose sanctions “to protect the integrity of their processes.” When counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for the court to require offending counsel to pay for his mistake, especially where, as here, out-of-town travel was involved. Therefore, the sanctions imposed below are affirmed. ***Vicksburg Refining, Inc. v. Energy Resources, Ltd.*, 512 So. 2d 901, 902 (Miss. 1987) (citations omitted).**

The decision to impose sanctions for discovery abuse is vested in the trial court's discretion. The provisions for imposing sanctions are designed to give the court great latitude. The power to dismiss is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket. Nevertheless, the trial court should dismiss a cause of action for failure to comply with discovery only under the most extreme circumstances. ***Pierce v. Heritage Prop., Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997) (citations omitted).**

### **Control over Those Appearing in Court**

#### **Uniform Civil Rule of Circuit and County Court Practice 1.03:**

Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.



## Attorneys

In this case, lesser sanctions [other than dismissal] for counsel's misconduct are available and may be appropriate. *Glover v. Jackson State Univ.*, 755 So. 2d 395, 404 (Miss. 2000).

In *Danzig v. Danzig*, 79 Wash. App. 612, 904 P.2d 312 (Wash. Ct. App. 1995), a trial court sanctioned an attorney for his unethical conduct arising out of a matter that was not before that court. On appeal it was held that the trial court has the power to police the conduct of an attorney in an action before it, as well as, the duty to initiate disciplinary action against an attorney whose unprofessional conduct comes to its attention. However, the trial court does not have subject matter jurisdiction to discipline an attorney for misconduct in matters which are not before the court. *Knott v. State*, 731 So. 2d 573, 576 (Miss. 1999).

### **Uniform Civil Rule of Circuit and County Court Practice 3.02:**

Attorneys should manifest an attitude of professional respect toward the judge, the opposing attorney, witnesses, defendants, jurors, and others in the courtroom. In the courtroom, attorneys should not engage in behavior or tactics purposely calculated to irritate or annoy the opposing attorney and shall address the court, not the opposing attorney, on all matters relating to the case.

All objections to testimony must be made to the judge and not to the opposing attorney. The objection must be specific and not general. The attorneys will not be permitted to argue between themselves. Attorneys must stand when addressing the court, examining witnesses, and addressing the jury, except when excused for good cause by the court. Attorneys may direct remarks to the jury panel only during voir dire, opening and closing statements.

## Bailiffs

### **Uniform Chancery Court Rule 1.03:**

The sheriff must see that the courtroom, library, Judge's chamber, witness rooms and rest rooms are kept clean and in comfortable condition.

### **Uniform Civil Rule of Circuit and County Court Practice 3.08:**

The bailiff will escort the impaneled jury each time they enter or leave the courtroom during the trial and after the verdict. All attorneys, litigants, and spectators will be seated when the jury enters or leaves the courtroom.

The bailiff was admonished for escorting a juror into the offices of the district attorney. *Gayle v. State*, 743 So. 2d 392, 397-98 (Miss. Ct. App. 1999).

### **Jurors**

#### **Uniform Civil Rule of Circuit and County Court Practice 3.06:**

Jurors are not permitted to mix and mingle with the attorneys, parties, witnesses and spectators in the courtroom, corridors, or restrooms in the courthouse. The court must instruct jurors that they are to avoid all contacts with the attorneys, parties, witnesses or spectators.

#### **Uniform Civil Rule of Circuit and County Court Practice 3.11:**

Within the discretion of the court, a recess of jury deliberations may be held. The jury may be reconvened at the time and place set by the court. In cases in which the jury is not sequestered the judge shall instruct the jury as to the following:

1. That the jurors are not to converse with anyone, including family members or another juror, about the case or on any subject connected with the trial. However, a juror may inform another about the juror's schedule.
2. That the jurors are not to form or express an opinion on the case or any subject connected with the trial.
3. That the jurors are not to view any place connected with the case or subject connected with the trial.
4. That the jurors are not to read, listen to, or watch any news account or other matter relating to the case or other subject connected with the trial.
5. That the jurors shall report to the court any communications or attempts to communicate with them on the case or subject connected with the trial.
6. On such other matters as the court deems appropriate.

The defense moved for a mistrial on the basis of the prosecutor's actions. They stated that such actions were commendable but for that very reason the jury might be influenced to the detriment of the defendant. The court questioned the jury, asking if anyone "saw or heard anything that would affect their decision." All jurors indicated that they had not and the trial proceeded. The concern here is that the actions of the prosecutor in treating the ill juror somehow ingratiated her with jurors. Initially, this was a decision for the trial judge to make. Had a mistrial been granted, that would be understandable. However, we do not find the failure to do so to be clearly erroneous. *Gayle v. State*, 743 So. 2d 392, 397-98 (Miss. Ct. App. 1999).

### Witnesses

And trial courts have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated. *People v. Rose*, 289 Mich. App. 499, 509, 808 N.W.2d 301, 310 (2010).

### Parties in Civil Proceedings

On the third day of the trial, S.F. Cockrell, owner of the [defendant company], went into the jury room and conversed with jurors for ten or 15 minutes. . . . Then Cockrell told Hall, a juror who was by profession a concrete finisher, that he (Cockrell) needed some work done on his driveway and that he would like Hall to do the work. When this conversation was brought to the attention of the trial court, the judge offered to grant plaintiff Selleck a mistrial. After consulting with his client regarding the trial court's offer, plaintiff's counsel stated the following: It's just economically impossible to pay all these expenses again. . . . Seldom has this Court encountered such a blatant attempt to influence a juror. We find it difficult to believe that Cockrell did not know the impropriety of offering employment to a juror during the trial. We would be remiss in our duty to administer justice if we allowed such misconduct to go unsanctioned. In *Great American Surplus Lines, Inc. v. Dawson*, 468 So. 2d 87 (Miss. 1985), we reversed because material witnesses had talked and laughed with jurors during the trial. There we stated that "whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions." Cockrell argues that Selleck waived this issue when, through counsel, he affirmatively stated that he did not want the circuit court to declare a mistrial. We note, however, that Selleck's counsel stated that his client could not afford a third trial unless he could "recover some of [his] expenses" for the second trial, which he estimated to be \$2,500.00. What occurred in the case at bar was an attempt to influence a juror by offering him employment. The only relief which the trial court offered Selleck was a mistrial with a \$2,500.00 price tag attached. Thus, Cockrell's intentional, inexcusable conduct put Selleck between a rock and a hard place: he could let his case go to a tainted jury, or he could lose the \$2,500.00 expended so far and still have no verdict. The trial court should not, nor should we, stand by and allow a wrong-doer like Cockrell to force such a choice. *Selleck v. S.F. Cockrell Trucking, Inc.*, 517 So. 2d 558, 559-60 (Miss. 1987).

### **Mississippi Rule of Civil Procedure 54(e):**

**(e) Costs.** Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. . . .

## Parties in Criminal Proceedings

### State &/or Prosecuting Attorney

The sanctions of excluding the evidence or granting a continuance or a mistrial are not the only sanctions within the trial court's discretion to impose. Nor, is the trial court limited in the imposition of sanctions to only one form of sanction.

Additionally, discovery violations may subject an attorney in a criminal trial to monetary sanctions either under the provisions of URCCC 1.03 (“[a]ny person . . . who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court”), URCCC 9.04 (willful violations may result in sanctions), or under the trial court's inherent authority to control proceedings before it. ***State v. Blenden*, 748 So. 2d 77, 88 (Miss. 1999).**

District attorneys must not directly, or by innuendo and insinuation, comment on a defendant's not testifying. Any person competent to be a prosecuting attorney knows that elementary principle of law. If a prosecuting attorney, who is presumed to know better, persists in making erroneous and prejudicial remarks in his argument before the jury, then the trial court should deal harshly with him to the extent of sanctions, reprimands and contempt. This Court will not look for some reason to excuse such action of a prosecuting attorney, even though a new trial would be expensive to the people of the county. Such expense, fault and blame should be placed at the door of the person who is responsible for it. ***Wilson v. State*, 433 So. 2d 1142, 1146 (Miss. 1983).**

The natural and probable consequence of granting wide latitude to closing argument should not be to cause wide-ranging improper arguments. Trial courts should control the arguments and consider contempt for those who disregard the proper boundaries. Appellate review may on occasion require reversal of convictions, which is not necessary here. ***Robinson v. State*, 733 So. 2d 333, 336 (Miss. Ct. App. 1998).**

### Defendant

The defendant's right to be present at his own trial, however, is not absolute. *Illinois v. Allen* explicitly held that:

A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

***Bostic v. State*, 531 So. 2d 1210, 1213 (Miss. 1988) (citations omitted).**

When the dignity and decorum of the court is undermined by a criminal defendant's actions, there are four (4) constitutionally permissible approaches to controlling that disruptive defendant:

- (1) Cite or threaten to cite a contumacious defendant for criminal contempt (This sanction, however, would not likely impress a defendant seeking to prevent any trial or facing a severe sentence such as death or life imprisonment.);
- (2) Imprison the unruly defendant for civil contempt and discontinue the trial until such time as the defendant promises to behave himself;
- (3) Remove the defendant from the courtroom and continue his trial in his absence until and unless he promises to conduct himself in a manner befitting an American courtroom;
- (4) Bind and gag a defendant, thereby keeping him present in the courtroom although this will affect the jury's attitude toward the defendant, and it is an affront to the very dignity and decorum of judicial proceedings.

***Bostic v. State*, 531 So. 2d 1210, 1213 (Miss. 1988) (citations omitted).**

The warning informs the defendant of the consequences of his actions. If a defendant then persists in his disruptive conduct, he has made a knowing and intelligent waiver of his right to be present at trial. ***Bostic v. State*, 531 So. 2d 1210, 1213 (Miss. 1988).**

### **Control Over Court Proceedings**

#### **Pre-Trial Proceedings**

#### **Pleadings**

#### **Mississippi Rule of Civil Procedure 11(b):**

**(b) Sanctions.** If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

## Discovery - Civil Proceedings

### **Mississippi Rule of Civil Procedure 26(c):**

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

But, the question still remains as to what actions the chancellor should have taken, if any, upon learning that a discovery violation had occurred. If a party fails to obey a court order permitting discovery, the court may, in its discretion, refuse to allow the disobedient party to support her claims with the undisclosed evidence. We also believe that sanctions may be imposed for the failure to supplement even without a prior court order. Although there is no statutory authority for imposing sanctions without an order, courts have “an inherent power to protect the integrity of their processes” where statutory law provides no adequate remedy. Ordinarily, the discovering party would have no way of knowing that a response should have been supplemented until he finds out at trial. Thus, if this were the proper case, the trial judge would have been permitted to impose a sanction. In our prior decisions, we have held that sanctions should be imposed where the disobedient party willfully neglected or declined to permit discovery, or where undue advantage and surprise results. We have also recognized, however, that the “lower court should be cautious in refusing to permit testimony.” In other words, penal sanctions are not to be imposed per se for every discovery violation, and a determination of whether to impose such a sanction is ordinarily vested in the sound discretion of the trial judge. *Ladner v. Ladner*, 436 So. 2d 1366, 1370-71 (Miss. 1983).

Not only may willful and intentional conduct be sanctioned, but courts have the inherent power to impose sanctions to protect the integrity of their processes. When counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for the court to require offending counsel to pay for his mistake, especially where, as here, out-of-town travel was involved. *Vicksburg Refining, Inc. v. Energy Resources, Ltd.*, 512 So. 2d 901, 902 (Miss. 1987).

### **Mississippi Rule of Civil Procedure 37:**

**(a) Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order may be made to the court in which the action is pending.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) Evasive or Incomplete Answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(b) Failure to Comply With Order.**

(1) Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**(c) Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially



justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

**(e) Additional Sanctions.** In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

The decision to impose sanctions for discovery abuse is vested in the trial court's discretion. The provisions for imposing sanctions are designed to give the court great latitude. The power to dismiss is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket. Nevertheless, the trial court should dismiss a cause of action for failure to comply with discovery only under the most extreme circumstances. Such dismissals by the trial court are reviewed under an abuse of discretion standard. When this Court reviews a decision that is within the trial court's discretion, it first asks if the court below applied the correct legal standard. If the trial court applied the right standard, then this Court considers whether the decision was one of several reasonable ones which could have been made. This Court will affirm a trial court's decision unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors. *Pierce v. Heritage Prop., Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997).

In *Pierce*, this Court adopted the position of the United States Court of Appeals for the Fifth Circuit in *Batson v. Neal Spelce Assocs., Inc.*, 765 F.2d 511 (5th Cir.1985), for evaluating the appropriateness of dismissal as a sanction:

First, dismissal is authorized only when the failure to comply with the court's order results from wilfulness or bad faith, and not from the inability to comply. Dismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the other party's preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or

sincere misunderstanding of the court's orders.  
***Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 996 (Miss. 1999)**  
**(citations omitted).**

**Mississippi Rule of Civil Procedure 41(b):**

**(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

Mississippi Rule of Civil Procedure 41(b) authorizes a court to dismiss an action for failure of the plaintiff to prosecute. This power is granted not only by Rule 41(b), but is part of a trial court's inherent authority and is necessary for the orderly expedition of justice and the court's control of its own docket. ***Regan v. S. Cent. Reg'l Med. Ctr.*, 234 So. 3d 1242, 1245 (Miss. 2017).**

In *Wallace v. Jones*, 572 So. 2d 371, 374 (Miss. 1990), this Court explained that involuntary dismissals should be granted in only three cases: dismissal at the close of the plaintiff's evidence for failure to show a right to relief; dismissal for want of prosecution, and dismissal for failure to comply with the rules of the court or any order of the court. The Court went on to say:

dismissal for failure to comply with an order of the district court is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice. This is so because dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases.

***Glover v. Jackson State Univ.*, 755 So. 2d 395, 404 (Miss. 2000)**  
**(citations omitted).**

**Uniform Chancery Court Rule 1.10:**

A. All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

B. When responding to discovery requests, interrogatories, requests for

production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

C. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

### **Discovery - Criminal Proceedings**

#### **Mississippi Rule of Criminal Procedure 17.9:**

**(a) Failure to Make Disclosure--Pre-Trial.** If, at any time prior to trial, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

**(b) Failure to Make Disclosure--Trial.** If, during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these Rules and the defense objects to the introduction for that reason, the court shall:

(1) Grant the defense a reasonable opportunity to interview the newly discovered witness and/or examine the newly produced documents, photographs or other evidence.

(2) If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence, grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence, or grant a mistrial.

(3) The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The court shall follow the same procedure for violation of discovery by the defense.

**(c) Sanctions.** Willful violation by an attorney of an applicable discovery rule, or an order issued pursuant thereto, may subject the attorney to appropriate sanctions

by the court.

When the State enters the court as a litigant, it places itself on the same basis as any other litigant; subjecting itself to the inherent authority of the court to control actions before it, just as any other litigant. The Court may invoke this inherent authority through the adjudication of cases, the promulgation of rules, or the development of internal management practices. Here the State committed various discovery violations which resulted in the declaration of a mistrial. As a result, the trial court exercised its inherent authority to control matters proceeding before it to impose monetary sanctions on the State. . . . For the above and foregoing reasons the trial court's judgments are affirmed. *State v. Blendon*, 748 So. 2d 77, 88-89 (Miss. 1999).

#### **Mississippi Rule of Criminal Procedure 17.4:**

**(a) Alibi Defense.**

(1) In General. Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten (10) days, or at such other time as the court may direct, upon the prosecuting attorney, a written notice of the intention to offer a defense of alibi, which notice shall state the specific place(s) at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses. If, prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) Effect of Failure to Comply. Upon the failure of either party to comply with subsection (a)(1), the court may use such sanctions as it deems proper, including:

- (A) Granting a continuance;
- (B) Limiting further discovery of the party failing to comply;
- (C) Finding the attorney failing to comply in contempt; or
- (D) Excluding the testimony of the undisclosed witness.

(3) Additional Provisions. Subsections (a)(1) and (a)(2) do not limit the defendant's right to testify in the defendant's own behalf.

**(b) Insanity Defense.**

(1) In General. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for filing pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court a written notice of the intention to offer a defense of insanity. Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the defendant shall serve upon the prosecuting attorney the names and addresses of the witnesses upon whom the defendant intends to rely to establish the defense of insanity. If a defendant intends to introduce expert testimony relating to a mental illness, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court notice of such intention, with the names and addresses of such expert witnesses upon whom the defendant intends to rely. The prosecuting attorney shall serve notice on the defendant promptly, but in no event less than ten (10) days prior to trial, stating the names and addresses of any witnesses upon whom the State intends to rely relating to the issue of the defendant's mental condition at the time of the alleged offense or the defendant's mental state required for the offense charged. If, prior to or during trial, either party learns of an additional witness whose identity should have been included in the notice under this rule, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) Effect of Failure to Comply. If there is a failure to comply with the requirements of subsection (b)(1), the court may use such sanctions as it deems eluding:

- (A) Granting a continuance and/or assessing costs against the appropriate attorney or party;
- (B) Limiting further discovery of the party failing to comply;
- (C) Finding the attorney failing to comply in contempt; or
- (D) Excluding the testimony of appropriate witnesses.

**(c) Exceptions.** For good cause shown, the court may grant an exception to the requirements of sections (a) and (b).

**Trial Proceedings**

The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

## Witnesses

### **Mississippi Rule of Civil Procedure 45(g):**

**(g) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

## Sequestration Rule

### **Mississippi Rule of Evidence 615:**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

**Advisory Committee Note:** This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State*, 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a “full-bore” cross-examination. *See Douglas v. State*, 525 So. 2d 1312 (Miss. 1988).

During the course of the trial, the witness Charles Coleman, who had apparently been subpoenaed by the State and who had been in the courtroom during the testimony of previous witnesses, was offered as a witness in the case-in-chief for the State. Gerrard objected, saying first that the witness had not been disclosed to the defense, and, second, that sequestration had been violated. The State announced that it would withdraw Coleman as a witness. Thereafter, Coleman sat in the courtroom for the remainder of the trial. After the defense had rested, the State announced that it would call Coleman as a rebuttal witness. This too brought an objection by the defense. . . . When the defense objected to

Coleman's testimony as being in violation of the Rule, the parties went into chambers. . . . The prosecutor felt that Coleman deserved an opportunity to respond to Gerrard's statements. The defense objected, stating that the prosecutor knew Gerrard would so testify because he had said it before. The trial judge then asked defense counsel to state specifically from where these statements appeared. Defense counsel did not answer. The trial judge then stated that he would allow the prosecution to ask only two questions, the content of which was established in chambers, and further stated that the defense would have wide open cross-examination. The defense at no time proffered how asking these two questions prejudiced their case. Since the trial court followed our rule and Comments thereto, there was no abuse of discretion. The trial court allowed the prosecution to ask only two questions, of which the content was limited. The defense declined cross-examination. This matter was properly within the discretion of the trial judge, and he conducted the proceedings in accordance with the standards set forth by this Court. . . . *Gerrard v. State*, 619 So. 2d 212, 217-18 (Miss. 1993).

### **Post-Trial Proceedings**

#### **Mississippi Rule of Civil Procedure 54(e):**

**(e) Costs.** Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

#### **Mississippi Rule of Civil Procedure 70(d):**

**(d) Contempt.** The court may also in proper cases adjudge the party in contempt.

## **Electronic & Photographic Coverage of Court Proceedings**

In 2003, the Mississippi Supreme Court adopted the Rules for Electronic and Photographic Coverage of Judicial Proceedings. The court stated that the rules were adopted in order to “promote the fair and effective administration of justice.” *In re Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings*, No. 89-R-99031, (Miss. 2003).

[O]n April 17, 2003, this Court adopted the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings (MREPC), bringing Mississippi in accord with those states which have elected to allow coverage of court proceedings by use of still cameras, television, and other electronic technology. Prior to passage of the MREPC, cameras were generally excluded from Mississippi courtrooms under the Mississippi Code of Judicial Conduct. At present, the MREPC allow for electronic media coverage of public judicial proceedings in appellate and trial courts of record in this state subject to certain conditions. *Stephens v. State*, 911 So. 2d 424, 431 (Miss. 2005).

### **Decorum**

#### **Rule 6 for Electronic and Photographic Coverage of Judicial Proceedings:**

The decorum and dignity of the court, the courtroom, and the judicial proceedings must be maintained at all times. Court customs shall be followed including appropriate attire. Movement in the courtroom during the proceedings shall be limited and may be completely prohibited except during breaks or recesses. Disruption of proceedings will not be permitted.

### **Notice**

#### **Rule 5 for Electronic and Photographic Coverage of Judicial Proceedings:**

Media representatives who propose to engage in electronic coverage of a judicial proceeding shall notify the clerk and the court administrator of the court of such intention at least forty-eight (48) hours prior to the commencement of the proceeding. The presiding justice or judge may shorten or waive the time for advance notice.

In the hearing on media coverage, there was discussion of the difference between MREPC 5, requiring that media representatives notify the clerk and court administrator of their intention to use electronic coverage forty-eight hours prior to trial, and MREPC 7 which requires parties to file objections to such coverage up to fifteen days prior to trial. In this



discussion, there was apparent confusion as to the purpose of the two rules. . . . MREPC 5 requires notice of the media's intention to record or broadcast forty-eight hours before the proceedings begin, so that administrative coordination may be had prior to the proceedings. The "media notice" is not for leave or permission to record or broadcast because that right is presumed unless there are objections or [an] order to the contrary. *In re WLBT, Inc.*, 905 So. 2d 1196, 1198 n.1 (Miss. 2005).

### **Authority of the Trial Court**

#### **Rule 3 for Electronic and Photographic Coverage of Judicial Proceedings:**

Electronic media coverage of public judicial proceedings shall be allowed in the appellate and trial courts of record in this state subject to the conditions below. The presiding justice or judge has the discretion to limit or terminate electronic coverage at any time during the proceedings if the court deems such necessary and in the interest of justice to protect the rights of the parties or witnesses, or the dignity of the court, or to assure orderly conduct of the proceedings.

(a) Authority of presiding justice or judge. All electronic coverage is subject at all time to the authority of the presiding justice or judge to

- (i) control the conduct of the proceedings,
- (ii) ensure decorum and prevent distraction, and
- (iii) ensure fair administration of justice in the pending case.

The rights of the parties to a fair adjudication are recognized as paramount. It is the responsibility of the media to so arrange and operate equipment in order to comply with these rules.

(b) Persons other than media representatives. These rules do not allow the use of electronic devices by attorneys and persons other than media representatives except as may be allowed by the court.

(c) Coverage of certain matters prohibited. Electronic coverage of the following matters is expressly prohibited unless the presiding justice or judge shall allow the coverage by order: divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; determination of paternity; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings.

(d) Coverage of certain persons prohibited. Electronic coverage of the following categories of witnesses is expressly prohibited: police

informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse.

Also, the rules allow the presiding justice or judge with the discretion to limit or terminate electronic coverage at any time during the proceedings if the court deems such necessary and in the interest of justice to protect the rights of the parties or witnesses, or the dignity of the court, or to assure orderly conduct of the proceedings. *Stephens v. State*, 911 So. 2d 424, 431 (Miss. 2005).

### **Objections**

#### **Rule 7 for Electronic and Photographic Coverage of Judicial Proceedings:**

Any party may object to electronic coverage by written motion, which may be supported by affidavits. Such motions shall be filed no later than fifteen (15) days prior to commencement of the judicial proceedings, unless good cause exists to shorten the time for filing.

In the hearing on media coverage, there was discussion of the difference between MREPC 5, requiring that media representatives notify the clerk and court administrator of their intention to use electronic coverage forty-eight hours prior to trial, and MREPC 7 which requires parties to file objections to such coverage up to fifteen days prior to trial. In this discussion, there was apparent confusion as to the purpose of the two rules. MREPC 7 requires parties to formally object to all use of camera and television coverage. Should parties believe media coverage would be prejudicial or otherwise objectionable, their objection is to be filed sufficiently in advance of the proceedings to allow a response and hearing. . . . *In re WLBT, Inc.*, 905 So. 2d 1196, 1198 n.1 (Miss. 2005).

[W]here no objection is made at the trial level regarding the admission or exclusion of the media as permitted by these rules, such error, if any, is waived on appeal. *Stephens v. State*, 911 So. 2d 424, 431-32 (Miss. 2005).

### **Restrictions on Coverage**

#### **Rule 4 for Electronic and Photographic Coverage of Judicial Proceedings:**

(a) The location of equipment and personnel necessary for electronic media coverage of judicial proceedings shall be at a place either inside or outside the courtroom so as to be minimally intrusive to the proceedings. Only equipment

which does not produce distracting sound or light shall be employed to cover judicial proceedings. No flash or strobe lighting shall be used. All running wires shall be securely taped to the floor. No other artificial lighting device of any kind shall be employed in connection with electronic coverage unless otherwise authorized by the court. Matters covered by this sub-part are subject to the discretion of the presiding judge and may be relaxed so long as the coverage does not result in distraction of the proceedings.

(b) No members or potential members of the jury may be recorded or shown at any time prior to their dismissal, nor shall the jury selection process be subject to electronic coverage. The presiding judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision.

(c) No audio recording is permitted of off-the-record conferences in the courtroom between the court and counsel, or between counsel and co-counsel, or between counsel and clients or witnesses.

(d) Judicial proceedings held in chambers and proceedings generally closed to the public shall not be subject to electronic coverage.

(e) Electronic media equipment shall not be taken into the courtroom, relocated, or removed from the designated media area except prior to convening of the judicial proceedings, during recesses, and after adjournment for the day. This prohibition shall not apply to small, handheld electronic devices.

(f) Unless otherwise allowed by the presiding judge, no more than one television camera or video recorder, one audio system for radio broadcasting, and one still photographer shall be allowed in any judicial proceeding. If pooling arrangements are employed, such data or information is to be available equally to all pool participants, and the pool representative shall charge no fees or expenses to the other pool participants. The pool representative is not to be given any economic or coverage advantage over the other pool participants. Any pooling arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding justice or judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding justice or judge shall exclude all contesting media personnel from a proceeding. . . .

Rule 4 of the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings places limitations on the use of the technology to prevent disruption [and to] protect jurors. . . . It is within these limits that

the presiding judge's discretion and courtroom management must be exercised. Here, the judge stated that taking pictures of the jury was “clearly inappropriate. . . .” *Smith v. State*, 158 So. 3d 1182, 1185 (Miss. Ct. App. 2015) (citation omitted).

### **Sanctions Available**

#### **Rule 9 for Electronic and Photographic Coverage of Judicial Proceedings:**

A violation of these rules may be sanctioned by measures deemed appropriate by the court.

### **Ways to Control the Courtroom**

- court decorum
- court formality
- punctuality of the court
- the judge’s personal demeanor
- the judge’s tone of voice
- enforcement of the court rules
- pre-trial conferences
- inform the parties of the court’s expectations
- consistency in controlling the courtroom
- take recesses to control the situations which may arise
- private conferences at the side bar or in chambers
- effective use of the bailiff
- make a record of what goes on in your court room

<b>Court Rules &amp; Statutes Authorizing Control Over Court Proceedings</b>			
<b>Court Rule or Statute</b>	<b>Rule Number</b>	<b>Title</b>	<b>Particular Provision</b>
Mississippi Rule of Civil Procedure	1	Scope of Rules	Rules apply to all civil proceedings
	4(c)(3)(C)	Summons	Payment of costs for personal service
	4(h)	Summons	Time limit for service
	6(b)	Time	Court can grant extension of time
	11	Signing of Pleadings & Motions	Sanctions available for violations of the rule
	12(f)	Defenses & Objections	Motion to strike
	15(a)	Amended & Supplemental Pleadings	Leave of court may be required
	16	Pre-Trial Procedure	Pre-trial conference conducted by the court
	26	General Provision Governing Discovery	Sanctions available for violations of the rule
	37	Failure to Make or Cooperate in Discovery	Sanctions available for violations of the rule
	41(b)	Dismissal of Actions	Involuntary dismissal by the court
	45(g)	Subpoena	Failure to obey subpoena can result in contempt of court
	47(a)	Jurors	Court may conduct voir dire

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	50	Motions for a Directed Verdict & for Judgment Notwithstanding the Verdict	Court's discretion to grant
	51(a)	Instructions to Jury	Procedural instructions from the court
	54	Judgment; Costs	Court may award costs
	56(g)	Summary Judgment	Sanctions for motions made in bad faith
	59(d)	New Trials; Amendments of Judgments	Court may <i>sua sponte</i> grant a new trial
	60	Relief from Judgment or Order	
	70(d)	Judgment for Specific Acts; Vesting Title	Contempt for failure to obey
	77(b)	Courts & Clerks	Court business is conducted in open court
	78	Motion Practice	Court establishes its own procedures for conducting court business
	81	Applicability of Rules	Special provisions for contempt
	83	Local Court Rules	
Mississippi Rule of Evidence	101	Scope	Apply in circuit court proceedings
	104(a)	Preliminary Questions	Court determines preliminary questions concerning admissibility, etc.
	105	Limited Admissibility	Court instructs the jury on limited admissibility of evidence
	403	Exclusion of Relevant Evidence	Court's discretion to exclude

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	611	Mode & Order of Interrogation & Presentation	Court maintains control of interrogation
	615	Exclusion of Witnesses	Court's discretion for sanctions for failure to comply
	706	Court Appointed Experts	Court's discretion to appoint
	1008	Functions of Court & Jury	Court determines whether a condition for admissibility has been met
	1101	Applicability of Rules	
Uniform Chancery Court Rule	1.01	Proceedings must Be Orderly and Dignified	Court decorum
	1.02	Officers must Be Present in Court	Clerk and sheriff present for court
	1.03	Sheriff Must Keep Courtroom Clean & Comfortable	Sheriff's duties
	1.04	Clerk Must Have Papers & Dockets in Courtroom	
	1.05	Officers, Witnesses & Solicitors Must be Prompt	Contempt of court for failure to abide by rule
	1.06	Assignment of Cases	Sanctions imposed if rule is violated
	1.10	Discovery Deadlines & Practice	
	1.11	Motion for Recusal of Judges	
	1.12	Electronic Media Coverage	
	2.08	Delay in Answering	Party may be taxed for delay costs

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	2.09	Amendments During Trial Term	Party seeking material amendment may be taxed for delay costs
	3.02	Cloud of Witness - What Done	Court may tax the costs for unnecessary witnesses
	3.10	Earwigging the Chancellor Prohibited	
	4.03	No Interruption While Rendering Opinions	
	6.01	Attorney Must Be Retained	Court may consent to removal
	6.02	Fiduciaries & Attorney Must be Diligent	Contempt for failure to abide by the rule
	6.12	Petitions for Allowance of Attorney's Fees	Fixed by the court
	6.17	Failure to File Accountings	Contempt for failure to file accountings
	8.05	Financial Statement Required	Contempt for failure to abide by the rule
Uniform Civil Rules of Circuit & County Court Practice	1.02	Court Decorum	
	1.03	Sanctions	Sanctions available for violating the court rules
	1.04	Cameras [in the court room]	Only in accord with Code of Judicial Conduct; <i>See MREPC</i>
	1.10	Earwigging Prohibited	
	2.02	Scope of Authority of Court	



Court Rules & Statutes Authorizing Control Over Court Proceedings			
	3.01	Prompt Attendance	
	3.02	Conduct of Attorneys	Court enforces the provisions of this rule
	3.04	Communication with Jury	
	3.06	Conduct of Jurors	
	3.07	Jury Instructions	Court may offer jury instructions
	3.08	Duty of Bailiff	
	3.09	Unnecessary Witnesses	Court may tax the costs for unnecessary witnesses
	3.11	Jury Recess	Court instructs jurors
	3.13	Assessment of Costs Upon Settlement of Case	Court may order costs to be paid
	5.02	Duty to Make Record	Duty to make a record of the court's proceedings
Mississippi Rules of Criminal Procedure	Appendix	Sample Charge to the Grand Jury	Court gives the charge to the grand jury
	17.4	Alibi Defense	Sanctions available for violations of the rule
	17.4	Insanity Defense	Sanctions available for violations of the rule

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	17.9	Failure to Disclose; Sanctions	Court procedure to remedy non-disclosed discovery; sanctions available for violations of the rule
	18.8	Jury Sequestration	Court's discretion in certain circumstances
	32.2	Direct Contempt	Sanction for contempt
	32.5	Further Proceedings	Sanction for contempt
Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings	3	Electronic Media Coverage Allowed	Authority of the trial court and prohibitions against coverage
	4	Restrictions	Restrictions on MREPC coverage
	6	Decorum	Courtroom decorum must be maintained
	9	Enforcement and Sanctions	Sanctions available for violations of the MREPC
Mississippi Code Annotated	§ 13-5-61	Non-disclosure of jury-room secrets	Penalty for violating is contempt
	§ 11-43-39	Subpoena of witnesses	Fines & contempt available to enforce subpoenas
	§ 11-55-5	Costs awarded for meritless action	Power to award costs as sanction

Scenarios & How to Maintain Control of the Court's Proceedings		
Description of the Facts	Ways to Control the Situation	Citation
The attorney made derogatory comments to the judge about the court proceedings.	<p>The court found the attorney in direct criminal contempt of court.</p> <p>The attorney was sentenced to 5 days incarceration.</p>	<i>In re Smith</i> , 926 So. 2d 878 (Miss. 2006).
The attorney failed to attend a court proceedings and had informed the clerk that she may or may not be in attendance, indicating that she knew she was scheduled to be in court.	The court found the attorney in direct criminal contempt of court.	<i>In re Hampton</i> , 919 So. 2d 949 (Miss. 2006).
The defendant's attorney made comments about the judge's conduct during the trial and derogatory comments about the judge.	The court found the attorney in criminal contempt and fined him \$100.00.	<i>Lumumba v. State</i> , 868 So. 2d 1018 (Miss. Ct. App. 2003).
The plaintiff's attorney makes numerous derogatory remarks on the record about the judge, albeit not in the presence of the jury.	<p>The court can declare a mistrial &amp; the judge possibly should recuse himself from further proceedings.</p> <p>The attorney could also be sanctioned for his remarks.</p> <p>However, dismissal should not be ordered because the party is not at fault for her attorney's actions.</p>	<i>Glover v. Jackson State Univ.</i> , 755 So. 2d 395 (Miss. 2000).

The attorney for a civil defendant makes an improper remark during cross-examination of a witness, which the court determines justifies a mistrial.	<p>If the court finds that the attorney's remark is not contemptuous or intentional, the court should not award litigation expenses to the opposing party.</p> <p>If the court finds that the attorney's remark is contemptuous or intentional, the court may be able to award litigation expenses to the opposing party.</p>	<i>Aeroglide Corp. v. Whitehead</i> , 433 So. 2d 952 (Miss. 1983).
Defense counsel for a criminal defendant repeatedly fails to follow proper court procedures & provides ineffective assistance to his client.	<p>The court should not make remarks about the attorney's conduct or suggest that the attorney will be jailed for his actions in front of the jury.</p> <p>The court may want to appoint different counsel for the defendant.</p>	<i>Waldrop v. State</i> , 506 So. 2d 273 (Miss. 1987).
An attorney does not attend court at the scheduled time & the court waits for his arrival & then dismisses the jurors.	<p>The court could find the attorney in contempt of court.</p> <p>Also sanctions are available for violating a court rule.</p>	<i>Alviers v. City of Bay St. Louis</i> , 576 So. 2d 1256 (Miss. 1991).
An attorney schedules a hearing on a motion but fails to check with the court to determine if the judge was available for the hearing; the parties appear but the judge is not available.	The court can order sanctions against the party for the expenses incurred by the opposing counsel in attending the hearing.	<i>Vicksburg Refining v. Energy Resources</i> , 512 So. 2d 901 (Miss. 1991).
An attorney, who is not appearing before the court in a specific proceeding, does legal work for a criminal defendant who has been declared a pauper.	The court does not have jurisdiction over the attorney and can not sanction him for his conduct.	<i>Knott v. State</i> , 731 So. 2d 573 (Miss. 1999).

The State fails to disclose discovery which has been properly asked for by the defense; in addition the state crime lab misrepresented its findings & procedures.	The court may order a mistrial & order sanctions against the State for the defense's reasonable expenses.	<i>State v. Blenden</i> , 748 So. 2d 77 (Miss. 1999).
A criminal defendant begins to insult the judge repeatedly in open court.	The court could find the defendant in direct criminal contempt of court.  The court should not physically or verbally assault the defendant.	<i>MCJP v. Guest</i> , 717 So. 2d 325 (Miss. 1998).
A criminal defendant takes the stand & begins to make various remarks which are inappropriate in front of the jury & begins to behave in a very disruptive manner.	After informing the defendant that if he does not act properly he will be removed from the court room until he can behave, the defendant can be removed from the court & the proceedings continue in his absence.	<i>Bostic v. State</i> , 531 So. 2d 1210 (Miss. 1988).
A criminal defendant will not be quiet during voir dire and at one point starts walking towards the door.	After informing the defendant that if he does not act properly he will be removed from the court room until he can behave, the defendant can be removed from the court & the proceedings continue in his absence.  Binding & gagging may also be used.	<i>Walters v. State</i> , 391 So. 2d 645 (Miss. 1980).
An out-of-state plaintiff in a suit to establish "heirship" is not diligent in prosecuting his case & also fails to comply with some of the court's orders.	The court should not dismiss the plaintiff's cause of action since lesser sanctions are available.	<i>Estate of Hunter v. Hunter</i> , 736 So. 2d 440 (Miss. 1999).

The plaintiff in a negligence action answers an interrogatory in a manner which may be untruthful.	If the answer is subject to more than one interpretation & is not obviously untruthful, the court should not dismiss the cause of action.	<i>Wood v. Biloxi Pub. Sch. Dist.</i> , 757 So. 2d 190 (Miss. 2000).
The plaintiff in a negligence action fails to answer fully and truthfully questions during discovery & offers no credible reason for failing to do so.	If the plaintiff wilfully gives false answers and knowingly does not answer discovery questions truthfully, then dismissal with prejudice is warranted.  Costs and reasonable attorney's fees could also be ordered.	<i>Scoggins v. Ellzey Beverages, Inc.</i> , 743 So. 2d 990 (Miss. 1999).
The plaintiff in a civil action testified falsely under oath and in discovery that no one else was with her at the time of the accident.	Because the plaintiff wilfully gave false testimony and knowingly withheld information, dismissal with prejudice is warranted.  Costs and reasonable attorney's fees could also be ordered.	<i>Pierce v. Heritage Prop., Inc.</i> , 688 So. 2d 1385 (Miss. 1997).
The defendant in a civil proceeding goes into the jury room and speaks with the jurors and even offers one juror a job.	The court should declare a mistrial & award the other party attorney's fees and expenses.  The court could also find the defendant in criminal contempt of court.	<i>Selleck v. S.F. Cockrell Trucking, Inc.</i> , 517 So. 2d 558 (Miss. 1987).

The defendant in a civil action refuses to answer questions asked at his deposition by the plaintiff and invokes his 5 <sup>th</sup> Amendment privilege against self-incrimination.	The court must proceed on a question by question basis to determine if the answer to the question might reveal criminal activity for which the defendant could lawfully be prosecuted.  If so, the defendant can lawfully refuse to answer.  If not, the defendant can be subject to contempt for failure to answer.	<i>In re Knapp</i> , 536 So. 2d 1330 (Miss. 1988).
A witness in a criminal proceeding invokes his 5 <sup>th</sup> Amendment privilege against self-incrimination while on the witness stand.	If he is subject to criminal prosecution, he has a right to refuse to answer any question which might indicate criminal activity.	<i>Butler v. State</i> , 702 So. 2d 125 (Miss. 1997).
In a divorce proceeding, the alleged girlfriend of the husband invokes her 5 <sup>th</sup> Amendment privilege against self-incrimination & refuses to answer questions under oath.	If she is subject to criminal prosecution, such as for adultery, she has a right to refuse to answer any question which might indicate criminal activity.	<i>See In re Knapp</i> , 536 So. 2d 1330 (Miss. 1988).
After the sequestration rule has been invoked by either party, a witness remains in the court room during the trial.	The court can refuse to let the witness testify, limit his testimony, find the witness in contempt of court, or allow a “full-bore” cross-examination.	<i>Gerrard v. State</i> , 619 So. 2d 212 (Miss. 1993).
A reporter is in the court room during a court proceeding & the court orders the reporter not to publish the information which has been discussed in open court.	This would be a prior restraint & presumptively invalid.	<i>Jeffries v. State</i> , 724 So. 2d 897 (Miss. 1998).

<p>A friend of a civil litigant or a criminal defendant places an ad in a newspaper giving her knowledge of the case, including information about polygraph examinations, &amp; her opinion of the case.</p>	<p>The court does not have jurisdiction over a member of the public who is not appearing before the court.</p> <p>URCCC 9.01 does not apply to people who are not appearing in court proceedings before the court.</p>	<p><i>See Terry v. State</i>, 718 So. 2d 1097 (Miss. 1998).</p>
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## **CHAPTER 5**

### **CONTEMPT OF COURT**

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## **CHAPTER 5**

### **CONTEMPT OF COURT**

#### **Contempt Power**

#### **Statutory Authority**

##### **§ 9-1-17      Punishment of contempt:**

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars (\$100.00) for each offense, nor shall the imprisonment continue longer than thirty (30) days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey or perform any rules, order, or judgment of the court, such court shall have power to fine and imprison such officer or person until he shall give evidence, or until the rule, order, or judgment shall be complied with.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

Section 1656, Mississippi Code 1942 Annotated (1956), limits the punishment that may be imposed for direct contempt of court to a fine of \$100 and imprisonment to thirty days. This section does not apply to constructive contempt. *Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).

#### **Civil Court Rules**

##### **Mississippi Rule of Civil Procedure 70(d) Judgment for Specific Acts; Vesting Title:**

**(d) Contempt.** The court may also in proper cases adjudge the party in contempt.

Rule 70 applies only after judgment is entered. **Miss. R. Civ. P. 70 Cmt.**

##### **Uniform Chancery Court Rule 1.05:**

When any civil action has been set for, or adjourned to, a particular day or hour, all officers, parties, witnesses and solicitors whose presence is necessary for the

trial shall be present promptly at the time set. Any negligent or willful failure to obey this rule shall be punished by contempt.

**Uniform Civil Rule of Circuit and County Court 1.03:**

Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.

**Criminal Court Rules**

**Mississippi Rule of Criminal Procedure 32.1 Applicability; Indirect and Direct Contempt Defined; Criminal and Civil Contempt Defined:**

**(a) Applicability.** Rule 32 applies to both civil and criminal contempt arising in a criminal action.

**(b) Indirect Contempt.** “Indirect contempt,” also known as “constructive contempt,” means any contempt other than a direct contempt.

**(c) Direct Contempt.** “Direct contempt” means contempt committed:

- (1) in the presence of the judge presiding in court; or
- (2) so near to the judge as to interrupt the court's proceedings.

**(d) Criminal Contempt.** “Criminal contempt” means either:

- (1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;
- (2) willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the primary purpose of the finding of contempt is to punish the contemnor; or
- (3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court.

**(e) Civil Contempt.** “Civil contempt” means willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule or command that by its nature is still capable of being complied therewith.

**Mississippi Rule of Criminal Procedure 32.2 Direct Contempt:**

**(a) Summary Imposition of Sanctions.** The court against which a direct civil or criminal contempt has been committed may summarily impose sanctions on the person who committed it if:

- (1) the presiding judge has personally perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it;
- (2) the contempt has interrupted the order of the court or interfered with the dignified conduct of the court's business; and
- (3) the punishment imposed does not exceed thirty (30) days incarceration or a fine of One-Hundred Dollars (\$100.00).

The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating evidence. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition or execution of sanctions until the conclusion of the proceeding during which the contempt was committed.

**(b) Order of Contempt.** Either before sanctions are imposed, or promptly thereafter, the court shall issue a written order stating, or shall state on the record, that a direct contempt has been committed and specifying:

- (1) whether the contempt is civil or criminal;
- (2) the evidentiary facts known to the court from the judge's own personal knowledge concerning the conduct constituting the contempt and, regarding any relevant evidentiary facts not so known, the basis of the court's findings;
- (3) the sanction imposed for the contempt;
- (4) in the case of civil contempt, how the contempt may be purged; and
- (5) in the case of criminal contempt, if the sanction is incarceration, a determinate term.

**(c) Review and Record.**

- (1) Review. The contemnor may seek review by appeal or by writ of habeas corpus, if appropriate.
- (2) Record. The appellate record in cases of direct contempt in which sanctions have been summarily imposed shall consist of:

- (1) the order of contempt; and, if the proceeding during which the contempt occurred was recorded, a transcript of that part of the proceeding; and
- (2) any evidence admitted in the proceeding.

**(d) No Summary Imposition of Sanctions.** In any proceeding involving a direct contempt for which the court determines not to impose sanctions summarily, the judge shall issue a written order specifying the evidentiary facts within the personal knowledge of the judge respecting the conduct constituting the contempt and the identity of the contemnor. Thereafter, the proceeding shall be conducted pursuant to Rule 32.3 or Rule 32.4, whichever is applicable, and Rule 32.5 in the same manner as an indirect contempt.

**Mississippi Rule of Criminal Procedure 32.3. Indirect Criminal Contempt; Commencement; Prosecution:**

**(a) Nature of the Proceedings.** All criminal contempts not adjudicated pursuant to Rule 32.2 shall be prosecuted by means of a written motion or on the court's own initiative.

**(b) Disqualification of the Judge.** Indirect criminal contempt charges shall be heard by a judge other than the trial judge.

**Mississippi Rule of Criminal Procedure 32.4. Indirect Civil Contempt:**

**(a) Commencement.** A civil contempt proceeding may be commenced by the filing of a motion for contempt with the clerk of the court whose order or judgment is claimed to have been violated. No filing fee shall be required in connection with the filing of the motion for civil contempt. The proceeding shall be considered part of the action out of which the contempt arose.

**(b) Contents of the Motion.** The motion for civil contempt shall contain:

- (1) a statement of the order or judgment involved, or a copy thereof, if available, and the name of the issuing judge where appropriate;
- (2) the case caption and the docket number of the case;
- (3) a short, concise statement of the facts on which the asserted contempt is based; and
- (4) a request for the issuance of a summons as specified below.

The motion for civil contempt shall be verified or supported by affidavits.

**(c) Summons.** The summons shall issue only on a judge's order and shall direct the parties to appear before the court at a date and time certain for the purpose(s) specifically stated therein of:

- (1) scheduling a trial;
- (2) considering whether and when the filing of an answer is necessary;



- (3) considering whether discovery is necessary;
- (4) holding a hearing on the merits of the motion; or
- (5) considering such other matters or performing such other acts as the court may deem appropriate.

A hearing on the merits of the motion shall be held not less than seven (7) days after service of the summons.

**(d) Service of the Summons and Motion.** The following shall be served upon the alleged contemnor:

- (1) a copy of the summons;
- (2) a copy of the motion for civil contempt;
- (3) a copy of the accompanying affidavits; and
- (4) if incarceration to compel compliance is sought, notice to the alleged contemnor in the following form:

TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:

1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.
2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note:

(a) A lawyer can be helpful to you by:

- (1) explaining the allegations against you;
- (2) helping you determine and present any defense to those allegations;
- (3) explaining to you the possible outcomes; and
- (4) helping you at the hearing.

(b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.

(c) If you want a lawyer but do not have the money to hire one, you may ask the court to appoint one for you.

3. IF YOU DO NOT APPEAR FOR A SCHEDULED COURT HEARING BEFORE THE JUDGE, YOU WILL BE SUBJECT TO ARREST.

### **Mississippi Rule of Criminal Procedure 32.5. Further Proceedings:**

**(a) Consolidation of Criminal and Civil Contempts.** If a person has been charged with more than one (1) contempt pursuant to Rule 32.3, Rule 32.4, or both, the court may consolidate the proceedings for hearing and disposition.

**(b) When Judge Disqualified.** A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

**(c) Failure to Appear at Hearing.**

(1) Generally. If, after proper notice, the alleged contemnor fails to appear personally at the time and place set by the court, the court may enter an order directing the alleged contemnor be taken into custody and brought before the court or judge designated in the order.

(2) Civil Contempt. If, after proper notice, the alleged contemnor in a civil contempt proceeding fails to appear in person or by counsel at the time and place set by the court, the court may proceed in the alleged contemnor's absence.

**(d) Disposition.** When a court makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term.

### **Mississippi Rule of Criminal Procedure 32.6. Bail:**

A contemnor incarcerated for contempt is entitled to the same consideration with respect to bail pending appeal as a defendant convicted in a criminal proceeding, as provided by law.

### **Case Law**

[T]his Court has determined that this statute is not applicable since the ability to punish for criminal contempt is derived from the inherent powers of the court.

***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

### **Types of Contempt of Court - Civil & Criminal**

Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. On the other hand, if the defendant does that which has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience. ***Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 120-21 (Miss. 1989).**

However, [the appellant] confuses "civil" and "criminal" contempt. The terms "criminal contempt" and "civil contempt" refer to the nature of the proceedings and the nature of the sentence meted out. A case tried under all the rules for criminal proceedings, in which the defendant is given all of the criminal due process, and sentenced to a certain term in jail, is clearly a criminal contempt case, even though the act of contempt is the violation of an injunction in a civil case. [I]f the case is tried under ordinary civil procedure, and the court orders the defendant to jail until he complies with the decree, the contempt proceeding is a civil one. ***Pierpont v. Bond*, 744 So. 2d 843, 845 (Miss. Ct. App. 1999).**

A determining factor in classifying a contempt action as civil or criminal is the purpose for which the power is exercised. Stated differently, what is the primary purpose of the suit? ***Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).**

The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. ***Common Cause v. Smith*, 548 So. 2d 412, 417 (Miss. 1989) (citation omitted).**

A COMPARISON & CONTRAST OF CIVIL & CRIMINAL CONTEMPT								
Type of Contempt	Primary Purpose	Purpose of Penalty	Penalties	Length of Incarceration	Burden of Proof	Burden of Persuasion	Right to Appeal	Standard of Review
<b>Civil</b>	If the primary purpose of the contempt proceeding is to enforce the rights of private litigants, or if the penalty is to enforce compliance with a court order, then the contempt is civil	Coercive Contemnor holds the keys to his own cell Compliance cures contempt	Fine (paid to the moving party) Incarceration Payment of past due amounts Compliance with court order Attorney fees	Indefinite length of time Incarceration terminates when the contemnor purges himself of the contempt &/or complies with the court order	Preponderance of the evidence	The moving party must prove that the contemnor has violated a valid court order  Contemnor can avoid incarceration by proving inability to pay or comply with the court order; show non-willful behavior	§ 11-51-12	Factual findings are subject to manifest error review
<b>Criminal</b>	A criminal contempt proceeding is maintained to vindicate the authority of the court or to punish for offensive conduct  2 types of criminal contempt: <i>Direct</i> <i>Constructive</i>	Punishment Contemnor cannot relieve himself of the contempt by agreeing to comply with a court order  Compliance does not cure contempt	Fine (paid to the court) Incarceration	Fixed term; definite amount of time Contemnor cannot shorten his sentence by promising not to repeat the offensive conduct  <i>Direct</i> - Not longer than 30 days in jail; No right to jury trial  <i>Constructive</i> - No maximum sentence; Right to jury trial may attach	Beyond a reasonable doubt	<i>Direct</i> - Occurs in the presence of the court & may be dealt with immediately; court's own knowledge  <i>Constructive</i> - Occurs outside the presence of the court & requires due process, i.e., specific charges, notice & a hearing; State must prove that the contemnor acted in such a manner that was calculated to impede, embarrass, obstruct, defeat or corrupt the administration of justice	§ 11-51-11	<i>Ab initio</i> review of the record

## **CIVIL CONTEMPT**

### **Characteristics of Civil Contempt**

#### **Purpose of Civil Contempt**

Civil contempt is coercive in nature. *Banks v. Banks*, 648 So. 2d 1116, 1123 (Miss. 1995).

If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. *Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).

If the primary purpose of [the contempt proceeding] is to enforce the rights of private litigants . . . then the contempt is civil. *Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).

[I]f the case is tried under ordinary civil procedure, and the court orders the defendant to jail until he complies with the decree, the contempt proceeding is clearly a civil one. *Pierpont v. Bond*, 744 So. 2d 843, 845 (Miss. Ct. App. 1999) (citations omitted).

#### **Purpose of Penalty**

A decree finding a person in civil contempt resembles an injunction and seeks to force a party to act or cease to act in a particular manner. *Lahmann v. Hallmon*, 722 So. 2d 614, 620 (Miss. 1998) (citation omitted).

Such orders [for civil contempt], although imposing a jail sentence, classically provide for termination of the contemnor's sentence upon purging himself of the contempt. The sentence is usually indefinite and not for a fixed term. Consequently, it is said that the contemnor "carries the key to his cell in his own pocket." *Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).

A civil contempt penalty is coercive. . . . *Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 120 (Miss. 1989).

[I]f the penalty is to enforce compliance with a court order, then the contempt is civil. *Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).

In civil contempt cases, the contemnor can discharge the contempt by paying the costs and expenses and doing what he had previously refused to do. In other

words, he carries the keys of his prison in his own pocket. *Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).

In civil contempt cases, the punishment is conditional in nature because the defendant can end the sentence and discharge himself at any moment by doing what he has previously refused to do. *Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).

### **Civil Contempt Proceedings**

#### **Burden of Proof**

#### **§ 11-51-12(4) Appeal from judgment of civil contempt:**

(4) The burden of proof in civil contempt shall be proof by a preponderance of the evidence.

The burden of proof in a case of civil contempt is by a preponderance of the evidence. *Goodson v. Goodson*, 816 So. 2d 420, 423 (Miss. Ct. App. 2002).

#### **Burden of Persuasion**

Civil contempt is commenced by private parties but the State also can be a plaintiff in a civil contempt action to vindicate a civil right as opposed to enforcing a criminal law. *Knowles v. State*, 708 So. 2d 549, 557-58 (Miss. 1998 (citation omitted)).

This type contempt proceeding is ordinarily instituted by one of the parties to the litigation who seeks to coerce another party to perform or cease performing an act. The order of contempt is entered by the court for the private benefit of the offended party. *Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).

[W]e would [also] reverse the contempt findings of the trial court based upon its lack of jurisdiction over various named defendants, for failure to properly issue service of process. . . . Service of process is required before a named person becomes a party to a motion [for contempt]. . . . *Mississippi Ass'n of Educ. v. Trustees of Jackson Mun. Separate Sch. Dist.*, 510 So. 2d 123, 127 (Miss. 1987).

### **Prima Facie Case**

The movant's showing on the contempt feature of the proceedings below consisted of the following:

- (a) Establishment that there was outstanding the decree imposing upon [the contemnor] the obligation to pay all reasonable and necessary medical and dental expenses;
  - (b) Exhibits tendered and admitted into evidence showing medical, dental and drug expenses incurred and/or paid; and
  - (c) Evidence to the effect that [the contemnor] had not paid the above sum.
- Our law is settled that such a showing makes out a prima facie case of contempt.

***Clements v. Young*, 481 So. 2d 263, 270 (Miss. 1985) (citations omitted).**

A citation for civil contempt is proper when the contemnor has willfully and deliberately ignored the order of the court. ***Jones v. Lee*, 754 So. 2d 564, 568 (Miss. Ct. App. 2000).**

A citation for contempt is determined upon the facts of each case and is a matter for the trier of fact. ***Ewing v. Ewing*, 749 So. 2d 223, 226 (Miss. Ct. App. 1999).**

### **Affirmative Defenses**

#### **Conduct Was Not Willful**

The chancellor ruled that Doyle was in contempt, but found that the contempt was not wilful because he acted on advice of his attorney. ***Gray v. Pearson*, 797 So. 2d 387, 395 (Miss. Ct. App. 2001).**

There are several available defenses to a civil contempt charge. One is that the violation was not willful or deliberate such that the behavior in question may not be labeled as contumacious. Included in this defense may be an honest inability to perform according to the dictates of the order or decree. ***Ewing v. Ewing*, 749 So. 2d 223, 226 (Miss. Ct. App. 1999) (citations omitted).**

Impossibility of performance of a court directive due to circumstances beyond the control of the alleged contemnor is a perfect defense to a contempt citation. ***Ewing v. Ewing*, 749 So. 2d 223, 225 (Miss. Ct. App. 1999).**

#### **Inability to Pay**

Once a prima facie case for civil contempt is established, the contemnor may avoid being incarcerated by proving the affirmative defense of inability to pay. ***Knowles v. State*, 708 So. 2d 549, 558 (Miss. 1998) (citation omitted).**

This Court has many times stated that even where there has been established a prima facie case of contempt, the defendant may avoid judgment of contempt [incarceration] by establishing that he is without present ability to discharge his obligation. If the contemnor raises this as a defense, he has the burden of proving his inability to pay, and such showing must be with particularity and not in general terms. *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993) (citations omitted).

### **Vague or Non-specific Order**

Another available defense is an inability to obey an order which is vague or not sufficiently specific. *Humphrey v. Martin*, 755 So. 2d 551, 554 (Miss. Ct. App. 2000) (citations omitted).

### **Clean Hands Doctrine**

Another available defense is the traditional notion of "clean hands." *Banks v. Banks*, 648 So. 2d 1116, 1123 (Miss. 1994) (citation omitted).

### **Penalties Available for Civil Contempt**

[D]etermination of punishment for contempt falls within the discretion of the [trial judge], and this Court will not reverse absent manifest error or application of an erroneous legal standard. *Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995).

The imposition of punishment for contempt of the court is within the discretion of the [trial judge]. *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993).

### **Fine**

One may be fined for civil contempt. . . . *Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1995).

### **Incarceration**

One may be jailed for civil contempt; however, the contemnor must be relieved of the penalty when he performs the required act. *Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1995).

### **Length of Incarceration**

The sentence is usually indefinite and not for a fixed term. *Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).



### Attorney's Fees

It is a civil contempt action. Courts do have the authority to award reasonable attorney fees in these actions. *Rogers v. Rogers*, 662 So. 2d 1111, 1116 (Miss. 1995) (citation omitted).

### Appeal of Civil Contempt

#### **§ 11-51-12 Appeal from judgment of civil contempt:**

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a civil contempt, may appeal to the court to which other cases are appealable from said tribunal. If jail confinement is ordered to compel the payment of any monetary sum, the contemnor shall be allowed to appeal upon the execution of an appearance bond, payable to the appellee, with sufficient sureties, in the penalty of one hundred twenty-five percent (125%) of such sum as he has been adjudicated in contempt for failure to pay, unless the court shall determine that a lesser bond should be required. The bond shall be conditioned to abide the results of the appeal.

(2) Where the punishment for civil contempt is other than jail confinement, the contemnor shall be allowed to appeal upon the posting of a bond, payable to the appellee, with sufficient sureties, to be approved by the tribunal appealed from, in an amount to be fixed by such tribunal, conditioned to abide the results of the appeal.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas. . . .

#### **§ 11-51-3 Appeals to Supreme Court:**

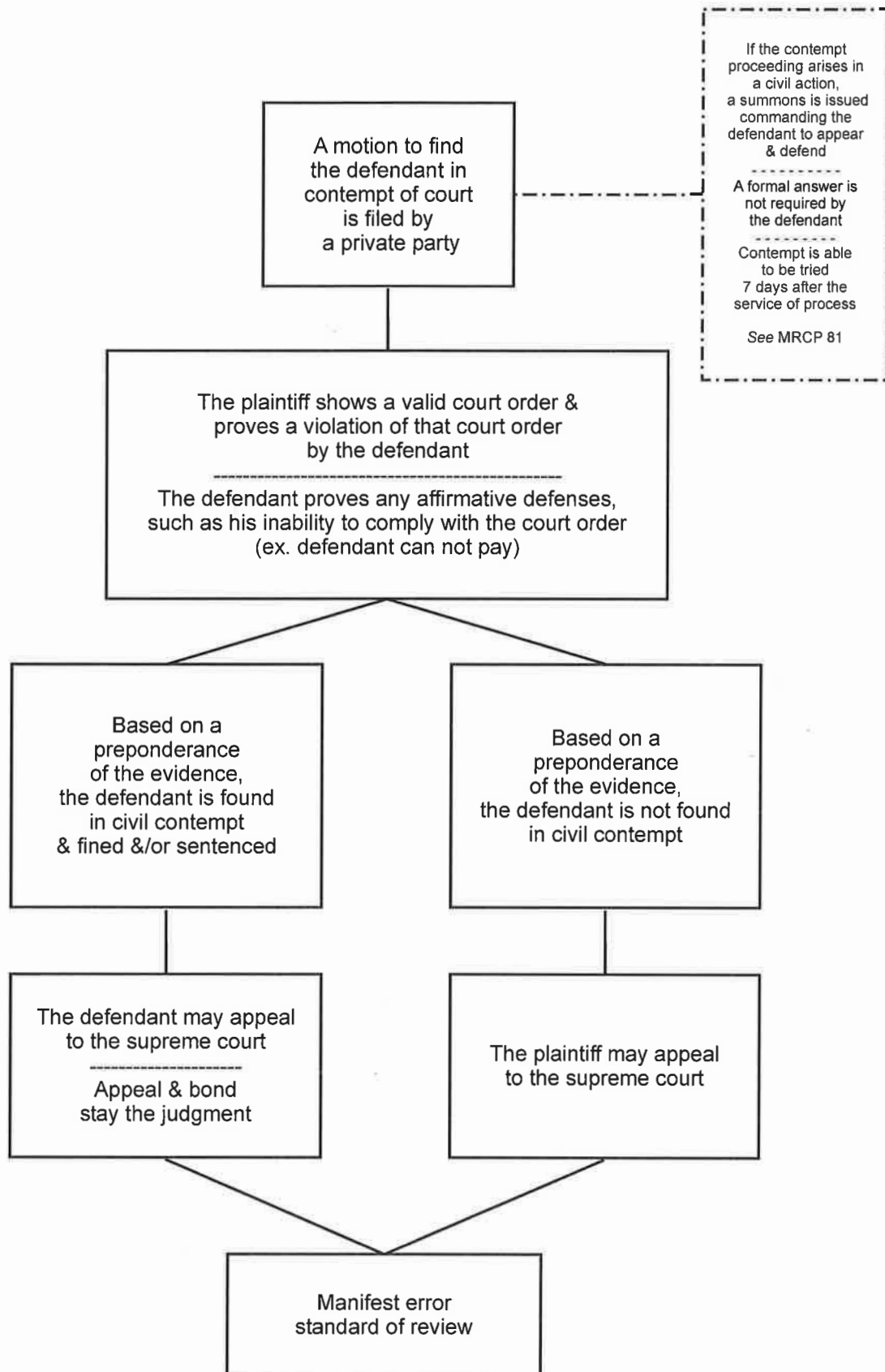
An appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representatives of such parties; and in no case shall such appeal be held to vacate the judgment or decree.

A plaintiff in a civil contempt case may appeal by [the] authority of § 11-51-3, which authorizes appeals from final judgments. *Common Cause v. Smith*, 548 So. 2d 412, 414-15 (Miss. 1989).

### Standard of Review

[D]etermination of punishment for contempt falls within the discretion of the chancellor, and this Court will not reverse on appeal absent manifest error or application of an erroneous legal standard. *Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995).

## CIVIL CONTEMPT OF COURT



## **CRIMINAL CONTEMPT**

### **Characteristics of Criminal Contempt**

#### **Purpose of Criminal Contempt**

Conduct directed against the court's dignity and authority is criminal contempt. It involves an act which tends to bring the court into disrepute or disrespect. Conduct amounting to criminal contempt must be directed against the court or against a judge acting judicially rather than individually. ***Purvis v. Purvis*, 657 So. 2d 794, 797 (Miss. 1995).**

Criminal contempt actions are prosecuted to vindicate the authority of the court. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

A case tried under all the rules for criminal proceedings, in which the defendant is given all of the criminal due process, and sentenced to a certain term in jail, is clearly a criminal contempt case, even though the act of contempt is the violation of an injunction in a civil case. ***Pierpont v. Bond*, 744 So. 2d 843, 845 (Miss. Ct. App. 1999) (citations omitted).**

#### **Purpose of Penalty**

[A] criminal contempt penalty is punishment. ***Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 120 (Miss. 1989).**

The penalty [in criminal contempt actions] is designed to punish the defendant for disobedience to the court's order; the punishment is for past offenses and does not terminate upon compliance with a court order. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

In criminal contempt cases, the nature of the punishment is unconditional because the relief cannot undo or remedy what has been done or afford any compensation and the defendant cannot shorten the term by promising not to repeat the offense. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

Because [the movant] sought, in this case, to sanction [the contemnor] for her past wilful disobedience of the [judge's] order rather than to coerce her future obedience, we conclude that this was a proceeding in the nature of criminal contempt. ***Allred v. Allred*, 735 So. 2d 1064, 1067 (Miss. Ct. App. 1999).**

*Types of Criminal Contempt - Direct & Indirect/Constructive*

**Mississippi Rule of Criminal Procedure 32.1 Applicability; Indirect and Direct Contempt Defined; Criminal and Civil Contempt Defined:**

**(b) Indirect Contempt.** “Indirect contempt,” also known as “constructive contempt,” means any contempt other than a direct contempt.

**(c) Direct Contempt.** “Direct contempt” means contempt committed:

- (1) in the presence of the judge presiding in court; or
- (2) so near to the judge as to interrupt the court's proceedings.

**(d) Criminal Contempt.** “Criminal contempt” means either:

- (1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;
- (2) willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the primary purpose of the finding of contempt is to punish the contemnor; or
- (3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court. . . .

*Direct Criminal Contempt*

Where the act which constitutes the contempt is committed in the immediate presence of the court, this contempt is defined as direct. A direct contempt consists of words spoken or acts done in the presence of the courts which tend to embarrass or prevent [the] orderly administration of justice. *Varvaris v. State*, 512 So. 2d 886, 887-88 (Miss. 1987) (citation omitted).

In defining what is meant by “the presence of the court,” as that term is used with reference to contempts, it is said that “the court” consists not of the judge, the courtroom, the jury, or the jury room individually, but of all of these combined. The court is present wherever any of its constituent parts is engaged in the prosecution of the business of the court according to law. *Ex Parte Wisdom*, 79 So. 2d 523, 524 (Miss. 1955).

### **Indirect/Constructive Criminal Contempt**

Constructive contempt is defined as any act calculated to impede, embarrass, obstruct, defeat, or corrupt administration of courts of justice when the act is done beyond the presence of the court. ***Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000).**

Constructive contempt is an act calculated to impede or embarrass, obstruct, defeat, or corrupt administration of courts of justice when the act is done beyond the presence of the court. ***Lawson v. State*, 573 So. 2d 684, 686 (Miss. 1990) (citations omitted).**

### **Deciding Between the Two Types**

We agree with the argument that the contempt [of a prospective juror giving false information to the trial judge], if any, was what the law regards as a “constructive” contempt rather than a “direct” one. The alleged contempt, while within the presence of the court, could not be known to the court in its judicial knowledge or observation, and hence there could not be summary punishment. ***Hinton v. State*, 222 So. 2d 690, 691 (Miss. 1969) (citation omitted).**

The important fact that we have to consider here is, that the court could not proceed upon its own knowledge of the facts, punish the offender without further proof, and without trial of any form. There had to be a hearing, and the court had to rely upon the testimony of witnesses. . . . [A]lthough the contempt may have been committed technically ‘in the presence of the court,’ but not within the sight or hearing of the judge, we think that notice should be given to the accused, and a reasonable opportunity afforded to him to prepare his defense. ***Ex Parte Wisdom*, 79 So. 2d 523, 524 (Miss. 1955).**

Whenever there is any doubt whether the alleged contemnor has been guilty of direct or constructive contempt, the doubt should be resolved in favor of the latter, rather than the former. . . . The alleged contemnor will thereby be brought into court, and tried on notice and specification of the grounds of the contempt. ***Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).**

## **Criminal Contempt Proceedings**

### **Burden of Proof**

#### **§ 11-51-11(4) Appeal from a judgment of criminal contempt:**

(4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. . . .

In a proceeding for criminal contempt [of court], evidence of guilt must be established beyond a reasonable doubt. *Terry v. State*, 718 So. 2d 1097, 1103 (Miss. 1998); *Varvaris v. State*, 512 So. 2d 886, 888 (Miss. 1987).

### **Burden of Persuasion**

#### **Direct Criminal Contempt**

##### **Who Carries the Burden**

A [direct] criminal contempt is one which takes place in the very presence of the judge making all the elements of the offense personal knowledge. *Varvaris v. State*, 512 So. 2d 886, 887-88 (Miss. 1987) (citation omitted).

### **Due Process Requirements**

A contempt which is direct, in the immediate presence of the court, may be summarily punished without affidavit, pleading or formal charges. *Thomas v. State*, 734 So. 2d 339, 341 (Miss. Ct. App. 1999) (citations omitted).

[T]here is no process that is due prior to the imposition of the penalty [in a direct criminal contempt proceeding]. *Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v. State*, 785 So. 2d 1059 (Miss. 2001).

### **Rules of Evidence**

**Mississippi Rule of Evidence 1101, Applicability of Rules**, states in pertinent part:

Except for the rules pertaining to privileges, these [evidence] rules do not apply in the following situations: . . . Contempt proceedings in which the court may act summarily.

### **Prima Facie Case**

The Mississippi Supreme Court has found that a charge of [direct criminal] contempt of court consists of words spoken or acts done in the presence of the court which tend to embarrass or prevent the orderly administration of justice. A direct criminal contempt "may consist of an open insult, in the presence of the court, to the person of the presiding justice, or a resistance to or defiance of power of the court." Disorderly conduct in the court room, or the use of violence, or threatening, or insulting language to the court, witnesses, or counsel is contempt. ***Thomas v. State*, 734 So. 2d 339, 341 (Miss. Ct. App. 1999) (citations omitted).**

Where the acts of criminal contempt take place in the presence of the court, no evidence or proof other than the court's own knowledge is required. ***Varvaris v. State*, 512 So. 2d 886, 887-88 (Miss. 1987) (citation omitted).**

### **Affirmative Defenses**

Contempt can only be willful. ***Brame v. State*, 755 So. 2d 1090, 1094 (Miss. 2000) (citations omitted).**

### **Judge's Recusal**

Direct contempt may be handled by the sitting judge instantly, although it is wise for a judge faced with personal attacks who waits until the end of the proceedings to have another judge take his place. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

[I]n cases of direct contempt, wherein a personal attack has been made on the court, necessitating instantaneous action, [the contempt] may be dealt with by the judge offended. ***Varvaris v. State*, 512 So. 2d 886, 888 (Miss. 1987) (citation omitted).**

The punishment for a criminal contempt rests exclusively with the court against [which] the contempt was directed. ***Culpepper v. State*, 516 So. 2d 485, 488 (Miss. 1987).**

## **Indirect/Constructive Criminal Contempt**

### **Who Carries the Burden**

The State must prove [that the contempt occurred]. ***Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000) (citations omitted).**

As in all criminal matters, the accused enjoys the presumption of innocence. The burden of [proof] to establish that contempt has been committed is on the party that is asserting that it has. ***Terry v. State*, 718 So. 2d 1097, 1103 (Miss. 1998).**

### **Due Process Requirements**

[The trial judge should have used] the correct procedural safeguards required for a charge of constructive [criminal] contempt, which are “a specific charge, notice, and a hearing.” ***Mississippi Comm’n on Jud. Perf. v. Byers*, 757 So. 2d 961, 970 (Miss. 2000) (citation omitted).**

[The judge] should have informed [the defendant] of her right to seek the advice of an attorney before proceeding with the contempt proceeding. . . . The trial courts should exercise due diligence to ensure that all parties are informed of this right [to counsel] before a [criminal] proceeding continues. ***Terry v. State*, 718 So. 2d 1097, 1107 (Miss. 1998).**

Constructive contempt requires a specification of charges, notice, and a hearing. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

[W]e would [also] reverse the contempt findings of the trial court based upon its lack of jurisdiction over various named defendants, for failure to properly issue service of process. . . . Service of process is required before a named person becomes a party to a motion. . . . ***Mississippi Ass’n of Educ. v. Trustees of Jackson Mun. Separate Sch. Dist.*, 510 So. 2d 123, 127 (Miss. 1987).**

### **Prima Facie Case**

The State must prove that [the alleged contemnor] acted in such a manner that was calculated to impede, embarrass, obstruct, defeat or corrupt the administration of justice, when the act is done beyond the presence of the court. ***Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000) (citations omitted).**



## *Affirmative Defenses*

### *Conduct Was Not Willful*

Contempt can only be willful. A contempt citation is proper only when the contemnor has wilfully and deliberately ignored the order of the court. It is a defense to a contempt proceeding that the person was not guilty of willful or deliberate violations of a prior judgment or decree. The circuit court found [the defendant's] conduct to constitute gross negligence. However, gross negligence does not rise to the level of willful conduct which is required to support a finding of criminal contempt. *Brame v. State*, 755 So. 2d 1090, 1094 (Miss. 2000) (citations omitted).

### *Vague or Non-specific Order*

It is one of the fundamental precepts of contempt proceedings that, in order to determine that an alleged contemnor's disobedience is wilful, the directive claimed to have been violated must have been clear in defining the action that is either mandated or proscribed. A person is entitled to be informed with a high degree of clarity as to exactly what her obligations are under a court order before she can be found in contempt for wilfully disobeying that order. *Allred v. Allred*, 735 So. 2d 1064, 1067 (Miss. Ct. App. 1999).

### *Judge's Recusal*

#### **Mississippi Rule of Criminal Procedure 32.5. Further Proceedings:**

**(b) When Judge Disqualified.** A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

[I]n cases of indirect or constructive criminal contempt, where the trial judge has substantial personal involvement in the prosecution, the accused condemner must be tried by another judge. [E]xamples of substantial personal involvement in the prosecution warranting recusal include cases where the trial judge acts as a one-man grand jury; where the trial judge is instrumental in the initiation of the constructive-contempt proceedings; and where the trial judge acts as prosecutor and judge. This Court repeatedly has found that a judge who initiates constructive contempt proceedings has substantial personal involvement and must recuse himself. It is undisputed that the chancellor initiated the contempt proceedings when he issued show-cause orders requiring that Appellants appear and

demonstrate why they should not be held in contempt. As the proceedings were for constructive criminal contempt, we conclude that the chancellor was required to recuse himself from conducting them. His failure to do so violated Appellants' due-process rights and warrants reversal of the contempt judgments. *Corr v. State*, 97 So. 3d 1211, 1215 (Miss. 2012) (citations omitted).

As noted, a person charged with constructive criminal contempt is afforded certain procedural safeguards. The citing judge must recuse himself from conducting the contempt proceedings involving the charges. [I]t is necessary for that individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. In *Williamson*, this Court reversed and remanded finding that it was improper for the citing judge to preside where he was a material witness. Based on *Williamson*, Cooper Tire is entitled to have proceedings before a different judge. *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 869 (Miss. 2004) (citations omitted).

[The trial judge] made his decision [to find the defendant in contempt] based on acts that took place outside of his presence. It is necessary for the individual to be tried by another judge in cases of constructive criminal contempt where the trial judge has substantial personal involvement in the prosecution [of the contempt proceeding]. . . . Because [the trial judge] was instrumental in the initiation of the constructive contempt proceedings, this Court holds that he should not have heard the contempt proceedings. He should have turned over those proceedings to another judge. *Terry v. State*, 718 So. 2d 1097, 1104-05 (Miss. 1998).

Where a course of action is aggravated by personal attacks, another judge should be asked to sit at the contempt hearing. *Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).

## Penalties Available for Criminal Contempt

### Fine

A person may be fined for . . . criminal contempt. *Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v. State*, 785 So. 2d 1059 (Miss. 2001).

Where the relief provided is by fine, it is punitive when it is paid to the court as opposed to the complainant. . . . *Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).

### Direct Criminal Contempt

#### **§ 9-1-17 Punishment of contempt:**

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars (\$100.00) for each offense. . . .

### Indirect/Constructive Criminal Contempt

#### **§ 11-51-11(4) Appeal from judgment of criminal contempt:**

(4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless the fine exceeds Five Hundred Dollars (\$500.00). . . .

Sentence of contempt of court and pay a fine of \$250.00 and serve ten days in the lee county jail, ten days suspended upon payment of fine and court costs [was] affirmed. *Lawson v. State*, 573 So. 2d 684, 687 (Miss. 1990).

This case is an appeal . . . wherein the defendant/appellant, Sheriff Edwin Coleman, was convicted of constructive or indirect criminal contempt of court for failure to incarcerate a felon. . . . Coleman was sentenced to serve a term of thirty (30) days in the Pontotoc County Jail and pay a \$500 fine, plus all court costs. . . . His conviction and sentence are hereby affirmed. *Coleman v. State*, 482 So. 2d 221, 223 (Miss. 1986).

### Incarceration

A person may be imprisoned for . . . criminal contempt. *Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v.*

*State*, 785 So. 2d 1059 (Miss. 2001).

[F]urthermore, the relief is punitive where the sentence of imprisonment is for a definite period; the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. *Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).

### **Direct Criminal Contempt**

#### **Length of Incarceration**

#### **§ 9-1-17 Punishment of contempt:**

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but . . . nor shall the imprisonment continue longer than thirty (30) days.

#### **No Right to a Jury Trial**

We conclude that where the confinement is not more than six (6) months . . . that the offense is a petty one, and the accused is not entitled to a jury trial under the Sixth Amendment of the Constitution of the United States. *Hinton v. State*, 222 So. 2d 690, 692 (Miss. 1969).

### **Indirect/Constructive Criminal Contempt**

#### **Length of Incarceration**

In Mississippi, there is no maximum penalty for the crime of [constructive] criminal contempt. *Walls v. Spell*, 722 So. 2d 566, 572 (Miss. 1998).

Section 1656 limits the punishment that may be imposed for direct contempt of court. . . . This section does not apply to constructive contempt. *Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).

#### **Right to a Jury Trial May Attach**

#### **§ 11-51-11(4) Appeal from judgment of criminal contempt:**

(4) A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless . . . the imprisonment exceeds six (6) months.

Where the legislature has failed to set a maximum penalty [for

constructive criminal contempt] under the statute, this Court will view the punishment imposed on multiple charges in the aggregate. As [the defendant] was sentenced to a total of 18 months in jail for contempt, we hold that the [trial judge] committed reversible error in failing to grant [the defendant's] motion for a jury trial. *Walls v. Spell*, 722 So. 2d 566, 573-74 (Miss. 1998).

When determining whether a contemnor has the right to a jury trial, the court must look to the maximum sentence possible under the statute, or to the penalty actually imposed if no punishment is provided by statute. . . . The actual penalty imposed . . . must be the focus. The maximum penalty allowed by [the Court] without a jury trial has been six (6) months imprisonment and \$500.00. [A sentence that falls beneath that] threshold limit triggering the right to a jury trial, [does not require a jury trial at the contempt proceedings]. *Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).

### **Appeal of Criminal Contempt**

A person convicted of criminal contempt [in circuit court] may appeal to [the Mississippi Supreme Court]. *Common Cause v. Smith*, 548 So. 2d 412, 414 (Miss. 1989).

#### **§ 11-51-11 Appeal from judgment of criminal contempt:**

(1) A person ordered by any tribunal . . . to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal. Where the punishment is either a fine only, or jail confinement only, the appeal shall be allowed upon the posting of a bond, payable to the state, with sufficient sureties, not exceeding \$1,000.00, conditioned to abide the results of the appeal. Where the punishment is both a fine and jail confinement, the appeal shall be allowed upon the posting of a bond, not exceeding \$2,000.00, conditioned to appear in the court to which the appeal is prosecuted and to abide the results of such appeal.

(2) The amount of the bonds provided for in subsection (1) of this section shall be fixed by the tribunal appealed from, shall be approved by the sheriff or other officer in whose custody the appellant may be and shall not be construed as a limitation on the amount of any fine which may be imposed.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas. . . .

### **Plaintiff in a Criminal Contempt Case May Not Appeal**

There is no statute authorizing an appeal by the petitioner [who brought the criminal contempt proceedings at the trial court level] when the a trial court has dismissed a petition for criminal contempt. . . . Consequently, [the Mississippi Supreme Court] has no subject matter jurisdiction to entertain an appeal from the lower court's dismissal of the criminal contempt charges against the defendants. ***Common Cause v. Smith*, 548 So. 2d 412, 415, 418 (Miss. 1989).**

### **Appeal of Contempt is a Separate Action**

The trial court's order [finding the defendant's attorney in direct criminal contempt] was styled as if it were an order in the [the defendant's] prosecution. However, criminal contempt is a separate action in which a bond must be posted before an appeal is authorized. ***Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) overruled on other grounds by *White v. State*, 785 So. 2d 1059 (Miss. 2001).**

### **Standard of Review**

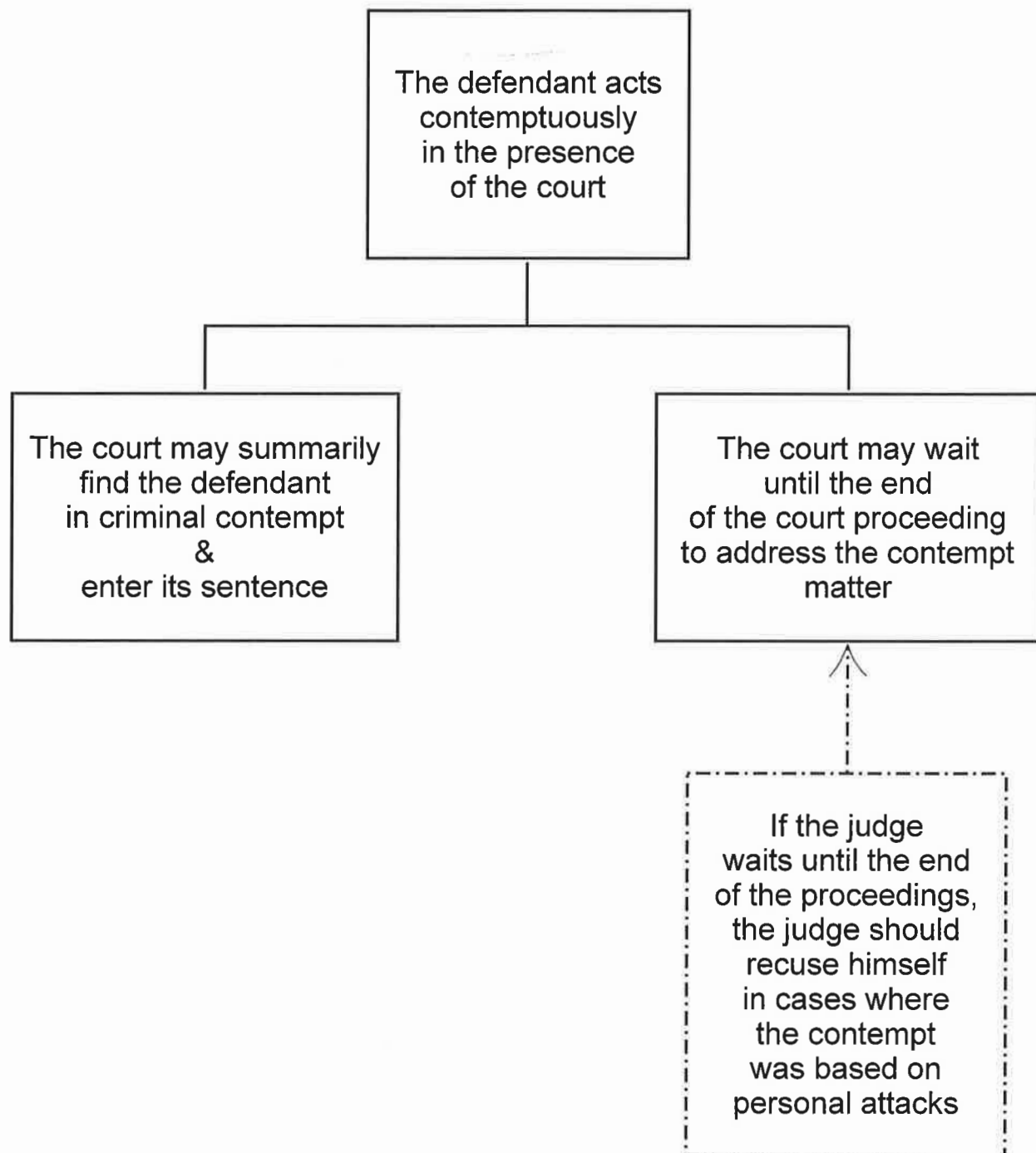
[W]here an appeal addresses a finding of criminal contempt which is punitive in nature, this Court is not bound by the manifest error rule when reviewing an appeal of a conviction of criminal contempt. There must be an *ab initio* review and determination of whether on the record the contemnor is guilty of contempt beyond a reasonable doubt. ***Shields v. State*, 702 So. 2d 380, 384 (Miss. 1997) (citation omitted).**

### **Ab Initio Review Explained**

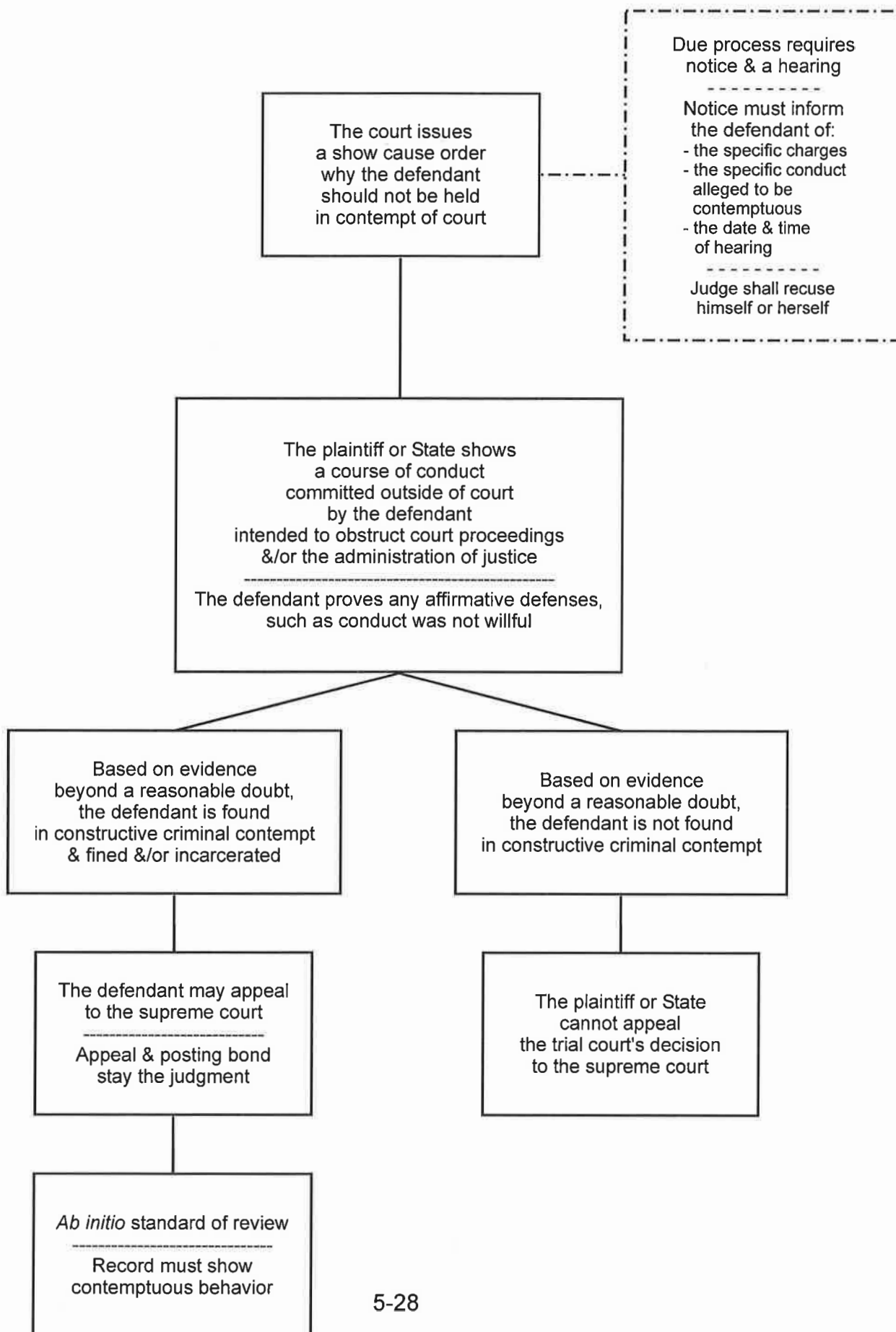
[In an appeal from a contempt ruling,] we proceed *ab initio*. It is our responsibility to determine whether on this record [defendant] is guilty of [criminal] contempt. We are not bound by the rule ordinarily applicable - that we have no authority to reverse except the [court] be manifestly in error. ***Cook v. State*, 483 So. 2d 371, 374 (Miss. 1986) (citations omitted).**

Although a reviewing court must consider the evidence in the light most favorable to the verdict, this does not mean that *ab initio* review is a lower standard than *de novo* review. . . . When conducting [an] *ab initio* review . . . the court looks at the entire record as a matter of first impression, giving no weight to the circuit court's findings. This is the same as *de novo* review." ***Management Computer Servs. Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 81 (Wisc. 1996) (citations omitted).**

## **DIRECT CRIMINAL CONTEMPT OF COURT**



## CONSTRUCTIVE CRIMINAL CONTEMPT OF COURT





**Contempt of Court for Failure to Pay Fines**

**§ 99-19-20 Fines; payment; indigent defendants; inability to work or unavailability of work:**

(1) Except as otherwise provided under Section 99-19-20.1 of this act, when any court sentences a defendant to pay a fine, the court may order

- (a) that the fine be paid immediately, or
- (b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or
- (c) that payment of the fine be a condition of probation, or
- (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or
- (e) any combination of the above.

(2) Except as otherwise provided under Section 99-19-20.1 of this act, the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

This subsection shall be limited as follows:

- (a) In no event shall such period of imprisonment exceed one (1) day for each One Hundred Dollars (\$100.00) of the fine.
- (b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.
- (c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

We now hold that when a circuit court makes release from prison contingent upon payment of a fine, it is mandatory that the circuit court follow the statutory requirement of Miss. Code Ann. § 99-19-20(2). The court must make an inquiry as to whether the convicted defendant is in fact able to pay the fine, and make a finding on this question. *Jones v. State*,

**564 So. 2d 848, 851 (Miss. 1990) (discussing prior version of statute).**

To begin with, it is established beyond per adventure that an indigent may not be incarcerated because he is financially unable to comply with an otherwise lawfully imposed sentence of a fine. So long as Cassibry is “financially unable to pay a fine” and the trial court so finds, he may not be imprisoned, period. *Cassibry v. State*, **453 So. 2d 1298, 1299 (Miss. 1984) (citations omitted) (discussing prior version of statute).**

Section 99-19-20(1)(d) authorizes the trial judge to require that Cassibry perform public service. Considering the present state of things, the trial judge may well want to employ this alternative and allow Cassibry to begin to work off his fine. Section 99-19-20(2)(c) provides that he would receive credit against his fine for any such public service work at the rate of the highest current federal minimum wage. Another alternative available to the trial judge at this time is the establishment of a realistic installment plan for the payment of the fine. Accepting the fact that Cassibry is financially unable to pay the \$45,000.00 at this time, the trial judge would be well within the scope of the discretionary authority vested in him by statute if he required that Cassibry pay what he reasonably could at reasonable, periodic intervals. *Cassibry v. State*, **453 So. 2d 1298, 1299-300 (Miss. 1984) (citations omitted) (discussing prior version of statute).**

**§ 99-19-20.1 Incarceration for failure to pay fine, restitution, or court costs; ability to pay; maximum term of imprisonment; minors:**

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars (\$10,000.00) in tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85-3-1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall

make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.

(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.

(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense. . .

**§ 99-37-7 Contempt for default:**

(1) Subject to the provisions of Section 99-19-20.1 of this act, when a defendant sentenced to pay a fine or to make restitution defaults in the payment thereof or of any installment, the court, on motion of the district attorney, or upon its own motion, may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(2) Subject to the provisions of Section 99-19-20.1 of this act, unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine or the restitution, or a specified part thereof, is paid.

(3) A judicial officer shall not be held criminally or civilly liable for failure of any defendant to pay any fine or to make restitution if the officer exercises his judicial authority in accordance with subsections (1) and (2) of this section to require the payment of such fine or restitution.

(4) When a fine or an order of restitution is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine or make the restitution from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

CONTEMPT OF COURT SCENARIOS				
Type of Contempt	Facts	Special Points to Consider / Rationale	Citation	
Criminal Contempt - Direct	Attorney made inflammatory remarks to the jury and to the judge repeatedly, resulting in a mistrial.	Both the transcripts and the audio recording of the record fully supported the trial court's findings. The record demonstrated beyond a reasonable doubt that the attorney was guilty of direct criminal contempt, and that his contemptuous conduct resulted in a mistrial in the underlying criminal matter.	<i>Minka v. State</i> , 234 So. 3d 353 (Miss. 2017).	
Criminal Contempt - Direct	Attorney stood up to dispute the court's ruling and interrupted court proceedings.	Attorney was found in direct criminal contempt after he disrespected the court, specifically by standing up to dispute a judge's bond ruling after the bond hearing had been concluded and despite being directed by the judge to sit down and make any further argument by written motion.	<i>Routh v. State</i> , 227 So. 3d 959 (Miss. 2017).	
Criminal Contempt - Direct	Attorney failed to abide by an order of the Court and was willfully disruptive of court proceedings.	Because the record established beyond a reasonable doubt that the attorney was guilty of direct criminal contempt for displaying willful, contemptuous conduct in the courtroom that interfered with the orderly administration of justice, the supreme court affirmed the trial court's order.	<i>Spore v. State</i> , 214 So. 3d 223 (Miss. 2017).	

Criminal Contempt - Direct	Attorney made derogatory comments about the court and the proceedings.	The attorney “used insulting language and was displaying both a resistance to, and a defiance of, the appropriate power and authority of the court. She chose to use words in the presence of the court which can easily be said to have a tendency to embarrass or prevent the orderly administration of justice.”	<i>In re Smith</i> , 926 So. 2d 878 (Miss. 2006).
Criminal Contempt - Direct	Attorney failed to attend a hearing.	The conversation between the attorney and the circuit clerk clearly indicates the attorney was aware of her obligation to attend the hearing and demonstrates her intention to absent herself from the hearing.	<i>In re Hampton</i> , 919 So. 2d 949 (Miss. 2006).
Criminal Contempt - Direct	In court on post-trial motions, an attorney and the trial judge became involved in a verbal exchange where the attorney called bailiffs the court’s “henchmen” and made the comment that he would pay for justice if that was what it took in the judge’s courtroom.	Attorney’s conduct was done in the presence of the court and intended to embarrass the judge and to prevent the orderly administration of justice.	<i>Lumumba v. State</i> , 868 So. 2d 1018 (Miss Ct. App. 2003).
Criminal Contempt - Direct	At his initial appearance, the defendant in a criminal proceeding called the justice court judge a disrespectful name and yelled obscenities in the court room.	The defendant was found in contempt of court and sentenced under the authority of § 9-11-15 which applies to justice court.	<i>Thomas v. State</i> , 734 So. 2d 339 (Miss. Ct. App. 1999).

Criminal Contempt - Direct	During a pre-trial hearing, a criminal defendant made derogatory comments about the judge and the judicial proceedings.	Defendant's conduct was inexcusable and it offended the dignity and authority of the court.	<i>Shields v. State</i> , 702 So. 2d 380 (Miss. 1997).
Criminal Contempt - Direct	At trial, the sequestration rule (M.R.E. 615) had been invoked but a witness for the State stayed in the court room throughout the testimony of other witnesses.	Court could find that the witness willfully violated the rule.  The comment to Rule 615 allows the court to "cite the witness for contempt," among other remedies, when a witness violates the sequestration rule.	<i>See Gerrard v. State</i> , 619 So. 2d 212 (Miss. 1993).
Criminal Contempt - Direct	Litigants in a civil proceeding engaged in a physical altercation that spilled over into the court room.	The actions done in the presence of the court embarrassed or prevented the orderly administration of justice.	<i>Lamar v. State</i> , 607 So. 2d 129 (Miss. 1992).
Criminal Contempt - Direct	A witness who was the father of a criminal defendant was found in contempt because he threatened to kill the assistant district attorney.	The statements made in the presence of the court embarrassed or prevented the orderly administration of justice.	<i>Varvaris v. State</i> , 512 So. 2d 886 (Miss. 1987).
Criminal Contempt - Indirect/Constructive	Process servers failed to serve process personally and signed and notarized the proof-of-service affidavits without the notary being physically present to witness the signatures.	The conduct at issue did not occur in the court's presence.	<i>Corr v. State</i> , 97 So. 3d 1211 (Miss. 2012).

Criminal Contempt - Indirect/Constructive	Party failed to comply with discovery order.	The fine imposed upon the party was to punish the party's failure to obey the discovery order and to vindicate the authority of the trial court.	<i>Cooper Tire &amp; Rubber Co. v. McGill</i> , 890 So. 2d 859 (Miss. 2004).
Criminal Contempt - Indirect/Constructive	The defendant violated an injunction prohibiting him from spraying pesticides.	The defendant acted knowingly.	<i>Walls v. Spell</i> , 722 So. 2d 566 (Miss. 1998).
Criminal Contempt - Indirect/Constructive	A criminal defendant's attorney makes a statement to a television station to the effect that his client passed a polygraph test and therefore should not be prosecuted.	If the court finds that the attorney willfully violated URCCC 9.01, a contempt charge would be upheld.	<i>See Terry v. State</i> , 718 So. 2d 1097 (Miss. 1998).
Criminal Contempt - Indirect/Constructive	An attorney was substantially late to court proceedings with no justifiable excuse for his tardiness, and the jury had to be excused.	The attorney can be found in contempt of court and fined up to the amount allowed for contempt.  Another remedy would be to order sanctions for violating URCCC 3.01 in the amount of the jury costs.	<i>See Alviers v. City of Bay St. Louis</i> , 576 So. 2d 1256 (Miss. 1991).
Criminal Contempt - Indirect/Constructive	After the jury had returned its verdict in a civil case, an attorney contacted two jurors to question them about the verdict despite a court order prohibiting such contact.	The attorney willfully disregarded the court's order and did not request permission from the court to contact the jurors.	<i>Lawson v. State</i> , 573 So. 2d 684 (Miss. 1990).



Criminal Contempt - Indirect/Constructive	At settlement negotiations, an attorney misrepresented to the court that his client was willing to settle the case when in fact the client did not know of the settlement offer.	The Mississippi Bar also sanctioned the attorney.	<i>Culpepper v. State</i> , 516 So. 2d 485 (Miss. 1987).
Criminal Contempt - Indirect/Constructive	A sheriff on numerous occasions released prisoners from the county jail who were imprisoned there under court order.	The sheriff violated his statutory duties.	<i>Coleman v. State</i> , 482 So. 2d 219 (Miss. 1986).
Criminal Contempt - Indirect/Constructive	A prospective juror did not answer the jury questions honestly, in particular failing to inform the court that the defendant's attorney also represented the prospective juror's wife in their divorce proceedings.	This was constructive because even though the contemptuous act occurred within the presence of the court, the court could not know of the contempt based on observation and its own judicial knowledge.	<i>Hinton v. State</i> , 222 So. 2d 690 (Miss. 1969).
Civil Contempt	Party to a consent decree final judgment continuously violated the terms of the agreement.	The record reflects that the party found in contempt routinely and deliberately operated the racetrack in violation of the conditions for timely conclusion of races and extinguishing of lights and thus the chancellor acted within her discretion in holding him in contempt.	<i>Riley v. Wiggins</i> , 908 So. 2d 893 (Miss. Ct. App. 2005).
Civil Contempt	Although he is able to pay, a judgment debtor has not paid the damages owed to the judgment creditor.	A judgment creditor would be able to collect the judgment by execution, garnishment or any other available lawful means so long as it does not include imprisonment.	<i>See In re Nichols</i> , 749 So. 2d 68 (Miss. 1999).

Civil Contempt	A witness refuses to answer any and all questions during a deposition.	The court must proceed on a question by question basis to determine if holding the witness in contempt is proper.	<i>In re Knapp</i> , 536 So. 2d 1330 (Miss. 1988).
Not Contempt (Constructive criminal contempt case)	A defense attorney was held in contempt for failure to prepare for court when he stated that he was not ready to proceed to trial because he had not received video recordings requested from the State.	There was no evidence that the defense attorney had willfully and deliberately ignored the court's order.	<i>Graves v. State</i> , 66 So. 3d 148 (Miss. 2011).
Not Contempt (Direct contempt case)	An attorney refused to recite the Pledge of Allegiance in open court.	There was no evidence that the attorney said or did anything to disrupt court proceedings or embarrass the court; the trial judge violated the attorney's First Amendment rights.	<i>Mississippi Comm'n on Jud. Perf. v. Littlejohn</i> , 62 So. 3d 968 (Miss. 2011).
Not Contempt (Constructive criminal contempt case)	An attorney held and looked at an evidence bag and the sheriff accused the attorney of trying to "smudge" off the identification numbers.	No contempt was found because there was no evidence that the attorney acted willfully, but only negligently.  Negligent acts can not support a finding of contempt.	<i>Brame v. State</i> , 755 So. 2d 1090 (Miss. 2000).
Not Contempt (Civil contempt case)	A judgment debtor has not paid the judgment creditor the amount he owes in damages and the debtor shows that he is unable to pay the damages.	Inability to pay is a defense to contempt.  Article 3, § 30 of the Mississippi Constitution prohibits imprisonment for a debt owed.	<i>In re Nichols</i> , 749 So. 2d 68 (Miss. 1999).

Not Contempt (Constructive criminal contempt case)	A reporter who had observed a criminal proceeding in open court wrote about a juvenile's prior court record despite the court ordering the reporter not to publish those facts.	Prior restraint on speech is presumptively invalid and court could not rebut that presumption.	<i>Jeffries v. State</i> , 724 So. 2d 897 (Miss. 1998).
Not Contempt (Constructive criminal contempt case)	A criminal defendant's attorney knew that a third-party was placing an advertisement in the local newspaper in which the advertisement stated that his client had passed a polygraph test.	The attorney could not be found in contempt because there was no evidence that the attorney "released or authorized for release" the advertisement.  URCCC 9.01 prohibits such actions.	<i>Terry v. State</i> , 718 So. 2d 1097 (Miss. 1998).
Not Contempt (Constructive criminal contempt case)	A friend of a criminal defendant placed an advertisement in the local newspaper which stated that her friend had passed a polygraph test.	This person could not be found in contempt; she was a non-party, not subject to URCCC 9.01.	<i>Terry v. State</i> , 718 So. 2d 1097 (Miss. 1998).
Not Contempt (Constructive criminal contempt case)	An attorney was substantially late to court proceedings, but his tardiness was due to a justifiable excuse, such as a car accident.	The court must evaluate the excuse, but a finding of contempt of court for being late would have to be based on evidence beyond a reasonable doubt.	<i>See Alviers v. City of Bay St. Louis</i> , 576 So. 2d 1256 (Miss. 1991).
Not Contempt (Civil contempt case)	A witness refuses to answer certain questions during a deposition which tend to relate to possible criminal activity.	The court must determine if the witness could be subject to criminal prosecution based on his answers and if so, the witness can not be held in contempt.	<i>In re Knapp</i> , 536 So. 2d 1330 (Miss. 1988).

Not Contempt (Civil contempt case)	The wife of a party to a partition of land proceeding interfered with a land surveyor who was surveying the property subject to the partition.	<p>The wife was not a party to the proceedings and could not be held in contempt.</p> <p>See MRCP 65(d)(2) which explains that a person in “active concert or participation” to a party will be bound by an injunction or restraining order if that person receives actual notice of the order by personal service or otherwise.</p>	<i>In re Will of Lynn v. Lynn</i> , 878 So. 2d 1052 (Miss. Ct. App. 2004).
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## **CHAPTER 6**

### **JURY TRIALS IN CHANCERY COURT**

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## **CHAPTER 6**

### **JURY TRIALS IN CHANCERY COURT**

#### **Right to Trial by Jury**

**Mississippi Constitution, Article III, § 31 Trial by jury, provides:**

The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

[The] right of trial by jury shall remain inviolate. . . . In chancery court, with some few statutory exceptions, the right to jury is purely within the discretion of the chancellor, and if one is empaneled, its findings are totally advisory. *Union National Life Ins. Co. v. Crosby*, 870 So. 2d 1175, 1181-82 (Miss. 2004) (citations omitted).

#### **§ 11-5-3 Issue tried by jury:**

The chancery court, in a controversy pending before it, and necessary and proper to be tried by a jury, shall cause the issue to be thus tried to be made up in writing. The jury shall be drawn in open court from the jury box used in the circuit court, in the presence of the clerk of the circuit court who shall attend with the box for that purpose. The number drawn shall not exceed twenty, and the slips containing the names shall be returned to the box. The clerk of the chancery court shall issue the venire facias to the sheriff, returnable as the court shall direct. If there be no jury box the jury may be obtained as provided for in the circuit court in such case. The sheriff and jurors, for failure to perform duty or to attend, shall be liable to like penalty as in the circuit court. The parties shall have the same right of challenge as in trials in the circuit court, and the jury may be completed in the same manner. The chancellor may instruct the jury in the same way that juries are instructed in the circuit court, and the parties shall have the same rights in respect thereto; the instructions shall be filed in the cause and become a part of the record, and the chancellor shall sign bills of exceptions as in the circuit court, and the court may grant new trials in proper cases.

[T]he granting of a jury trial, in the chancery court, where no statute prescribes one, is always discretionary with the chancellor. *Carradine v. Estate of Carradine*, 58 Miss. 286, 293 (Miss. 1880).

**§ 11-5-5      Venue change in jury cases:**

The chancery court may award a change of venue for the trial of all issues to be tried by a jury pursuant to the procedure provided for in the Mississippi Rules of Civil Procedure. . . .

**Specific Statutes Authorizing Trial by Jury in Chancery Proceedings**

**Civil Practice & Procedure**

**§ 11-51-11      From criminal contempt judgment:**

(1) A person ordered by any tribunal . . . to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal. . . .

(4) . . . . A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless the fine exceeds Five Hundred Dollars (\$500.00), or the imprisonment exceeds six (6) months.

**Soil Conservation Districts**

**§ 69-27-41      Judicial enforcement of work requirements:**

Where the commissioners of any district shall find that any of the provisions of land-use regulations prescribed in an ordinance adopted in accordance with the provisions of Section 69-27-37 are not being observed on particular lands . . . then the commissioners may present to the chancery court of the county in which the lands of the defendant may lie a petition, duly verified, setting forth the adoption of the ordinance prescribing land-use regulations, the failure of the defendant landowner or operator or both to observe such regulations, and to perform particular work, operations or avoidance as required thereby. . . . Upon the filing of such petition, process shall issue against the defendant returnable in the manner provided by law, and said cause shall be tried in the manner provided by law for the trial of civil actions. The defendant may demand a trial by jury and in such event, the jurors shall have the qualifications of jurors in eminent domain proceedings in the chancery court. . . .

**§ 69-27-49      Appealing board of adjustment order:**

Any petitioner aggrieved by an order of the board granting or denying, in whole or in part, the relief sought, . . . may obtain a review of such order in the chancery court of the county in which the lands of the petitioner may lie, by filing in such court a petition praying that the order of the board be modified or set aside and may demand a jury qualified in all respects as the jurors in eminent domain proceedings in the chancery court. . . .

### **Meat Inspection**

#### **§ 75-35-305 Seizure and condemnation of carcasses; grounds; bond:**

(1) Any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules or other equines, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine, that is being transported in intrastate commerce, or is held for sale in this state after such transportation, and that (a) is or has been prepared, sold, transported, or otherwise distributed or offered or received for distribution in violation of this chapter, or (b) is capable of use as human food and is adulterated or misbranded, or (c) in any other way is in violation of this chapter, shall be liable to be proceeded against and seized and condemned, at any time, on a bill of complaint in the chancery court. . . . The proceedings in such chancery court cases shall conform, as nearly as may be, to the usual proceedings in chancery, except that either party may demand trial by jury of any issue of fact joined in any case, and all such proceedings shall be removed at the suit of and in the name of this state in the circuit court. . . .

### **Enforcement of Natural Gas Pipeline Safety Standards**

#### **§ 77-11-5 Equitable remedies:**

(2) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this article, trial shall be by the court, or upon demand of the accused, by a jury and, upon demand of the accused, a jury trial for criminal contempt shall be transferred to the chancery court of the county in which the accused resides or has his principal place of business.

### **Executors & Administrators**

#### **§ 91-7-19 Parties; jury trial:**

Any proponent of a will for probate may, in the first instance, make all interested persons parties to his application to probate the will, and in such case all who are made parties shall be concluded by the probate of the will. At the request of either party to such proceeding, an issue shall be made up and tried by a jury as to whether or not the writing propounded be the will of the alleged testator.

We conclude that the role of a jury in a will contest is the same as that of a jury in a civil trial in a court of law and is not "merely advisory." *Fowler v. Fisher*, 353 So. 2d 497, 501 (Miss. 1977).

*No Right to Trial by Jury*

*Uniform Law on Paternity*

§ 93-9-15      Remedies:

Parties to an action to establish paternity shall not be entitled to a jury trial.

***See § 93-9-27 Effect of test results; rebuttable presumption; no right to jury trial.***

*Role of the Jury In Chancery Court*

The proper role of a jury in chancery court has long been a subject of debate in Mississippi. . . . The first case to consider the role of a jury in chancery after passage of the general statute in its present form was *Carradine v. Carradine*, 58 Miss. 286 (1880). On allegation of error for refusal to grant a jury trial, this Court first ruled that no question of fact was presented, but went on to state that "the granting of a jury trial in the chancery court where no statute prescribed one, is always discretionary with the chancellor." Subsequent interpretations of the statutory language "necessary and proper to be tried by a jury" left to the chancellor's discretion the decision of a jury trial being necessary and proper but limited the discretion to those occasions when no statute required a jury trial. . . . We think these cases illustrate that while a chancellor may deny a jury trial, disregard the verdict of the jury, or not be subject to error due to erroneous instructions, that each category is based upon the premise that a jury trial was not required by statute. These restrictive interpretations indicate that a chancellor's discretion is not as broad where a jury trial is mandated. ***Fowler v. Fisher*, 353 So. 2d 497, 498 (Miss. 1977).**

## **THE JURY SELECTION PROCESS**

### **Jury Selection by Statute**

**Mississippi Rule of Civil Procedure 47(b), Jurors, states:**

**(b) Selection of Jurors; Jury Service.** Jurors shall be drawn and selected for jury service as provided by statute.

**§ 13-5-2      Statement of public policy:**

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

### **Competency of Jurors**

**§ 13-5-1      Competent juror qualifications:**

Every citizen not under the age of twenty-one (21) years, who is either a qualified elector, or a resident freeholder of the county for more than one (1) year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five (5) years and who is not a common gambler or habitual drunkard, is a competent juror. No person who is or has been within twelve (12) months the overseer of a public road or road contractor shall, however, be competent to serve as a grand juror. The lack of any such qualifications on the part of one (1) or more jurors shall not, however, vitiate an indictment or verdict. Moreover, no talesman or tales juror shall be qualified who has served as such talesman or tales juror in the last preceding two (2) years, and no juror shall serve on any jury who has served as such for the last preceding two (2) years. No juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

In order to determine that prospective jurors can read and write, the presiding judge shall, with the assistance of the clerk, distribute to the jury panel a form to be completed personally by each juror prior to being empaneled as follows:

**Juror Information Card**

1. Your name \_\_\_\_\_ Last \_\_\_\_\_ First \_\_\_\_\_ Middle initial \_\_\_\_\_
2. Your home address \_\_\_\_\_
3. Your occupation \_\_\_\_\_
4. Your age \_\_\_\_\_
5. Your telephone number \_\_\_\_\_ If none, write none
6. If you live outside the county seat, the number of miles you live from the courthouse \_\_\_\_\_ Miles

\_\_\_\_\_  
Sign your name

The judge shall personally examine the answers of each juror prior to empaneling the jury and each juror who cannot complete the above form shall be disqualified as a juror and discharged.

A list of any jurors disqualified for jury duty by reason of inability to complete the form shall be kept by the circuit clerk and their names shall not be placed in the jury box thereafter until such person can qualify as above provided.

**Jury Selection Procedure**

**§ 13-5-4      Definitions:**

As used in this chapter:

- (a) "Court" means the circuit, chancery and county courts of this state and includes, when the context requires, any judge of the court.
- (b) "Clerk" and "clerk of the court" means the circuit clerk of the county and any deputy clerk.
- (c) "Master list" means the voter registration lists for the county.
- (d) "Voter registration lists" means the official records of persons registered to vote in the county.

(e) "Jury wheel" means any physical device or electronic system for the storage of the names or identifying numbers of prospective jurors.

(f) "Jury box" means the jury wheel in which is placed the names or identifying numbers of prospective jurors whose names are drawn at random from the jury wheel and who are not disqualified.

(g) "Senior judge" means the circuit or chancery judge, as the case may be, who has the longest continuous service on the court in a particular judicial district which has more than one (1) such judge, or if the judges are equal in time of service, then the judge who has been engaged for the longest time continuously in the practice of law in this state.

### **Jury Commission & Its Duties**

#### **§ 13-5-6      Jury commission:**

(1) A jury commission shall be established in each county to manage the jury selection process under the supervision and control of the court. The jury commission shall be composed of three (3) members who will serve a four-year term beginning on January 1, 1975, as follows:

- One (1) member shall be appointed by the circuit judge of said county;
- One (1) member shall be appointed by the chancery judge of said county;
- and
- One (1) member shall be appointed by the board of supervisors of said county.

If there is more than one (1) judge in a judicial district, then the senior circuit or chancery judge, as the case may be, shall make the said appointment for each county in his district. Any unexpired term shall be filled by the appropriate appointing authority who is in office at the time the vacancy occurs.

(2) A jury commissioner shall have the following qualifications:

- (a) He shall be a duly qualified elector at the time of his appointment;
- (b) He shall be a resident citizen in the county in which he is to serve; and
- (c) He shall not be an attorney nor an elected public official.

(3) Each jury commissioner shall receive compensation at a per diem rate as provided in Section 25-3-69.

**§ 13-5-8      Master list:**

(1) In April of each year, the jury commission for each county shall compile and maintain a master list consisting of the voter registration list for the county.

(2) The circuit clerk of the county and the registrar of voters shall have the duty to certify to the commission during the month of January of each year under the seal of his office the voter registration list for the county.

**Jury Wheel**

**§ 13-5-12      Jury wheel name selection procedure:**

Unless all the names on the master list are to be placed in the jury wheel pursuant to Section 13-5-10, the names or identifying numbers of prospective jurors to be placed in the jury wheel shall be selected by the jury commission at random from the master list in the following manner:

The total number of names on the master list shall be divided by the number of names to be placed in the jury wheel; the whole number nearest the quotient shall be the "key number," except that the key number shall never be less than two (2). A "starting number" for making the selection shall then be determined by a random method from the number from one (1) to the key number, both inclusive. The required number of names shall then be selected from the master list by taking in order the first name on the master list corresponding to the starting number and then successively the names appearing in the master list at intervals equal to the key number, recommencing if necessary at the start of the list until the required number of names has been selected. The name of any person who is under the age of twenty-one (21) years and the name of any person who has been permanently excused from jury service pursuant to Section 13-5-23(4) shall be passed over without interrupting the sequence of selection. Any person who has been excluded from the master list for jury service may be reinstated to the master list after one (1) year by requesting that the circuit clerk reinstate him to the master list. Upon recommencing at the start of the list, names previously selected from the master list shall be disregarded in selecting the additional names.

The jury commission may use an electronic or mechanical system or device in carrying out its duties.



**§ 13-5-10      Maintaining jury wheel:**

The jury commission for each county shall maintain a jury wheel into which the commission shall place the names or identifying numbers of prospective jurors taken from the master list. If the total number of prospective jurors on the master list is one thousand (1,000) or less, the names or identifying numbers of all of them shall be placed in the jury wheel. In all other cases, the number of prospective jurors to be placed in the jury wheel shall be one thousand (1,000) plus not less than one percent (1%) of the total number of names on the master list. From time to time a larger or additional number may be determined by the jury commission or ordered by the court to be placed in the jury wheel. In April of each year, beginning in 1976, the wheel shall be emptied and refilled as prescribed in this chapter.

It is not necessary to maintain a physical jury wheel and jury box if the clerk is using a computer, as long as the clerk is capable of printing out a physical record of the contents of the jury wheel and jury box if it becomes necessary to do so. **Computerized Jury Wheel, 92 Op. Att’y Gen. 0700 (Dec. 3, 1992).**

**§ 13-5-14      Delivery of jury wheel names:**

At any time the jury commission places names in the jury wheel, the jury commission shall also deliver to the senior judge a list of all names placed on or in the jury wheel, and said judge shall spread upon the minutes of the circuit court all of the names so placed in the jury wheel.

**§ 13-5-16      Random drawing of jurors:**

(1) Except as otherwise provided by subsection (2) of this section, from time to time and in a manner prescribed by the court, a private citizen who does not have an interest in a case pending trial and who is not a practicing attorney publicly shall draw at random from the jury wheel the names or identifying numbers of as many prospective jurors as the court by order requires. The clerk shall prepare an alphabetical list of the names drawn. Neither the names drawn nor the list shall be disclosed to any person other than pursuant to this chapter or specific order of the court.

(2) The court may order that the drawing of names or identifying numbers pursuant to subsection (1) of this section may be performed by random selection of a computer or electronic device pursuant to such rules and regulations as may be prescribed by the court.

### **Jury Box**

#### **§ 13-5-26 Drawing and assigning jurors:**

(1) The circuit clerk shall maintain a jury box and shall place therein the names or identifying numbers of all prospective jurors drawn from the jury wheel.

(2) A judge or any court or any other state or county official having authority to conduct a trial or hearing with a jury within the county may direct the circuit clerk to draw and assign to that court or official the number of jurors he deems necessary for one (1) or more jury panels or as required by law for a grand jury, except as otherwise provided by subsection (3) of this section.

Upon receipt of the direction, and in a manner prescribed by the court, the circuit clerk shall publicly draw at random from the jury box the number or jurors specified.

(3) The court may order that the drawing and assigning of jurors pursuant to subsection (2) of this section may be performed by random selection of a computer or electronic device pursuant to such rules and regulations as may be prescribed by the court. The jurors drawn for jury service shall be assigned at random by the clerk to each jury panel in a manner prescribed by the court.

### **Summoning of Jurors**

#### **§ 13-5-28 Summoning person drawn for duty:**

If a grand, petit or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons, either personally or by mail, addressed to the juror at the juror's usual residence, business or post office address, requiring the juror to report for jury service at a specified time and place. The summons shall include instructions to the potential jurors that explain, in layman's terms, the provisions of Section 13-5-23.

#### **§ 13-5-30 Summoning petit jurors where shortage:**

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

#### **§ 13-5-18 Requirement of telephone answering device:**

The clerk of the circuit court in each county shall purchase and install a telephone answering device for the purpose of providing a recorded message after 5:00 p.m. to jurors who have been summoned to jury duty, in order for such jurors to inquire as to whether their presence will be required in court the following day. The cost of purchasing and maintaining said telephone answering device shall be paid by the board of supervisors from the county general fund.

**§ 13-5-32      Names of jurors made public:**

The names of jurors drawn from the jury box shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

**§ 13-5-87      Laws as to listing, drawing, summoning and impaneling of juries are directory:**

All the provisions of law in relation to the listing, drawing, summoning and impaneling juries are directory merely, and a jury listed, drawn, summoned or impaneled, though in an informal or irregular manner, shall be deemed a legal jury after it shall have been impaneled and sworn, and it shall have the power to perform all the duties devolving on the jury.

**Exemptions & Excuses from Jury Service**

**§ 13-5-23      Grounds for service exemption:**

(1) All qualified persons shall be liable to serve as jurors, unless excused by the court for one (1) of the following causes:

(a) When the juror is ill and, on account of the illness, is incapable of performing jury service;

An excuse of illness under subsection (1)(a) of this section may be made to the clerk of court outside of open court by providing the clerk with a certificate of a licensed physician, stating that the juror is ill and is unfit for jury service, in which case the clerk may excuse the juror. If the excuse of illness is not supported by a physician's certificate, a judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(a) of this section.

(b) When the juror's attendance would cause undue or extreme physical or financial hardship to the prospective juror or a person under his or her care or supervision; or

The test of an excuse under subsection (1)(b) of this section for undue or extreme physical or financial hardship shall be whether the individual would either:

- (i) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury; or
- (ii) Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support; or
- (iii) Suffer physical hardship that would result in illness or disease.

“Undue or extreme physical or financial hardship” does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment or business.

A judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(b) of this section. A person asking to be excused based on a finding of undue or extreme physical or financial hardship must take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty.

A person asking a judge to grant an excuse under subsection (1)(b) of this section may be required to provide the judge with documentation such as, but not limited to, federal and state income tax returns, medical statements from licensed physicians, proof of dependency or guardianship and similar documents, which the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation may result in a denial of the request to be excused.

(c) When the potential juror is a breast-feeding mother.

In cases under subsection (1)(c) of this section, the excuse must be made by the juror in open court under oath.

(4) A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature. A person who has been summoned for jury duty who meets the age threshold for exemption from jury service shall have the option to be permanently excused from jury service due to age by filing with the circuit clerk a notarized request to be permanently excused. . . .

**§ 13-5-25      Personal privilege exemptions:**

Every citizen over sixty-five (65) years of age, and everyone who has served as a grand juror or as a petit juror in the trial of a litigated case within two (2) years, shall be exempt from service if the juror claims the privilege. No qualified juror shall be excluded because of any such reasons, but the same shall be a personal privilege to be claimed by any person selected for jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim. Provided, however, that no person who has served as a grand juror or as a petit juror in a trial of a litigated case in one (1) court may claim the exemption in any other court where the juror may be called to serve.

***See also § 33-1-5 Jury duty exemption and § 47-5-55 Exemption from jury duty.***

**§ 13-5-33      One time postponement; emergency postponement:**

(1) Notwithstanding any other provisions of this chapter, individuals scheduled to appear for jury service have the right to postpone the date of their initial appearance for jury service one (1) time only. Postponements shall be granted upon request, provided that:

- (a) The juror has not been granted a postponement within the past two (2) years;
- (b) The prospective juror appears in person or contacts the clerk of the court by telephone, electronic mail or in writing to request a postponement; and
- (c) Prior to the grant of a postponement with the concurrence of the clerk of the court, the prospective juror fixes a date certain to appear for jury service that is not more than six (6) months or two (2) terms of court after the date on which the prospective juror originally was called to serve and on which date the court will be in session, whichever is the longer period.

(2) A subsequent request to postpone jury service may be approved by a judicial officer only in the event of an extreme emergency, such as a death in the family, sudden illness, or a natural disaster or a national emergency in which the prospective juror is personally involved, that could not have been anticipated at the time the initial postponement was granted. Prior to the grant of a second postponement, the prospective juror must fix a date certain on which the individual will appear for jury service within six (6) months or two (2) terms of court after the postponement on a date when the court will be in session. . . .

**Failure to Appear or Unfit to Serve**

**§ 13-5-34      Punishment for failure to appear:**

(1) A person summoned for jury service who fails to appear or to complete jury service as directed, and who has failed to obtain a postponement in compliance with the provisions for requesting a postponement, or who fails to appear on the date set pursuant to Section 13-5-33, may be ordered by the court to appear and show cause for failure to comply with the summons. If the juror fails to show good cause for noncompliance with the summons, the juror may be held in civil contempt of court and may be fined not more than Five Hundred Dollars (\$500.00) or imprisoned not more than three (3) days, or both. The prospective juror may be excused from paying sanctions for good cause shown or in the interest of justice.

(2) In addition to, or in lieu of, the fine or imprisonment provided in subsection (1) of this section, the court may order that the prospective juror complete a period of community service for a period no less than if the prospective juror would have completed jury service, and provide proof of completion of this community service to the court.

**§ 13-5-83      Juror intoxication:**

If any juror summoned to appear at court, should render himself unfit for service by intoxication before his name is called in court, he shall be fined in a sum not exceeding One Hundred Dollars (\$100.00), and be imprisoned for a term not exceeding twenty-four hours. After grand and petit jurors are impaneled they shall be under the control of the court, and, for any breach of duty or contempt of court, may be fined and imprisoned.

**Fees for Jury Service**

**§ 25-7-61      Jurors; voluntary return of fees to county:**

**[Effective until January 1, 2008, or such time as the Lengthy Trial Fund is fully funded by a specific appropriation of the Legislature, whichever is later, this section shall read as follows:]**

(1) Fees of jurors shall be payable as follows:

(a) Grand jurors and petit jurors in the chancery, county, circuit and special eminent domain courts shall be paid an amount to be set by the board of supervisors, not to be less than Twenty-five Dollars (\$25.00) per day and not to be greater than Forty Dollars (\$40.00) per day, plus mileage

authorized in Section 25-3-41. In the trial of all cases where jurors are in charge of bailiffs and are not permitted to separate, the sheriff with the approval of the trial judge may pay for room and board of jurors on panel for actual time of trial. No grand juror shall receive any compensation except mileage unless he has been sworn as provided by Section 13-5-45; and no petit juror except those jurors called on special venires shall receive any compensation authorized under this subsection except mileage unless he has been sworn as provided by Section 13-5-71. . . .

(2) Any juror may return the fees provided as compensation for service as a juror to the county that paid for the person's service as a juror. The fees returned to the county may be earmarked for a particular purpose to be selected by the juror, including:

- (a) The local public library;
- (b) Local law enforcement;
- (c) The Mississippi Burn Care Fund created in Section 7-9-70; or
- (d) Any other governmental agency.

**[From and after January 1, 2008, or such time as the Lengthy Trial Fund is fully funded by a specific appropriation of the Legislature, whichever is later, this section shall read as follows:]**

(1) Fees of jurors shall be payable as follows:

(a) Grand jurors and petit jurors in the chancery, county, circuit and special eminent domain courts shall be paid an amount to be set by the board of supervisors, not to be less than Twenty-five Dollars (\$25.00) per day and not to be greater than Forty Dollars (\$40.00) per day, plus mileage authorized in Section 25-3-41. In the trial of all cases where jurors are in the charge of bailiffs and are not permitted to separate, the sheriff with the approval of the trial judge may pay for room and board of jurors on panel for actual time of trial. No grand juror shall receive any compensation except mileage unless the juror has been sworn as provided by Section 13-5-45; and no petit juror except those jurors called on special venires shall receive any compensation authorized under this subsection except mileage unless the juror has been sworn as provided by Section 13-5-71.

(2) Any juror may return the fees provided as compensation for service as a juror to the county that paid for the person's service as a juror. The fees

returned to the county may be earmarked for a particular purpose to be selected by the juror, including:

- (a) The local public library;
- (b) Local law enforcement;
- (c) The Mississippi Burn Care Fund created in Section 7-9-70; or
- (d) Any other governmental agency.

(3) The Administrative Office of Courts shall promulgate rules to establish a Lengthy Trial Fund to be used to provide full or partial wage replacement or wage supplementation to jurors who serve as petit jurors in civil cases for more than ten (10) days.

(a) The Uniform Circuit and County Court Rules shall provide for the following:

- (i) The selection and appointment of an administrator for the fund.
- (ii) Procedures for the administration of the fund, including payments of salaries of the administrator and other necessary personnel.
- (iii) Procedures for the accounting, auditing and investment of money in the Lengthy Trial Fund.
- (iv) A report by the Administrative Office of Courts on the administration of the Lengthy Trial Fund in its annual report on the judicial branch, setting forth the money collected for and disbursed from the fund.
- (v) The Lengthy Trial Fund Administrator and all other necessary personnel shall be employees of the Administrative Office of Courts.

(b) The administrator shall use any monies deposited in the Lengthy Trial Fund to pay full or partial wage replacement or supplementation to jurors whose employers pay less than full regular wages when the period of jury service lasts more than ten (10) days.

(c) To the extent funds are available in the Lengthy Trial Fund, and in



accordance with any rules or regulations promulgated by the Administrative Office of Courts, the court may pay replacement or supplemental wages out of the Lengthy Trial Fund not to exceed Three Hundred Dollars (\$300.00) per day per juror beginning on the eleventh day of jury service. In addition, for any jurors who qualify for payment by virtue of having served on a jury for more than ten (10) days, the court, upon finding that the service posed a significant financial hardship to a juror, even in light of payments made with respect to jury service after the tenth day, may award replacement or supplemental wages out of the Lengthy Trial Fund not to exceed One Hundred Dollars (\$100.00) per day from the fourth to the tenth day of jury service.

(d) Any juror who is serving or has served on a jury that qualifies for payment from the Lengthy Trial Fund, provided the service began on or after January 1, 2008, may submit a request for payment from the Lengthy Trial Fund on a form that the administrator provides. Payment shall be limited to the difference between the jury fee specified in subsection (1) of this section and the actual amount of wages a juror earns, up to the maximum level payable, minus any amount the juror actually receives from the employer during the same time period.

(i) The form shall disclose the juror's regular wages, the amount the employer will pay during the term of jury service starting on the eleventh day and thereafter, the amount of replacement or supplemental wages requested, and any other information the administrator deems necessary for proper payment.

(ii) The juror also shall be required to submit verification from the employer as to the wage information provided to the administrator, for example, the employee's most recent earnings statement or similar document, before initiation of payment from the fund.

(iii) If an individual is self-employed or receives compensation other than wages, the individual may provide a sworn affidavit attesting to his or her approximate gross weekly income, together with such other information as the administrator may require, in order to verify weekly income.

(4) Nothing in this section shall be construed to impose an obligation on any county to place monies in the Lengthy Trial Fund or to pay replacement or supplemental wages to any juror from county funds.

**§ 25-7-63      Jurors; amount:**

The amount of compensation due to each grand juror, petit juror, and juror summoned on a special venire and regularly discharged by the court shall, after the discharge of such juror, be determined on the oath of the juror, allowed in open court, and entered on the minutes thereof. The clerk shall thereupon give a certificate of the same to the juror, and said certificate shall be negotiable and shall be paid by the county treasurer upon presentation by the payee or the holder in due course. In all other cases the court or officer before whom the juror serves shall determine the sum due and give certificate accordingly.

## **THE PETIT JURY & JURY VERDICTS**

### **Right to a Trial by Jury**

**Mississippi Constitution, Article III, § 31, Trial by Jury**, provides:

The right to trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

Section 31 of the Mississippi Constitution provides that the right to trial by jury shall remain inviolate. This Court has interpreted that constitutional provision to apply to all cases where the right to trial by jury existed at common law. *Isaac v. McMorris*, 461 So. 2d 714, 715 (Miss. 1984) (citations omitted).

Section 31 of the Constitution of the State of Mississippi guarantees a jury trial only in those cases where a jury was necessary according to the principles of common law. *Walters v. Blackledge*, 71 So. 2d 433, 444 (Miss. 1954) (citations omitted).

**Mississippi Rule of Civil Procedure 38, Jury Trial of Right**, states:

(a) Right Preserved. The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate.

(b) Waiver of Jury Trial. Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived and requesting that the action be tried by the court. The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.

### *The Petit Jury*

A group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them. ***Black's Law Dictionary*** (10th ed. 2014).

### *Number of Jurors*

**Mississippi Rule of Civil Procedure 48, Juries and Jury Verdicts**, provides:

**(a) Circuit and Chancery Courts.** Jurors in circuit and chancery court actions shall consist of twelve persons, plus alternates as provided by Rule 47(d). A verdict or finding of nine or more of the jurors shall be taken as the verdict or finding of the jury.

Rule 47(d) places the decision to have alternate jurors within the trial court's sound discretion. ***See Miss. R. Civ. P 47(d)***.

### *Impaneling the Venire*

**Uniform Civil Rule of Circuit and County Court 3.03, Number of Petit Jurors Summoned**, states:

The court may direct the clerk of court concerning the number of petit jurors needed to be summoned for jury duty. The circuit and county court may employ the same jury venire in the selection of petit juries. . . .

### **§ 13-5-65      **Impaneling of petit juries:****

After the drawing of the grand jury, the remaining jurors in attendance shall be impaneled into three (3) petit juries for the first week of court if there be a sufficient number left, and, if not, the court may direct a sufficient number for that purpose to be drawn and summoned. If there be more than enough jurors for the three (3) juries, or for two (2) juries if the court shall direct only two (2) to be impaneled, the excess may be discharged, or they may be retained, in the discretion of the court, to serve as talesmen. If so retained, they shall have the privilege of members of the regular panel, of exemption from service.

**§ 13-5-30      Summoning of jurors where there is shortage of petit jurors drawn from jury box:**

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

The judge could have directed the [circuit] clerk to draw more names from the jury wheel. . . . A judge should not hesitate in enlarging the jury panel when legitimate questions for cause, for whatever reason, arise. *Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).

**Juror Examination - Voir Dire**

The purpose of voir dire is to select a fair and impartial jury. *Puckett v. State*, 737 So. 2d 322, 332 (Miss. 1999).

The judge has an absolute duty, however, to see that the jury selected to try any case is fair, impartial and competent. *Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992) (citations omitted).

**Preliminary Questions by the Court**

**Mississippi Rule of Civil Procedure 47(a), Jurors**, provides:

**(a) Examination of Jurors.** Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. . . .

[T]he trial judge . . . [should] propound all questions asked the jurors on their voi[r] dire touching [on] their qualifications. . . . *Williams v. State*, 124 Miss. 720, 87 So. 273, 273 (1921).

**Questions by the Parties**

**Mississippi Rule of Civil Procedure 47(a), Jurors**, states:

**(a) Examination of Jurors.** Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.

**§ 13-5-69 Examination of jurors by attorneys or litigants:**

Except in cases in which the examination of jurors is governed by rules promulgated by the Mississippi Supreme Court, the parties or their attorneys in all jury trials shall have the right to question jurors who are being impaneled with reference to challenges for cause, and for peremptory challenges, and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys or by litigants not represented by attorneys.

**Uniform Civil Rule of Circuit and County Court 3.05, Voir Dire**, provides:

In the voir dire examination of jurors, the attorney will question the entire venire only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

The trial court has broad discretion in passing on the extent and propriety of questions that are addressed to the venire. ***Davis v. State*, 684 So. 2d 643, 651 (Miss. 1996) (citations omitted).**

**Standard of Review for Voir Dire**

The standard used in examining the conduct of the voir dire is abuse of discretion. ***Berry v. State*, 575 So. 2d 1, 9 (Miss. 1990).**

### **Jury Selection Process**

**Uniform Civil Rule of Circuit and County Court 4.04, Jury Selection Process**, states:

A. Peremptory jury challenges shall be exercised as follows:

1. The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.
2. Next, the plaintiff shall tender to the defendant a full panel of accepted jurors having considered the jury in the order in which they appear, having exercised any peremptory challenges desired.
3. Next, the defendant shall go down the juror list accepted by the plaintiff and exercise any peremptory challenge(s) to that panel.
4. Once the defendant exercises peremptory challenges to the panel tendered, the plaintiff shall then be required to again tender to the defendant a full panel of accepted jurors.
5. The above procedure shall be repeated until a full panel of jurors has been accepted by both sides.
6. Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.

B. Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered.

### **Jury Challenges**

#### **Challenges for Cause<sup>1</sup>**

**Uniform Civil Rule of Circuit and County Court 4.04, Jury Selection Process**, states:

1. The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.

The judge has wide discretion in determining whether to excuse any prospective juror, including one challenged for cause. ***Scott v. Ball*, 595 So. 2d 848, 849 (Miss. 1992).**

To the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's

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<sup>1</sup>A party's challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror. ***Black's Law Dictionary* (10th ed. 2014).**

claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**

When a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**

When a rational challenge is made by a party to a prospective juror, and other jurors against whom no challenge is made are available, the judge should ordinarily excuse the challenged juror. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**

In our recent decision, *Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989), we added a factor which the judge should consider in reaching his decision whether or not to excuse a prospective juror when a rational reason to do so has been brought to his attention. *Hudson* involved a suit against a physician in which a number of the jury panel or members of their family had been patients of his. Because that suit was in a county in which the circuit court could have, without hardship or any significant inconvenience, summoned additional jurors for the venire, we reversed. Our implicit, if not explicit, holding in *Hudson* is that the judge's discretion in determining a juror's qualification where a reasonable challenge has been made is considerably narrowed where, without great inconvenience, other prospective jurors may be readily summoned. When a rational challenge is made by a party to a prospective juror, and other jurors against whom no challenge is made are available, the judge should ordinarily excuse the challenged juror. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992); see *Hudson v. Taleff*, 546 So. 2d 359, 360-63 (Miss. 1989).**

We have consistently held that the trial court may not be put in error for refusal to excuse jurors challenged for cause when the complaining party chooses not to exhaust his peremptory challenges. ***Scott v. Ball*, 595 So. 2d 848, 851 (Miss. 1992).**



## Peremptory Challenges<sup>2</sup>

Mississippi Rule of Civil Procedure 47(c), Jurors, provides:

**(c) Challenges.** In actions tried before a 12-person jury, each side may exercise four peremptory challenges. In actions tried before a 6-person jury, each side may exercise two peremptory challenges. Where one or both sides are composed of multiple parties, the court may allow challenges to be exercised separately or jointly, and may allow additional challenges; provided, however, in all actions the number of challenges allowed for each side shall be identical. Parties may challenge any juror for cause.

### Batson Objection to the Use of Peremptory Challenges

Under the current case law, a *Batson* challenge to a peremptory strike should now proceed as follows:

- (1) The opponent to the strike must establish a prima facie case of discrimination in the selection of the jury members.
- (2) The proponent of the strike then has the burden of stating a non-race, non-gender, or non-religious-based reason given for the strike. Once the proponent gives a neutral explanation, the opponent can then attempt to rebut that explanation.
- (3) The trial court must make an on-the-record factual finding for each peremptory challenge to determine if the proponent engaged in purposeful discrimination. *Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998).

### When Jury Challenges Cause a Shortage of Prospective Jurors

#### **§ 13-5-30      Summoning petit jurors where shortage:**

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

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<sup>2</sup>One of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate. . . . *Black's Law Dictionary* (10th ed. 2014).

### **Impaneling Alternate Jurors**

**Mississippi Rule of Civil Procedure 47(d), Jurors**, states:

**(d) Alternate Jurors.** The trial judge may, in his discretion, direct that one or two jurors in addition to the regular panel be called and empaneled to sit as alternate jurors.

Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties.

Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities, and privileges as the regular jurors.

Each party shall be allowed one peremptory challenge to alternate jurors in addition to those provided by subdivision (c) of this rule. The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges, provided by subdivision (c) of this rule, may not be used against an alternate juror.

We take this opportunity to remind the trial courts that the law states that alternate jurors may replace a juror only prior to the time the jury retires to deliberate. The alternate juror(s) must be discharged as soon as the jury retires to deliberate. *Department of Human Services v. Moore*, 632 So. 2d 929, 933 (Miss. 1994) (citations omitted).

#### **§ 13-5-67      Impaneling of alternate jurors:**

Except in cases in which jury selection and selection of alternate jurors is governed by rules promulgated by the Mississippi Supreme Court, whenever, in the opinion of a chancellor, the trial is likely to be a protracted one, such chancellor, in his discretion, may direct that one (1) or two (2) jurors in addition to the regular panel be called and impaneled to sit as alternate jurors.

Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.

An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict. . . .

In all other cases each party shall be allowed one (1) peremptory challenge to alternate jurors in addition to those otherwise provided by law. . . . The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges allowed by law may not be used against an alternate juror.

**Uniform Civil Rule of Circuit and County Court 4.04, Jury Selection Process,** provides:

6. Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth [in this rule] for selecting the jury panel.

**Oath of Petit Jurors**

**Oath**

**13-5-71      Oath of petit jurors:**

Petit jurors shall be sworn in the following form:

<p style="text-align: center;"><b>Oath</b></p> <p>You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God.</p>
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The oath shall authorize the jury to try all issues and execute all writs of inquiry which may be submitted to it during that term of the court. Talesmen, if any be summoned or retained, shall in like manner be sworn to try all issues and execute all writs of inquiry which may be submitted to them during the day for which they are summoned or the time for which they are retained.

### *Instructing the Jury*

**Mississippi Rule of Civil Procedure 51, Instructions to Jury**, states:

**(a) Procedural Instructions.** At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure, the duty and function of the jury, and may acquaint the jury generally with the nature of the case.

. . . .

**(c) Instructions to Be Written.** Except as allowed by Rule 51(a), all instructions shall be in writing.

**(d) When Read; Available to Counsel and Jurors.** Instructions shall be read by the court to the jury at the close of all the evidence and prior to oral argument; they shall be available to counsel for use during argument. Instructions shall be carried by the jury into the jury room when it retires to consider its verdict.

**Uniform Civil Rule of Circuit and County Court 3.07, Jury Instructions**, in pertinent part states:

The judge may instruct the jury. The court's instructions must be in writing and must be submitted to the attorneys, who in accordance with this rule, must dictate their specific objections into the record.

All instructions shall be captioned at the top of the page "Jury Instruction # \_\_\_\_" in order to allow the court to number the instructions given in such sequence as it deems proper. All letters and numerals identifying instructions submitted by parties for the court's consideration shall be in conformity with Rule 51(b)(2), Mississippi Rules of Civil Procedure, and shall be placed in the bottom right hand corner of each page.

All instructions will be read by the court in whatever order the court chooses, will be available for the attorneys during their argument, and will be carried by the jury into the jury room when they retire to consider their verdict.

### *Petit Jury Authority & Powers*

#### *Jurors May Take Notes During a Trial*

**Uniform Civil Rule of Circuit and County Court 3.14, Note Taking by Jurors**, states:

1. Note Taking Permitted in the Discretion of the Court - The court may, in its

discretion, permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

2. Instructions - The court shall instruct the jury as to whether note taking will be permitted. If the court permits jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. These instructions shall be given in the following manner.

(a) Preliminary Instruction - Note Taking Forbidden:

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes. You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(b) Preliminary Instruction - Note Taking Permitted:

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(c) Use of Notes During Deliberations - Jury Instruction #

Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors. Thus, during your deliberations, do not assume simply because something appears in your notes that it necessarily took place in court.

The court allows juror note taking at the discretion of the trial judge subject to some restrictions. However, a significant danger of prejudice exists if jurors are allowed to use in deliberations notes taken during trial. Juror notes may give undue weight to that portion of the evidence covered by a juror's notes at the expense of evidence on which no notes were taken. The notes should not be read or used by any juror other than the juror who took the notes. We therefore hold that juror notes are permissible, but should not be allowed to be taken by that juror into the jury room during deliberations. *Wharton v. State*, 734 So. 2d 985, 991 (Miss. 1998) (citations omitted).

### **Jurors May Not Interrogate Witnesses**

Although this Court has not written approvingly of the practice of juror interrogation of witnesses, the practice implemented by the judge in the present case is, in many respects, less objectionable than the practices which this Court considered in both *Myers* and *Lucas*. . . . The record reveals that the questions which were submitted to the witnesses all concerned factual matters. . . .

[However] the most obvious problem with allowing jurors to question witnesses is the unfamiliarity of jurors with the rules of evidence. Other potential problems include:

- (1) Counsel may be forced to either make an objection to a question in front of the juror who asks the question, at the risk of offending the juror, or withhold the objection and permit prejudicial testimony to come in without objection;
- (2) Juror objectivity and impartiality may be lessened or lost;
- (3) If the juror submits a question in open court, the other jurors are informed as to what the questioning juror is thinking, which may begin the deliberation process before the evidence is concluded and before final instructions from the court;
- (4) If the juror is permitted to question the witness directly, the interaction may create tension or antagonism in the juror; and
- (5) The procedure may disrupt courtroom decorum.

Today we hold that juror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this Court. *Wharton v. State*, 734 So. 2d 985, 989-90 (Miss. 1998).

### **Jury May View Property**

#### **§ 13-5-91 Jury may view the place:**

When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, . . . the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed.

After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by the court and by the representative of each side at the time and place of such view or

inspection, in reference to any material fact brought out by such view or inspection.

The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while so in session outside the courtroom it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance and to punish for contempt such as it has when sitting in the courtroom.

### **Jury Deliberations**

**Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict,** states:

The court may direct the jury to select one (1) of its members to preside over the deliberations and to write out and return any verdict agreed upon, and admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trial only while the jury is convened in the jury room for the purpose of reaching a verdict.

Trial judges should not appoint or select who is to serve as jury foreperson. *See Hunter v. State*, 684 So. 2d 625, 636 (Miss. 1996); *Ballenger v. State*, 667 So. 2d 1242, 1259 (Miss. 1995).

The jurors shall be kept together for deliberations as the court reasonably directs.

The court shall permit the jury, upon retiring for deliberation, to take to the jury room the instructions and exhibits and writings which have been received in evidence, except depositions.

After the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence.

The court, after notice to all attorneys, may recall the jury after it has retired and give such additional written instructions to the jury as the court deems appropriate.

If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its question to writing and the court in its discretion, after affording the parties an opportunity to state their objections or assent, may grant additional written instructions in response to the jury's request. . . .



### **Mistrial**

**Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict,** states in pertinent part:

If it appears to the court that there is no reasonable probability of agreement, the jury may be discharged without having agreed upon a verdict and a mistrial granted.

**Uniform Civil Rule of Circuit and County Court 3.12, Mistrials,** states in pertinent part:

Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case.

Upon motion of a party or its own motion, the court may declare a mistrial if:

1. The trial cannot proceed in conformity with law; or
2. It appears there is no reasonable probability of the jury's agreement upon a verdict.

### **Jury Verdicts**

**Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict,** states in pertinent part:

When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge.

The court shall ask the foreman or the jury panel if an agreement has been reached on a verdict. If the foreman or the jury panel answers in the affirmative, the judge shall call upon the foreman or any member of the panel to deliver the verdict in writing to the clerk or the court.

The court may then examine the verdict and correct it as to matters of form. The clerk or the court shall then read the verdict in open court in the presence of the jury.

**Mississippi Rule of Civil Procedure 48, Juries and Jury Verdicts,** states:

**(a) Circuit and Chancery Courts.** Jurors in circuit and chancery court actions shall consist of twelve persons . . . . A verdict or finding of nine or more of the jurors shall be taken as the verdict or finding of the jury.

**§ 13-5-93      Nine jurors may return a verdict in civil cases:**

In the trial of all civil suits in the circuit or chancery courts of this state, nine or more jurors may agree on the verdict and return it into court as the verdict of the jury. Either party may request an instruction in writing to this effect and it shall thereupon be the duty of the trial judge to instruct the jury in writing that if nine or more jurors agree on the verdict that they may return the same into open court as the verdict of the jury.

**Types of Civil Verdicts**

**Mississippi Rule of Civil Procedure 49, General Verdicts and Special Verdicts**, provides:

**(a) General Verdicts.** Except as otherwise provided in this rule, jury determination shall be by general verdict. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.

**(b) Special Verdict.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

**(c) General Verdict Accompanied by Answers to Interrogatories.** The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered consistent with the answers, notwithstanding the general verdict, or the court may return the jury for

further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

**(d) Court to Provide Attorneys With Questions.** In no event shall the procedures of subdivisions (b) or (c) of this rule be utilized unless the court, within a reasonable time before final arguments are made to the jury, provides the attorneys for all parties a copy of the written questions to be submitted to the jury.

### **Form of the Verdict**

**Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict,** states in pertinent part:

If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts the court shall declare a mistrial.

#### **§ 11-7-157     Form of verdict:**

No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.

The basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court. This well-established rule of law has long been recognized by this Court. *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So. 2d 954, 968 (Miss. 1999) (citations omitted); *see Byars v. Moore Planting Co.*, 755 So. 2d 415 (Miss. 2000); *Harrison v. Smith*, 379 So. 2d 517 (Miss. 1980) (discussing defective verdicts).

### **Polling The Jury**

**Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict,**  
states in pertinent part:

The court shall inquire if either party desires to poll the jury, or the court may on its own motion poll the jury. If neither party nor the court desires to poll the jury, the verdict shall be ordered filed and entered of record and the jurors discharged from the cause. If the court, on its own motion, or on motion of either party, polls the jury, each juror shall be asked by the court if the verdict rendered is that juror's verdict.

Where the required number of jurors have voted in the affirmative for the verdict, the court shall order the verdict filed and entered of record and discharge the jury.

If less than the required number cannot agree the court may:

- 1) return the jury for further deliberations or
- 2) declare a mistrial.

No motion to poll the jury shall be entertained after the verdict is ordered to be filed and entered of record or the jury is discharged.

### **Dismissing The Jury**

**Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict,**  
states in pertinent part:

[I]t is appropriate for the court to thank jurors at the conclusion of a trial for their public service. . . .

**CHAPTER 7**

**MISSISSIPPI RULE OF CIVIL PROCEDURE**

**81**

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## **CHAPTER 7**

### **MISSISSIPPI RULE OF CIVIL PROCEDURE**

#### **81**

#### **Scope of Rules**

##### **Mississippi Rule of Civil Procedure 1, Scope of Rules:**

These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

#### **Rule 81**

##### **Mississippi Rule of Civil Procedure 81, Applicability of Rules:**

**(a) Applicability in General.** These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

- (1) proceedings pertaining to the writ of habeas corpus;
- (2) proceedings pertaining to the disciplining of an attorney;
- (3) proceedings pursuant to the Youth Court Law and the Family Court Law;
- (4) proceedings pertaining to election contests;
- (5) proceedings pertaining to bond validations;
- (6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;
- (7) eminent domain proceedings;
- (8) Title 91 of the Mississippi Code of 1972;
- (9) Title 93 of the Mississippi Code of 1972;
- (10) creation and maintenance of drainage and water management districts;
- (11) creation of and change in boundaries of municipalities;
- (12) proceedings brought under §§ 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11- 1-49, 11-5-151 through 11-5-167, and 11-17-33.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

**(b) Summary Proceedings.** In ex parte matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

**(c) Publication of Summons or Notice.** Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

**(d) Procedure in Certain Actions and Matters.** The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules.

### **30 Day Matters**

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit:

- adoption;
- correction of birth certificate;
- alteration of name;
- termination of parental rights;
- paternity;
- legitimation;
- uniform reciprocal enforcement of support;
- determination of heirship;
- partition;
- probate of will in solemn form;
- caveat against probate of will;
- will contest;
- will construction;
- child custody actions;
- child support actions; and
- establishment of grandparents' visitation.

***Advisory Committee Notes:*** Rule 81(d) divides the actions therein detailed into two categories. This division is based upon the recognition that some matters, because of either their simplicity or need for speedy resolution, should be triable after a short notice to the defendant/respondent; while others, because of their complexity, should afford the defendant/respondent more time for trial preparation.



## 7 Day Matters

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit:

removal of disabilities of minority;  
temporary relief in divorce,  
separate maintenance,  
child custody, or  
child support matters;  
modification or enforcement of custody, support, and alimony judgments;  
contempt; and  
estate matters and  
wards' business

in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

In Rule 81 matters, a Rule 81 summons must be issued; otherwise, service is defective. Actual notice does not cure defective process. *Estate of Labasse v. Labasse*, 242 So. 3d 167, 173 (Miss. Ct. App. 2017), *cert. denied sub nom. Chester v. Labasse*, 246 So. 3d 70 (Miss. 2018).

Here, the record shows that Young was not provided notice through Rule 81. As discussed above, Young's citation was a citation of criminal contempt, and so she was entitled to notice via a Rule 81 summons. The chancery court failed to provide such notice, and, therefore, we find that the chancery court erred, creating an additional ground for reversal. *C.W. v. Lamar County*, 250 So. 3d 1248, 1258 (Miss. 2018).

Calling a “petition for contempt” a “motion” and using motion procedures with contempt actions is incorrect according to Rule 81. We recognized in *Sanghi* that the petitions there were denominated and noticed procedurally as “motions.” No summons was included with those “motions,” just as in the instant case. A petition, not a motion, is to be filed where a party is seeking contempt. Motions may be served by first-class mail. The procedural mechanisms that apply to motions do not apply to contempt matters. This has been the case since 1986 when Rule 81 was amended to that effect. Accordingly, service by mail of only Browning's “motion,” without a Rule 81 summons, was not appropriate. *Pearson v. Browning*, 106 So. 3d 845, 849 (Miss. Ct. App. 2012) (citations omitted).

Because Rule 81(d) embodies “special rules of procedure” that only apply to the matters listed in Rules 81(d)(1)-(2), and divorce is not one of these enumerated matters, service of Aileen's amended complaint for divorce falls outside the scope of Rule 81. Thus, the general rules govern, see *Sanghi*, and Rule 4 contains the proper procedure for serving the amended complaint. ***Clark v. Clark*, 43 So. 3d 496, 499 n.3 (Miss. Ct. App. 2010).**

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required so to do shall not be permitted to present evidence on his behalf.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

***Advisory Committee Notes:*** Rule 81(d)(5) recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend. If the matter is not heard on the date originally set for the hearing, the court may sign an order on that day continuing the matter to a later date. The rule also provides that the Court may adopt a rule or issue an order authorizing its Clerk to set actions or matters for original hearings and to continue the same for hearing on a later date.

The Mississippi Supreme Court has held that a central consideration under Rule 81 is the adequacy of the notice of the date, time, and place of the hearing. However, if a proper summons is given that notifies the other party of a new controversy that has arisen and of the date, time, and place for a hearing, the rule itself provides that an order entered on the day of the initially scheduled hearing obviates the need for any new summons for a hearing actually held on the later date. If no such order is entered, there should be a new Rule 81 summons. ***Matter of Dissolution of Marriage of***

***Tullos*, 230 So. 3d 330, 333 (Miss. Ct. App. 2017) (citations omitted).**

(6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to answer the original complaint.

**(e) Proceedings Modified.** The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

**(f) Terminology of Statutes.** In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement): Bill of complaint, bill in equity, bill, or declaration shall mean a complaint as specified in these rules; Plea in abatement shall mean motion; Demurrer shall be understood to mean motion to strike as set out in Rule 12(f); Plea shall mean motion or answer, whichever is appropriate under these rules; Plea of set-off or set-off shall be understood to mean a permissible counterclaim; Plea of recoupment or recoupment shall refer to a compulsory counterclaim; Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules; Revivor, revive, or revived, used with reference to actions, shall refer to the substitution procedure stated in Rule 25; Decree pro confesso shall be understood to mean entry of default as provided in Rule 55; Decree shall mean a judgment, as defined in Rule 54;

**(g) Procedure Not Specifically Prescribed.** When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute.

**Service of Process Under Rule 81(d)(5)**

**Mississippi Rule of Civil Procedure 81(d), Applicability of Rules:**

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

It is patent and obvious that the Chancellor erred in granting the default judgment.

Rule 81(d)(5) requires the issuance of summons commanding the defendant to appear and defend at a time and place at which the action is to be heard and precludes a default judgment. That kind of summons was not issued in this case. The proper procedure under Rule 81 would have been to serve [the father] with the motion for modification and a Rule 81 summons, setting a time and date for a hearing at the Hinds Chancery Court, First Judicial District, and informing him that he was not required to respond in writing. It appears from the record that at the time [the father] was served with the motion and Rule 4 summons, no date was set for a hearing. It is clear that under Rule 81, even had [the father] been served with the correct form of summons, he would not have been required to respond in writing to the motion. The effect of the Rule 4 summons was merely to inform [the father] that a motion for modification had been filed. Such "notice" does not comply with Rule 81, which requires that a date and time be set for a hearing. Therefore, the Court finds that when proceeding under matters enumerated in Rule 81, a proper 81 summons must be served. ***Powell v. Powell*, 644 So. 2d 269, 274 (Miss. 1994).**

***See Form 1D. Rule 81 Summons.***

Upon the filing of any action or matter listed in [Rule 81(d)] subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Rule 4 does not fully apply to such proceedings. Issuance of a summons in the form required by Rule 4 to notify a party of a Rule 81(d)(2) petition has no effect. A Rule 81 summons notifies a party "of the time and place where he is to appear and defend," while a Rule 4 summons requires a written response within 30 days. To utilize a summons form that provides only Rule 4 information necessarily means that Rule 81(d) information is not given. Sample form 1D states that the petition is attached to the summons, though the Rule itself is not explicit. Failure to attach would mean that the person served would not know the matter against which a defense is to be made. ***Sanghi v. Sanghi*, 759 So. 2d 1250, 1253 (Miss. Ct. App. 2000).**

***Service by Publication or Notice***

**Mississippi Rule of Civil Procedure 81(c), Applicability of Rules:**

**(c) Publication of Summons or Notice.** Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

### *Waiver of Service of Process*

#### **Mississippi Rule of Civil Procedure 4 Summons:**

**(e) Waiver.** Any party defendant who is not an unmarried minor, or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

With regard to a contempt proceeding, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The record shows Pearson was not given a meaningful opportunity to present evidence on his behalf. Even though Pearson appeared on November 3, 2010, he protested his lack of notice, regardless of how in-artful, such that his appearance cannot be labeled a waiver of insufficient notice. . . . The notice to Pearson by letter without an additional Rule 81 summons was not acceptable compliance with Rule 81(d)(5). Pearson did not waive this issue by appearing and contesting jurisdiction for lack of sufficient notice under Rule 81. Therefore, for all of the above reasons, the chancery court lost jurisdiction over Pearson when Pearson was not given sufficient notice under Rule 81. ***Pearson v. Browning*, 106 So. 3d 845, 851–52 (Miss. Ct. App. 2012).**

## **No Default Judgment Under Rule 81**

### **Mississippi Rule of Civil Procedure 81(d)(3), Applicability of Rules:**

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) 30 day matters and (2) 7 day matters above shall not be taken as confessed.

***Advisory Committee Notes:*** Rule 81(d)(3) provides that the pleading initiating the action should be commenced by complaint or petition only and shall not be taken as confessed. . . .

Under Rule 81, even when the defendant is properly served and fails to appear, an entry of default is improper since no answer is required to be filed by the defendant unless ordered by the court. The trial court must hold an evidentiary hearing on the issues set out in the pleadings before granting a judgment, and failure to do so is reversible error. ***Bailey v. Estate of Barksdale*, 187 So. 3d 204, 209 (Miss. Ct. App. 2016) (citations omitted).**

On the filing of this Motion, a regular Rule 4 summons was issued, and with the pleadings, requests for admissions and interrogatories served on the defendant. Walter did not answer. . . . On January 28, 1988, counsel filed an application for default judgment and supporting affidavit which showed, among other things, that Walter had about \$30,000 on deposit in a bank account for the undergraduate education of the child. . . . A default judgment was entered finding that the mother was entitled to an increase in the amount of child support and attorney's fees, fixing a date for an evidentiary hearing to determine the precise amounts of the increased support. In the meantime, Walter had discharged his attorney and employed a new one who filed an entry of appearance on February 24, 1988, and a motion to set aside the default judgment or for a continuance the same day. This motion charged, correctly, that under R. 81 the entry of default was improper since no answer was required to be filed by the defendant unless ordered by the court, and that the sanction of having the request for admissions deemed admitted was premature without a motion to compel. . . . It is patent and obvious that the Chancellor erred in granting the default judgment. Rule 81(d)(5) requires the issuance of summons commanding the defendant to appear and defend at a time and place at which the action is to be heard and precludes a default judgment. ***Saddler v. Saddler*, 556 So. 2d 344, 345-46 (Miss. 1990).**

**Service of Process by Mississippi Rule of Civil Procedure 4**

**Mississippi Rule of Civil Procedure 4 Summons:**

**(a) Summons: Issuance.** Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

**(b) Same: Form.** The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

**(c) Service.**

(1) By Process Server. A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) By Sheriff. A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) By Mail.

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) By Publication.

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized, by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or



other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, aver that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the plaintiff may have publication of summons for them and such proceedings shall be thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) Service by Certified Mail on Person Outside State. In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

**(d) Summons and Complaint: Person to Be Served.** The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2) (A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such person has no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

**(e) Waiver.** Any party defendant who is not an unmarried minor, or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

**(f) Return.** The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused". Failure to make proof of service does not affect the validity of the service.

**(g) Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

**(h) Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

***See Mississippi Rule of Civil Procedure 6 Time:***

**(b) Enlargement.** When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion

(1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect;

but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) except to the extent and under the conditions therein stated.

In *Cross Creek Productions v. Scafidi*, 911 So. 2d 958, 960 (Miss. 2005), we found that Rule 4(h)'s good-cause requirement “does not apply to a motion for additional time filed within the initial 120 days.” Instead, we determined that, under Rule 6(b), a party need only show “cause” to obtain an enlargement of time so long as the enlargement is sought within Rule 4(h)'s 120-day period. Rule 6(b) of the Mississippi Rules of Civil Procedure states:

(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) except to the extent and under the conditions therein stated. . . .

Rule 4(h), however, is not a specific rule governing a general rule because Rule 4(h) and Rule 6(b) are in no way contradictory. Rule

4(h) places a duty upon the trial court regarding service after 120 days and does not address enlargements of time. Rule 6(b), on the other hand, addresses enlargements of time and specifically notes the rules which remain unaffected by Rule 6(b). Notably, Rule 4 is not one of those rules. Therefore, if Rule 6(b) is meant to be read in conjunction with Rule 4(h), then a trial judge has discretion to grant a second (or third, fourth, fifth, etc.) enlargement of time to serve process “for cause shown” so long as the motion is “made before the expiration of the period . . . as extended by a previous order.” Rule 6(b) provides that a trial judge may grant an enlargement of time, not establish a separate period of time. Thus, Rule 4(h) actually requires a good-cause showing after the expiration of the 120-day period as enlarged by any court order pursuant to Rule 6(b), not just after “the expiration of 120 days. . . .” This holding is in conformity with a strict reading of the rules and their unambiguous language. . . . To demonstrate “for cause shown” or “cause” to obtain an enlargement of time under Rule 6(b)(1), a party must articulate a legitimate reason, made in good faith, as to why the enlargement of time should be granted. While this may not rise to the level of Rule 4(h)'s “good cause” standard, it requires something constituting diligence or a legitimate reason excusing same. This is not to say that continuous mistakes or inadvertence - while possibly made in good faith - would continue to satisfy Rule 6(b)'s “for cause shown” standard. Each case should be left to the discretion of the trial court so the judge can look to the totality of the circumstances to determine if “cause” is being shown in light of all facts and circumstances. Under this definition, we are able to issue a decision in compliance with the strict reading of Rule 6(b)(1) while, at the same time, ensuring that parties seek to perfect timely service of process. Further, this holding will not lead to unending litigation. Plaintiffs will be held to this “for cause shown” standard to obtain any enlargement of time, including the initial enlargement. Likewise, defendants still can challenge whether “cause” was shown. Also, a trial court's determination of cause will be reviewed under an abuse-of-discretion standard as with any other “fact-based finding.” *Fulgham v. Jackson*, 234 So. 3d 279, 282-84 (Miss. 2017) (citations omitted).

## **CHAPTER 8**

### **EVIDENCE**

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## **CHAPTER 8**

### **EVIDENCE**

#### **Authentication**

##### **Mississippi Rule of Evidence 901, Authenticating or Identifying Evidence:**

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Under Mississippi Rule of Evidence 901, the authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Authentication is a condition precedent to admissibility. Moreover, [a] party must make a prima facie showing of authenticity, and then the evidence goes to the jury, which ultimately will determine the evidence's authenticity. *Saunders v. State*, 241 So. 3d 645, 648 (Miss. Ct. App. 2018).

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

Rule 901 of the Mississippi Rules of Evidence governs the authentication of documents in Mississippi trial courts. [The defendant] sought to have the exemplars and the statements in question authenticated by an expert witness under Rule 901(b)(3), which provides that a document may be authenticated by comparison by the trier of fact or by expert witness with specimens which have been authenticated. While this is an acceptable form of authentication, it is certainly not the only form. A handwritten document may be authenticated by someone who is familiar with the handwriting of the purported writer of the document. This rule of evidence is well-established in Mississippi case law. "A witness

who in the course of official business or in any other way has acquired by experience a knowledge of a person's handwriting, may state his opinion as to whether a particular writing was made by such person.” *Flora v. State*, 925 So. 2d 797, 805-06 (Miss. 2006) (citation omitted).

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by the Mississippi Constitution or Court Rule. Any method of authentication or identification allowed by the Mississippi Constitution or a rule prescribed by the Mississippi Supreme Court.

Whether the evidence presented satisfies Miss. R. Evid. 401 and 901 is a matter left to the discretion of the trial judge. His decision will be upheld unless it can be shown that he abused his discretion. *Stromas v. State*, 618 So. 2d 116, 119 (Miss. 1993).

### **Self-Authentication**

#### **Mississippi Rule of Evidence 902, Evidence That Is Self-Authenticating:**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so.

The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Mississippi Supreme Court pursuant to statutory authority.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal or State Statute. A signature, document, or other matter that a Mississippi or federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Records of a Regularly Conducted Activity. A record that meets the requirements of Rule 803(6), if a certificate of the custodian or another qualified witness complies with subparagraph (A).

(A) Certificate. The certificate must show:

- (i) the custodian's or witness's first hand knowledge of the making, maintenance, and storage of the record; and
- (ii) that the record complies with Article X and Rules 803(6)(A)-(C) and 901(a).

A certificate relating to a foreign record must also be accompanied by the final certification required by paragraph (3).

The foundational requirements for admitting evidence under the business records exception are:

- 1) the statement is in written or recorded form;
- 2) the record concerns acts, events, conditions, opinions or diagnoses;
- 3) the record was made at or near the time of the matter recorded;
- 4) the source of the information had personal knowledge of the matter;
- 5) the record was kept in the course of regular business activity; and
- 6) it was the regular practice of the business activity to make the record. ***Dillon v. Greenbriar Digging Service, Ltd.*, 919 So. 2d 172, 175 (Miss. Ct. App. 2005) (citation omitted).**

(B) Notice. Before the trial or hearing at which the record will be offered, the proponent must give an adverse party notice of the intent to offer the record--and must provide a copy of the record and certificate--so that the party has a fair opportunity to state any

objection. Otherwise, the record is not self-authenticating under this paragraph (11).

(C) Making Objections. An adverse party waives any objection that is not:

- (i) stated specifically in writing; and
- (ii) served within 15 days after receiving the notice required by subparagraph (B), or at a later time that the parties agree on or that the court allows.

(D) Hearing and Ruling on Objections. The proponent must schedule a hearing on any objection, and the court should determine admissibility of the record before the trial or hearing at which it may be offered. If the court cannot do so, the record is not self-authenticating under this paragraph (11).

(E) Sanctions. In a civil case after the trial or hearing, the proponent may move that the objecting party and attorney pay the expenses of presenting the evidence necessary to have the record admitted. The court must so order, if it determines that the objection raised no genuine question and lacked arguable good cause.

(F) Definitions. In this paragraph “certificate” means:

- (i) for a domestic record, a written declaration under oath or attestation given under penalty of perjury; and
- (ii) for a foreign record, a written declaration signed in a foreign country that, if falsely made, would subject the maker to criminal penalty under that country's laws.

(12) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11).

(13) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11).

## Relevancy

### **Mississippi Rule of Evidence 401, Test for Relevant Evidence:**

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the case.

Rule 401 makes no distinction between relevancy and materiality. The Mississippi Rules of Evidence 401 defines relevant evidence as evidence which makes the determination of the action more probable or less probable than without the evidence. If the evidence has any probative value, the rule favors admission. *Suber v. Suber*, 936 So. 2d 945, 950 (Miss. Ct. App. 2006).

## Probative Value v. Prejudicial Effect

### **Mississippi Rule of Evidence 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons:**

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

**Advisory Committee Note:** Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. Such a rule also keeps collateral issues from being injected into the case. This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative.

Rule 403 is the ultimate filter through which all otherwise admissible evidence must pass. *Jenkins v. State*, 75 So. 3d 49, 55 (Miss. Ct. App. 2011).

While a trial court must certainly balance probative value and prejudice when evaluating evidence under Rule 403, a trial court's failure to articulate the balancing on the record does not require reversal. ***Brink v. State*, 888 So. 2d 437, 451 (Miss. Ct. App. 2004) (citations omitted).**

The trial court is afforded great discretion in determining whether or not to admit evidence under Rule 403. The Mississippi Supreme Court has long held that evidentiary rulings are within the trial judge's broad discretion and will only be reversed if the reviewing court perceives an abuse of that discretion. ***Gribble v. State*, 760 So. 2d 790, 792 (Miss. Ct. App. 2000).**

### **Photographs**

It is well settled in this state that the admission of photographs is a matter left to the sound discretion of the trial judge and that his decision favoring admissibility will not be disturbed absent a clear abuse of that judicial discretion. The discretion of the trial judge in this matter is almost unlimited, regardless of the gruesomeness, repetitiveness, and the extenuation of probative value. So long as a photograph has probative value and serves a meaningful evidentiary purpose, it may still be admissible despite being gruesome, grisly or inflammatory. The trial judge's discretion, however, while almost unlimited, is not completely unfettered. It has been noted by the Mississippi Supreme Court that photographs have been held to be so gruesome and inflammatory as to be prejudicial in only one circumstance, [a] close-up photograph of a partly decomposed, maggot-infested skull. Photographs are considered to have evidentiary value in the following instances: (1) aid in describing the circumstances of the killing; (2) describe the location of the body and the cause of death; (3) supplement or clarify witness testimony. ***Jones v. State*, 938 So. 2d 312, 316-17 (Miss. Ct. App. 2006) (citations omitted).**

### **Character Evidence**

#### **Mississippi Rule of Evidence 404, Character Evidence; Crimes or Other Acts:**

##### **(a) Character Evidence.**

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.



Although relevant, character evidence, also referred to as prior bad acts, may not be used for the purpose of proving that [a person] acted in conformity therewith on a particular occasion. But this rule has several exceptions, one of which is evidence of a pertinent trait of character of the victim of the crime offered by an accused. Another exception is where the evidence is not offered for character purposes, but rather for some other purpose. In this case, both exceptions apply. Rule 404(a)(2) which allows a defendant to admit evidence of a pertinent trait of character of the victim of the crime applies on its face. The character trait at issue violence is certainly pertinent to Richardson's claim of self-defense. And Rule 404(b) which allows character evidence to be introduced for other purposes applies because Richardson clearly and forcefully attempted to use the prior criminal history, not to show propensity, but to show his state of mind, that is, that at the time of the shooting, he feared Quilon, and that his fear was reasonable. Murder requires deliberate design. A killing in self-defense requires an objectively reasonable belief that lethal force was necessary to prevent death or serious bodily harm. Richardson's claim of self-defense not only allows, but requires evidence of the defendant's state of mind at the time of the killing. So, evidence showing Richardson's knowledge of Quilon's prior violent criminal history was quite clearly relevant under Rule 401's standard and admissible under the standards of Rule 404(a)(2) and Rule 404(b). ***Richardson v. State*, 147 So. 3d 838, 841-42 (Miss. 2014).**

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and

(C) the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

If evidence is admissible under Rule 404(b), it still must pass through Rule 403, which is the ultimate filter through which all otherwise admissible evidence must pass. *Horton v. State*, 253 So. 3d 334, 341 (Miss. Ct. App.), *cert. denied*, 252 So. 3d 595 (Miss. 2018).

While evidence of other crimes or bad acts is not usually admissible, an exception exists where [the evidence] is necessary to show identity, knowledge, intent, [or] motive[;] or to prove scienter. Another exception exists where the evidence is necessary to tell the complete story so as not to confuse the jury. *Barber v. State*, 143 So. 3d 586, 591 (Miss. Ct. App. 2013).

The trial judge instructed the jury that it could consider Cole's prior bad acts to show among other things the absence of mistake or accident. Where a defendant does not put mistake or accident at issue or where a reasonable juror could not conclude from the evidence that the defendant's conduct was an accident or mistake, prior-bad-acts evidence may not be admitted for that purpose. . . . We therefore cannot say that the trial judge abused his discretion in finding that the evidence of Cole's prior bad acts was admissible for the purpose of showing absence of accident or mistake. *Cole v. State*, 126 So. 3d 880, 885 (Miss. 2013).

### Limiting Instructions

#### **Mississippi Rule of Evidence 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes:**

If the court admits evidence that is admissible against a party or for a purpose--but not against another party or for another purpose--the court, unless expressly waived or rebutted, shall restrict the evidence to its proper scope, contemporaneously instruct the jury accordingly, and give a written instruction if requested.

The burden should properly be upon the trial counsel to request a limiting instruction. This was our rule before *Smith v. State*, in accord with Rule 105 of the Mississippi Rules of Evidence. The rule provides in pertinent part that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." We struggled in *Smith* to require judges to issue the sua sponte ruling, since that would contradict "a rule so clear" as M.R.E. 105. Today we abandon *Smith's* requirement that a judge issue a sua sponte limiting instruction and return to the clear language of Rule 105. The rule clearly places the burden of requesting a Rule 404(b) limiting instruction upon counsel. ***Brown v. State*, 890 So. 2d 901, 913 (Miss. 2004) (citation omitted).**

## Witnesses

### Husband & Wife

#### **Mississippi Rule of Evidence 601, Competency to Testify:**

(a) In General. Every person is competent to be a witness, except as provided in subdivisions (b) and (c).

(b) Competency of Spouse. If one spouse is a party, the other spouse may not testify as a witness in the case unless both consent, except:

(1) when called as a witness by the spouse who is a party;

(2) in a controversy between them; or

(3) in a criminal case for:

(A) a criminal act against a child;

(B) contributing to the neglect or delinquency of a child;

(C) desertion or nonsupport of a child under 16; and

(D) abandonment of a child.

#### **Compare § 13-1-5 Competency of spouses:**

Husbands and wives may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them. Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or nonsupport of children under the age of sixteen (16) years, or abandonment of children. But in all other instances where either of them is a party litigant the other shall not be competent as a witness and shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances without the consent of both.

Section 13-1-54 was superceded by Mississippi Rule of Evidence 601(a), but both contain similar language. ***Sandlin v. State*, 156 So. 3d 813, 818 (Miss. 2013).**

The record shows that, at the time of the homicide, appellant and his wife were divorced. . . . Since the parties were divorced at the time of the homicide, the wife was competent to testify as to the acts of the husband. *Hudson v. McAdory*, 268 So. 2d 916, 923 (Miss. 1972).

### **Husband-Wife Privilege**

#### **Mississippi Rule of Evidence 504, Spousal Privilege:**

(a) Definition. A communication is “confidential” if a person makes it privately to the person's spouse and does not intend its disclosure to any other person.

(b) General Rule of Privilege. A person has a privilege to prevent the person's current or former spouse from testifying in a civil or criminal case about any confidential communication between them.

(c) Who may Claim the Privilege. Either spouse may claim the privilege. A spouse has authority to claim the privilege on the other spouse's behalf.

(d) Exceptions. The privilege does not apply:

(1) in a civil case between the spouses; or

(2) in a criminal case when one spouse is charged with a crime against:

(A) the person of a minor child; or

(B) the person or property of:

(i) the other spouse;

(ii) a resident of either spouse's household;  
or

(iii) a third person when committed during a crime against any person described in paragraphs (d)(1) and (2).

After this transaction, and after the courts had severed the bonds of matrimony between him and his wife, will the courts permit him to tell about this transaction between himself and his wife, over the objections of his divorced wife? If to relate this story it can be said that the witness will be disclosing the confidences of husband and wife, we think the answer will be in the negative. On the other hand, if the witness is merely relating an ordinary business transaction, which the wife could have made with any other person, and which cannot be reasonably termed confidential, the answer must be the reverse. *Hesdorffer v. Hiller*, 71 So. 166, 166-67 (Miss. 1916).

### **Recorded Telephone Conversations**

#### **§ 41-29-503 Admission of evidence:**

The contents of an intercepted wire, oral or other communication and evidence derived from an intercepted wire, oral or other communication may not be received in evidence in any trial, hearing or other proceeding in or before any court, . . . if the disclosure of that information would be in violation of this article. *See* 18 U.S.C. § 2515 (1968).

#### **§ 41-29-535 Application:**

This article shall not apply to a person who is a subscriber to a telephone operated by a communication common carrier and who intercepts a communication on a telephone to which he subscribes. This article shall not apply to persons who are members of the household of the subscriber who intercept communications on a telephone in the home of the subscriber. *See* 18 U.S.C. § 2511 (1968).

The situation in the present case does appear to be factually distinguishable from those in *Stewart* and *Simpson*. In both of those cases, one spouse taped another spouse in the marital home. In this case Steve and Carol are not spouses, and have no marital home. The Fifth Circuit Court and this Court found no violation of the federal wiretapping statute, because they found that those situations fell within the business-use exception. The same logic that was applied in *Stewart* and *Simpson* should be applied to the case before

us today. If there is no prohibition against a spouse recording the conversations of another spouse within the marital home, then it follows that there should be no prohibition against a custodial parent recording the conversations of her children in the custodial home. Steve argues that the *Simpson* decision should not be extended beyond its particular facts, but we do not consider this decision an extension. The logic behind these cases is as follows. It is permissible to record what one could just as easily hear by picking up an extension phone. ***Wright v. Stanley*, 700 So. 2d 274, 279 (Miss. 1997) (citations omitted).**

### **Appraiser**

#### **Mississippi Rule of Evidence 601, Competency to Testify:**

(c) Competency of Appraiser. When the court--as required by law--appoints a person to make an appraisal for the immediate possession of property in an eminent domain case:

- (1) the appraiser may not testify as a witness in the trial of the case; and
- (2) the appraiser's report is not admissible in evidence during the trial.

### **Children**

#### **Mississippi Rule of Evidence 803, Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness:**

(25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

- (A) the court--after a hearing outside the jury's presence--determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and
- (B) the child either:
  - (i) testifies; or
  - (ii) is unavailable as a witness, and other evidence corroborates the act.

Under Mississippi Rule of Evidence 803(25), the “tender-years exception” to the hearsay rule, a witness may testify about statements made by a child of tender years describing any act of sexual contact with or by another. Before admitting this testimony, the trial judge must conduct a hearing outside the jury's presence and make two findings - - (1) the child was of tender years when she made the statement, and (2) the statement has substantial indicia of reliability. *Nelson v. State*, 222 So. 3d 318, 323 (Miss. Ct. App. 2017).

### **Tender Years**

For the tender-years exception to apply, the child must be of tender years. In determining whether a child is of tender years, the circuit court should consider the age of the child at the time the statement was made, not the age of the child at the time of the trial. *Little v. State*, 72 So. 3d 557, 560 (Miss. Ct. App. 2011).

Today we hold that there is a rebuttable presumption that a child under the age of twelve is of tender years. Where an alleged sexual abuse victim is twelve or older, there is no such presumption and the trial court must make a case-by-case determination as to whether the victim is of tender years. This determination should be made on the record and based on a factual finding as to the victim's mental and emotional age. If the court finds that the declarant is of tender years, then it must still rule on the Rule 803(25)(a) and (b) factors before admitting the testimony. *Veasley v. State*, 735 So. 2d 432, 436-37 (Miss. 1999).

***See § 99-43-101 Child witness standards of protection.***

### **Testimony Must Relate to Acts Performed With or On the Child**

There was no sexual contact "performed with or on the child" as defined in M.R.E. 803(25) [for the testimony to be admissible]. *Smith v. Jones*, 654 So. 2d 480, 491 (Miss. 1995).

### **Indicia of Reliability**

Some factors that the court should examine to determine if there is sufficient indicia of reliability are



- (1) whether there is an apparent motive on declarant's part to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declarations;
- (6) the relationship between the declarant and the witness;
- (7) the possibility of the declarant's faulty recollection is remote;
- (8) certainty that the statements were made;
- (9) the credibility of the person testifying about the statements;
- (10) the age or maturity of the declarant;
- (11) whether suggestive techniques were used in eliciting the statement; and
- (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated.

***Advisory Committee Note:*** Corroborating evidence may not be used as an indicia of reliability. A finding that there is a substantial indicia of reliability should be made on the record.

Again, this Court has previously held that no mechanical test is available to find substantial indicia of reliability. Although not an exhaustive list, some factors to consider are spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. Other factors to consider are whether there is an apparent motive on the part of the declarant to lie and the timing of the declarations. ***Hennington v. State*, 702 So. 2d 403, 418 (Miss. 1999).**

The reliability of the statement must be judged independently of any corroborating evidence; otherwise the confrontation clause may be violated. To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. ***Hennington v. State*, 702 So. 2d 403, 416 (Miss. 1999).**

### **Unavailability**

#### **Mississippi Rule of Evidence 804, Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness:**

- (a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: . . .

(2) refuses to testify about the subject matter despite a court order to do so; . . .

The trial judge's determination on the availability of a witness will not be disturbed on appeal unless this Court finds the trial judge abused his discretion. Clearly the record before this Court indicates the judge did all he could to persuade the child to testify. His repeated attempts were met with a flat refusal by the child. He simply did not want to go into court and testify about what had happened to him. We hold that the trial judge correctly found the child unavailable as a witness under Miss. R. Evid. 804(a)(2). ***Hennington v. State*, 702 So. 2d 403, 411 (Miss. 1999).**

(6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

The abuse of discretion standard is applied when considering a lower court's decision that a witness is unavailable, and the trial judge's determination will not be disturbed on appeal unless the appellate court finds that the trial judge abused his discretion. This Court finds that the trial court was entitled to rely on the uncontested testimony of the expert and did not abuse its discretion in finding that the children were unavailable within the meaning of M.R.E. 804(a)(6). ***Britt v. State*, 844 So. 2d 1180, 1184 (Miss. 2003).**

The trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and the emotional distress that would be suffered by the child witness must be more than mere nervousness or a reluctance to testify. ***J.L.W.W. v. Clarke County Dep't of Human Services*, 759 So. 2d 1183, 1186 (Miss. 1999) (citations omitted).**

## Expert Witnesses

### **Mississippi Rule of Evidence 702, Testimony by Expert Witnesses:**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

For expert testimony to be admissible, it must be both relevant and reliable. The party offering the testimony must show that the expert based his opinion not on opinions or speculation, but rather on scientific methods and procedures. The Court made it clear the role that the trial judge plays in assessing whether to allow expert testimony: The trial judge enjoys a role as a gatekeeper in assessing the value of the testimony. To be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue. As the trial court operates as the gatekeeper as to the admissibility of expert testimony, we examine the trial court's decision under an abuse of discretion standard of review. ***Moss v. Batesville Casket Co.*, 935 So. 2d 393, 404 (Miss. 2006) (citations omitted).**

### Qualifications

For a witness to be qualified as an expert, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003) (citations omitted).**

### Testimony

For expert testimony to be admissible, the witness' scientific, technical or other specialized knowledge must assist the trier of fact in understanding

or deciding a fact in issue. *Mississippi Transp. Comm’n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003) (citations omitted).

The trial court must determine that the expert testimony is relevant – that is, the requirement that the testimony must assist the trier of fact means the evidence must be relevant. *Mississippi Transp. Comm’n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003) (citations omitted).

The trial court must [also] determine whether the proffered testimony is reliable. *Mississippi Transp. Comm’n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003) (citations omitted).

The trial court must consider whether the expert opinion is based on scientific knowledge (reliability) and whether the expert opinion will assist the trier of fact to understand or determine a fact in issue (relevance). *Edmonds v. State*, 955 So. 2d 787, 791 (Miss. 2007) (citations omitted).

The trial court [should] also consider factors mentioned in *Daubert v. Merrell Dow Pharms., Inc.*:

1. whether the theory can be, and has been, tested;
2. whether the theory has been published or subjected to peer review;
3. any known rate of error; and
4. the general acceptance that the theory has garnered in the relevant expert community.

*Edmonds v. State*, 955 So. 2d 787, 791 (Miss. 2007) (citations omitted).

### **Limitations on Expert Witness Testimony**

Trial judges should remember their solemn gate-keeping responsibilities consistent with *Daubert*, our amended Rule 702, and *McLemore* and its progeny, whether it be assuring that an expert is confined to offering opinions within his/her areas of expertise or assuring that an expert's testimony is based upon sufficient facts and data, is the product of reliable principles and methods, and is based on the principles and methods having been applied reliably to the facts of the case. *Bullock v. Lott*, 964 So. 2d 1119, 1129 (Miss. 2007) (citations omitted).

The trial judges should take care that [a witness'] testimony as an expert is confined to the area of his expertise under Miss. R. Evid. 702. *Stubbs v. State*, 845 So. 2d 656, 670 (Miss. 2003)

### **Role of the Trial Judge**

The trial judge acts as a gatekeeper, ensuring that expert testimony is both relevant and reliable. *Bullock v. Lott*, 964 So. 2d 1119, 1128 (Miss. 2007) (citations omitted).

The admission of expert testimony is within the sound discretion of the trial judge. *Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003) (citations omitted).

The trial court's decision to allow expert testimony will be affirmed unless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case. *Bullock v. Lott*, 964 So. 2d 1119, 1128 (Miss. 2007) (citations omitted).

### **Other Expert Witness Testimony Rules**

#### **Mississippi Rule of Evidence 703, Bases of an Expert's Opinion Testimony:**

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.

#### **Mississippi Rule of Evidence 706, Court-Appointed Expert Witnesses:**

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs--and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

(f) Certain Eminent Domain Cases. Subdivisions (a)-(d) do not apply to an appraiser whom a court appoints--as required by law--for an immediate possession claim in an eminent domain case.

### **Exclusion of Witnesses**

#### **Mississippi Rule of Evidence 615, Excluding Witnesses:**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

Applying these principles to this case, the trial court erred in allowing the Sheriff to testify. The Rule had clearly been invoked by both parties at the beginning of the trial. At that point, all witnesses-- case-in-chief witnesses and rebuttal witnesses--should have been sequestered. . . . ***Douglas v. State*, 525 So. 2d 1312, 1316 (Miss. 1988)**

### **Violations of the Rule**

This Court has held that the possible remedies for violations of the sequestration rule include:

- prohibiting the witness from testifying,
- striking his testimony,
- citing him for contempt, or
- allowing a "full-bore" cross-examination.

***State v. Blenden*, 748 So. 2d 77, 85 (Miss. 1999)**

## Hearsay

### Definitions

#### **Mississippi Rule of Evidence 801, Definitions That Apply to This Article; Exclusions from Hearsay:**

(a) Statement. “Statement” means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;



(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

### **Hearsay Rule**

#### **Mississippi Rule of Evidence 802, The Rule Against Hearsay:**

Hearsay is not admissible except as provided by law. The words “as provided by law” include other rules prescribed by the Mississippi Supreme Court.”

### **Hearsay Exceptions - Availability of Declarant is Immaterial**

#### **Mississippi Rule of Evidence 803, Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness:**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. In *Clark v. State*, 693 So. 2d 927, 932 (Miss. 1997), the Mississippi Supreme Court held that the transcript of the victim's 911 call to the emergency operator fell within the present sense impression to the hearsay rule, because the events leading up to the call were sufficiently contemporaneous

to fit within the exception. ***Cabrere v. State*, 920 So. 2d 1062, 1065 (Miss. Ct. App. 2006)**

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition. The Mississippi Supreme Court [has] held that the transcript of the 911 call also fell within the excited utterance exception to the hearsay rule since it relates to the events that were unfolding as it was made, it was made while the victim was in an excited state, and it was made contemporaneously with the event. The circuit court was within its discretion in admitting the transcript of the 911 call into evidence. ***Cabrere v. State*, 920 So. 2d 1062, 1065 (Miss. Ct. App. 2006)**

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

The Court of Appeals addressed this same hearsay issue in *Edwards v. State*, 856 So. 2d 587 (Miss. Ct. App. 2003). The facts in *Edwards* are very similar to the case sub judice. Prior to his death, Nathaniel Edwards, Sr. (the victim) went to the home of his neighbor, a deputy police officer. The victim stated "I want you to come get my son out of the house because he is going to hit me in the head and take my money." The next day the victim was found dead with a lacerated head. The trial court admitted the evidence under M.R.E. 803(3) and allowed the officer to testify to the statement. In *Edwards*, the Court of Appeals correctly held that the trial court erred by admitting the hearsay statement pursuant to M.R.E. 803(3). However, the Court of Appeals found that the admission of the hearsay statement was harmless error because the properly admitted evidence was sufficient to support a jury verdict. We find that the statements in the case sub judice and *Edwards* are similar. The statements concerned two victims' desire to evict a defendant from their home prior to their deaths. Like *Edwards*, we find the trial court's admission of the testimony pursuant to M.R.E.

803(3) was error. However, the admission of the hearsay statement was harmless error because the properly admitted evidence was sufficient to support a jury verdict. ***McIntosh v. State*, 917 So. 2d 78, 82-83 (Miss. 2005)**

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made to any person at any time for--and is reasonably pertinent to--medical diagnosis or treatment;

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) is supported by circumstances that substantially indicate its trustworthiness.

In this paragraph, “medical” includes emotional, mental, and physical health.

Rule 803(4) provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. A two-part test must be met before Rule 803(4) testimony may be admitted. First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and second, the content of the statement must be such as is reasonably relied on by a physician in treatment.

***Osborne v. State*, 942 So. 2d 193, 197-98 (Miss. Ct. App. 2006)**

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The radio log was a record of regularly conducted business activity. It was therefore admissible under the business records exception to the hearsay rule. Such records are admissible upon the showing of the following foundational requirements: (1) the statement is in written or recorded form; (2) the record concerns acts, events, conditions, opinions or diagnoses; (3) the record was made at or near the time of the matter recorded; (4) the source of the information had personal knowledge of the matter; (5) the record was kept in the course of regular business activity; and (6) it was the regular practice of the business activity to make the record. *Cabrere v. State*, 920 So. 2d 1062, 1064 (Miss. Ct. App. 2006)

Counsel established all the foundational requirements necessary to admit the inspection report under the business records exception to the hearsay rule. The inspection report was one that was kept daily on the same form prepared by the inspector that was working that day. Ploattski was competent to testify about the inspection report because he worked for Lexie as an inspector and regularly kept similar records on the same form. The supreme court [has] held that a person who is familiar with the contents, terms, and

meaning of a form is competent to give testimony regarding the foundational requirements of the business record exception. *Dillon v. Greenbriar Digging Service, Ltd.*, 919 So. 2d 172, 176 (Miss. Ct. App. 2005)

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the prosecution in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

The Department's field inspectors prepare a weekly "kill report" for each inspected plant. This report is used for statistical information to track the number and weight of animals being slaughtered in the state. The reports are prepared on-site, e-mailed to the Department's main office in Jackson where they are printed, and then are sent to the USDA, Department of Agriculture Statistics. The documents, although available in e-mail form only and therefore unsigned, are admissible as government records

prepared in the regular course of business pursuant to Mississippi Rules of Evidence 803(8). The records were authenticated at the Commission hearing by their custodian, and were admitted into evidence. *Slay v. Spell*, 882 So. 2d 254, 259 (Miss. Ct. App. 2004)

(9) Public Records of Vital Statistics. A record of a vital statistic, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that  
(i) the record or statement does not exist; or  
(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an

opposing party without charge in discovery.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) Other Exceptions. A statement not specifically covered by this Rule if:



(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

In *Parker v. State*, 606 So. 2d 1132, 1138 (Miss. 1992), we analyzed the five requirements for the admission of hearsay under M.R.E. 803(24), which provides the same residual exception for the admission of hearsay as M.R.E. 804(b)(5), regardless of whether the declarant is available to testify.

The five requirements are

trustworthiness,  
materiality,  
probative value,  
interests of justice, and  
notice.

An on-the-record finding as to these five factors is generally required, and the trial judge has considerable discretion in determining whether to admit hearsay evidence under this exception and his decision will not be overturned except for an abuse of discretion. ***Rubenstein v. State*, 941 So. 2d 735, 751-52 (Miss. 2006)**

(25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

(A) the court -- after a hearing outside the jury's presence -- determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

- (i) testifies; or
- (ii) is unavailable as a witness, and other evidence corroborates the act.

**Hearsay Exceptions - Declarant Unavailable**

**Mississippi Rule of Evidence 804, Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness:**

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
  - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
  - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4); or
- (6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) Other Exceptions. A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of

trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

We [have] held [that this] analysis [should be] applied to M.R.E. 804(b)(5). The five requirements [for admissibility] are

trustworthiness,  
materiality,  
probative value,  
interests of justice, and  
notice.

An on-the-record finding as to these five factors is generally required, and the trial judge has considerable discretion in determining whether to admit hearsay evidence under this exception and his decision will not be overturned except for an abuse of discretion. ***Rubenstein v. State*, 941 So. 2d 735, 751-52 (Miss. 2006)**

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

### **Standard of Review for Admitting or Denying Evidence**

This Court reviews a trial judge's decision to admit or deny evidence under an abuse-of-discretion standard. If an error involves the admission or exclusion of evidence, this Court will not reverse unless the error adversely affects a substantial right of a party. ***Robinson Property Group v. Mitchell*, 7 So. 3d 240, 244 (Miss. 2009).**

**CHAPTER 9**

**ATTORNEY'S FEES**

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## **CHAPTER 9**

### **ATTORNEY'S FEES**

#### **§ 9-1-41 Evidence as to attorney fees reasonableness:**

In any action in which a court is authorized to award reasonable attorneys' fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

#### **Uniform Chancery Court Rule 6.12, Petitions for Allowance of Attorney's Fees, states:**

Every petition by a fiduciary or attorney for the allowance of attorney's fees for services rendered shall set forth the same facts as required in Rule 6.11, touching his compensation, and if so, the nature and effect thereof. If the petition be for the allowance of fees for recovering damages for wrongful death or injury, or other claim due the estate, the petition shall show the total amount recovered, the nature and extent of the service rendered and expense incurred by the attorney, and the amount if any, offered in compromise before the attorney was employed in the matter. In such cases, the amount allowed as attorney's fees will be fixed by the Chancellor at such sum as will be reasonable compensation for the service rendered and expense incurred without being bound by any contract made with any unauthorized persons. If the parties make an agreement for a contingent fee the contract or agreement of the fiduciary with the attorney must be approved by the Chancellor. Fees on structured settlements shall be based on the "present cash value" of the claim.

#### **Divorce Proceedings**

While the awarding of attorney's fees and costs appears automatic pursuant to the statute [§ 93-9-45], we have held that those fees must be reasonable. The record in this case includes a detailed Attorney's Report of Fees Incurred . . . with an itemization of all charges and expenses related to this paternity action, an employment contract, and affidavits from two attorneys practicing in [the] County as to the usual and customary fees charged by attorneys in domestic relations cases in the community. In his opinion, the chancellor noted, "the attorney's fees are reasonable, and the statute also says that the future father shall pay attorney fees if they are reasonable and they are granted. He shall pay them." This Court "will not disturb the factual findings of a chancellor when supported by

substantial evidence unless the Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard.” The chancellor's decision to award attorney's fees pursuant to Section 93-9-45 cannot be characterized as an abuse of discretion, manifestly wrong, or clearly erroneous. Mr. Coleman's reliance on *Clark v. Whiten*, 508 So. 2d 1105 (Miss. 1987) and *McKee v. McKee*, 418 So. 2d 764 (Miss. 1982), is misplaced. *Clark* involved a jury's, rather than a judge's, awarding of attorney's fees without any evidence such as the reasonableness of the hourly rate charged by the petitioner's attorneys. In contrast, the fees charged by Ms. Dobbins' attorney fall within the customary charge in the community, as explained in two attorney affidavits. In *McKee*, we found that fees based on an estimated 850 hours worked on the case were too speculative to support an award of attorney's fees. Here, the chancellor was provided with an itemized account of all of Ms. Dobbins' attorney's fees and charges. Given the substantial evidence supporting the chancellor's award of attorney's fees to Ms. Dobbins, we decline to disturb the chancellor's findings. ***Dobbins v. Coleman*, 930 So. 2d 1246, 1251-52 (Miss. 2006).**

Attorney fees are appropriate only where a party is financially unable to pay them. The fee should be fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary. ***Monroe v. Monroe*, 745 So. 2d 249, 253 (Miss. 1999) (citation omitted).**

[T]he determination of attorney's fees is largely within the sound discretion of the chancellor. ***Smith v. Smith*, 614 So. 2d 394, 398 (Miss. 1993).**

If a party is financially able to pay her attorney, an award of attorney's fees is not appropriate. ***Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990).**

In determining an appropriate amount of attorneys fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed. The fee depends on consideration of:

- the relative financial ability of the parties,
- the skill and standing of the attorney employed,
- the nature of the case and novelty and difficulty of the questions at issue,
- the degree of responsibility involved in the management of the cause,
- the time and labor required,
- the usual and customary charge in the community, and
- the preclusion of other employment by the attorney due to the acceptance of the case.

***McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982).**



We are also of the opinion the allowance of attorneys fees should be only in such amount as will compensate for the services rendered. It must be fair and just to all concerned after it has been determined that the legal work being compensated was reasonably required and necessary. *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982).

The standard for an award of attorney fees on a motion for modification of support is basically the same as that applied in an original divorce action. Attorney fees are not awarded in child support modification cases unless the party requesting fees is financially unable to pay them. *Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994).

### **Contempt Proceedings**

Attorney fees are appropriate only where a party is financially unable to pay them. *Monroe v. Monroe*, 745 So. 2d 249, 253 (Miss. 1999) (citation omitted).

This case also involved contempt proceedings. When the court denies a spouse's petition for contempt, no award of attorneys fees is warranted. Since [the wife] was successful on her motion for contempt, it follows she is eligible for an award of attorney fees. When considering an award of attorney fees, the lower court must take into account

- a sum sufficient to secure a competent attorney;
- the relative financial ability of the parties;
- the skill and standing of the attorney employed;
- the nature of the case and novelty and difficulty of the questions at issue;
- the degree of responsibility involved in the management of the cause;
- the time and labor required;
- the usual and customary charge in the community; and
- preclusion of other employment by the attorney due to the acceptance of the case.

But for [the former husband's] repeated failure to pay, [the wife] would not have incurred the expense of bringing multiple contempt actions against her former husband. *Varner v. Varner*, 666 So. 2d 493, 498 (Miss. 1995) (citations omitted).

### **Payment Directly to Attorney is Not Allowable**

The decree directed the payment of attorney's fees directly to the attorney for [the party] rather than to [the party] for her use and benefit to be applied to attorney's fees. This is error. *Massey v. Massey*, 475 So. 2d 802, 804 (Miss. 1985).

**Selected Statutes Which Authorize Attorney's Fees**

- § 9-5-255      Appointment of family masters**
- § 11-21-31      Reasonable attorney's fee**
- § 11-55-5        Costs awarded for meritless action**
- § 11-55-7        Discretion regarding amount awarded**
- § 31-13-11      Court costs and fee of bond attorney**
- § 35-5-23        Compensation of guardians for services**
- § 41-21-79      Liability for costs; maximum amount**
- § 43-19-31      Purpose of unit**
- § 43-19-37      Support, costs, attorney's fees; referral**
- § 89-9-21        Assessment upon condominium**
- § 91-7-281      Attorney's fees**
- § 93-5-23        Children; spousal maintenance or alimony; referrals for failure to pay child support**
- § 93-14-207     Jurisdiction declined by reason of conduct**

**Standard of Review**

The standard of review to be applied to a trial court's decision on attorney fees is abuse of discretion but otherwise, a reviewing court will not undertake to substitute its judgment for that of the chancellor. Unless the chancellor is manifestly wrong, his decision regarding attorney fees will not be disturbed on appeal. *In re Conservatorship of Williams*, 724 So. 2d 1022, 1027 (Miss. Ct. App. 2001) (citation omitted).

**CHAPTER 10**

**STANDARDS OF REVIEW**

**CHART**

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## CHAPTER 10

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Issue	Standard of Review	Case
Agency or board ruling, trial court review of	Arbitrary & capricious	When this Court reviews a decision by a chancery or circuit court concerning an agency action, it applies the same standard of review that the lower courts are bound to follow. We will entertain the appeal to determine whether the order of the administrative agency 1) was unsupported by substantial evidence; 2) was arbitrary or capricious; 3) was beyond the power of the administrative agency to make; or 4) violated some statutory or constitutional right of the complaining party. <i>Miss. Sierra Club v. Miss. Dep't of Envtl. Quality</i> , 819 So. 2d 515, 519 (Miss. 2002).
Attorney's fees	Abuse of discretion	Whether to award attorney's fees rests entirely within the discretion of the trial court. A trial court's decision on attorney's fees is subject to an abuse of discretion standard. Unless the trial court is manifestly wrong, its decision regarding attorney's fees will not be disturbed on appeal. <i>Ward v. Ward</i> , 825 So. 2d 713, 720 (Miss. Ct. App. 2002).
<i>Batson</i> findings	Clearly erroneous or against the overwhelming weight of the evidence	We give great deference to the trial court's findings of whether or not a peremptory challenge was race neutral. Such deference is necessary because finding that a striking party engaged in discrimination is largely a factual finding and thus should be accorded appropriate deference on appeal. Indeed, we will not overrule a trial court on a <i>Batson</i> ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence. <i>Manning v. State</i> , 765 So. 2d 516, 519 (Miss. 2000).
Contempt of court (civil)	Manifest error	In civil contempt actions, the trial court's findings are affirmed unless there is manifest error. <i>Riley v. Wiggins</i> , 908 So. 2d 893, 897 (Miss. Ct. App. 2005).

Contempt of court (criminal)	Ab initio	This Court proceeds ab initio to determine whether the record proves the appellant guilty of contempt beyond a reasonable doubt. <i>Brame v. State</i> , 755 So. 2d 1090, 1093 (Miss. 2000).
Death penalty issues	Heightened review	On appeal to this Court convictions of capital murder and sentences of death must be subjected to what has been labeled “heightened scrutiny.” Under this method of review, all bona fide doubts are to be resolved in favor of the accused because “what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.” <i>Balfour v. State</i> , 598 So. 2d 731, 738 (Miss. 1992).
Domestic relations	Manifest error/ clearly erroneous	In domestic relations cases the scope of review is limited by the substantial evidence/manifest error rule. This Court may reverse a chancellor's findings of fact only when there is no substantial credible evidence in the record to justify his finding. Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. <i>Jundoosing v. Jundoosing</i> , 826 So. 2d 85, 88 (Miss. 2002).
Eminent domain	Verdict is grossly excessive and evinces bias, passion and prejudice by the jury	This Court has quite thoroughly set forth the standard of review for jury verdicts in eminent domain cases as follows: As in the case of any other jury determination of damages, we are not at liberty to order a new trial unless the verdict is so at variance with the evidence as to shock the conscience of the court. Except where the verdict is grossly excessive and evinces bias, passion and prejudice by the jury, we have no authority to require the prevailing party to submit to a second adjudication. This rule applies in eminent domain cases as in others. <i>Miss. Transp. Comm'n v. Bridgforth</i> , 709 So. 2d 430, 441 (Miss. 1998).

Evidence, admission or exclusion	Abuse of discretion	The standard of review regarding the admission or exclusion of evidence is abuse of discretion. <i>Yoste v. Wal-Mart Stores, Inc.</i> , 822 So. 2d 935, 936 (Miss. 2002).
Expert testimony	Abuse of discretion	Our standard of review for challenges to the qualifications of an expert witness has been stated as follows: The qualification of an expert in fields of scientific knowledge are left to the sound discretion of the trial court. Its determination on this issue will not be reversed unless it clearly appears that the witness is not qualified. This Court reviews the trial court's decision to allow expert testimony under the well-known clearly erroneous standard. Similarly, an expert's testimony is always subject to M.R.E. 702. For a witness to give a M.R.E. 702 opinion, the witness must have experience or expertise beyond that of an average adult. Thus, we generally defer to the discretion of the trial court in determining whether an expert is qualified to testify, and we will only reverse when there was clear error or clear abuse of discretion in the decision to admit the testimony. <i>Cowart v. State</i> , 910 So. 2d 726, 728-29 (Miss. Ct. App. 2005).
Findings of fact	Manifest error	Findings of fact are given deferential treatment and are subject to the manifest error/substantial evidence standard. <i>Russell v. Performance Toyota, Inc.</i> , 826 So. 2d 719, 721 (Miss. 2002).
Findings of fact by Chancellor	Manifest error/ clearly erroneous	A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. <i>Sanderson v. Sanderson</i> , 824 So. 2d 623, 625-26 (Miss. 2002).

Findings of fact by Circuit Judge	Manifest error/ clearly erroneous	A circuit court judge sitting without a jury is afforded the same deference as a chancellor. We will not disturb a circuit court's findings after a bench trial unless they are manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. <i>City of Jackson v. Sandifer</i> , 107 So. 3d 978, 983 (Miss. 2013).
JNOV/directed verdict, motion for (civil case)	Evidence viewed in the light most favorable to the verdict	The standard of review for the denial of a motion for judgment notwithstanding the verdict and a motion for directed verdict are identical. This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts are so overwhelmingly in favor of the appellant that a reasonable juror could not have arrived at a contrary verdict, this Court must reverse and render. On the other hand, if substantial evidence exists in support of the verdict, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, then this Court must affirm. <i>Harrah's Vicksburg Corp. v. Pennebaker</i> , 812 So. 2d 163, 170 (Miss. 2002).



JNOV/directed verdict, motion for (criminal case)	Evidence viewed in the light most favorable to the verdict	<p>When one argues on appeal concerning the legal sufficiency of the evidence supporting a conviction, the standard is as follows: This Court has often stated the standard of review to be used on motions for a directed verdict: In passing upon a motion for a directed verdict, all evidence introduced by the State is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for directed verdict must be overruled. A motion for judgment notwithstanding the verdict, after the jury verdict is returned, essentially tests the legal sufficiency of the evidence that supports a guilty verdict. The standard of review for such a claim is familiar: Where a defendant has moved for jnov, the trial court must consider all of the evidence which supports the State's case--in a light most favorable to the State. The State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences 'so considered' point in favor of the defendant with sufficient force that reasonable men could not have found 'beyond a reasonable doubt' that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion--that is, evidence of such quality and weight that having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions--the motion should be denied. <i>Corbin v. State</i>, 585 So. 2d 713, 715 (Miss. 1991).</p>
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Judicial Performance	De novo	We review judicial disciplinary matters under a de novo standard, though the findings of fact and recommendations of the Commission are carefully reviewed. In a judicial disciplinary proceeding the Supreme Court must conduct an independent inquiry and make its own final determination of the appropriate sanction, although the Court accords careful consideration to the findings of fact and recommendations of the Commission on Judicial Performance or its committee. <i>Miss. Comm'n on Jud. Performance v. Hartzog</i> , 822 So. 2d 941, 943 (Miss. 2002).
Jurisdiction, in personam	De novo	An appellate court reviews jurisdictional issues de novo by examining the facts set out in the pleadings and exhibits to determine the propriety of the proceedings. <i>American Cable Corp. v. Trilogy Communications, Inc.</i> , 754 So. 2d 545, 549 (Miss. Ct. App. 2000).
Jurisdiction, subject matter	De novo	Whether the trial court had jurisdiction to hear a particular matter is a question of law, to which this Court must apply a de novo standard of review. <i>Edwards v. Booker</i> , 796 So. 2d 991, 994 (Miss. 2001).
Jury instructions (civil case)	Read as a whole	This Court's standard of review in reviewing jury instructions is as follows: In determining whether reversible error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. <i>Whitten v. Cox</i> , 799 So. 2d 1, 16 (Miss. 2000).

Jury instructions (criminal case)	Read as a whole	Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. <i>Poole v. State</i> , 826 So. 2d 1222, 1230 (Miss. 2002).
Law, questions of	De novo	We conduct a de novo review for determinations of legal questions. <i>Russell v. Performance Toyota, Inc.</i> , 826 So. 2d 719, 721 (Miss. 2002).
Mistrial, failure to grant (civil case)	Abuse of discretion	In civil cases, this Court leaves the grant or denial of a mistrial or new trial founded upon juror misconduct to the sound discretion of the trial court. A mistrial or a new trial should not be granted on this ground in a civil case, unless the circumstances indicate some prejudice, wrongful intent, or unfairness. <i>Fielder v. Magnolia Beverage Co.</i> , 757 So. 2d 925, 936-37 (Miss. 1999).
Mistrial, failure to grant (criminal case)	Abuse of discretion	Whether to grant a motion for mistrial is within the sound discretion of the trial court. The standard of review for denial of a motion for mistrial is abuse of discretion. <i>Caston v. State</i> , 823 So. 2d 473, 492 (Miss. 2002).
New trial, motion for Verdict is against the overwhelming weight of the evidence, or the result of bias, passion, or prejudice on the part of the jury (civil case)	Abuse of discretion in failing to grant a new trial	In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. <i>Wal-Mart Stores, Inc. v. Frierson</i> , 818 So. 2d 1135, 1143 (Miss. 2002).

New trial, motion for Verdict is against the overwhelming weight of the evidence, or the result of bias, passion, or prejudice on the part of the jury (criminal case)	Abuse of discretion in failing to grant a new trial	In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. <i>Montana v. State</i> , 822 So. 2d 954, 967-68 (Miss. 2002).
Post-conviction relief motion, denial of	Clearly erroneous	In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. <i>Smith v. State</i> , 806 So. 2d 1148, 1150 (Miss. Ct. App. 2002).
Recusal	Abuse of discretion (M.R.A.P. 48B) or Manifest error (by case law)	The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Miss. R. App. P. 48B. This Court reviews a trial court judge's refusal to recuse themselves under the manifest error standard of review. <i>State v. Culp</i> , 823 So. 2d 510, 514 (Miss. 2002).
Sentencing	Abuse of discretion (not within the limits of the statute)	Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute. <i>Nichols v. State</i> , 826 So. 2d 1288, 1290 (Miss. 2002).

Statutory interpretation	De novo	Statutory interpretation is a matter of law and is therefore reviewed de novo. <i>Grand Casino Tunica v. Shindler</i> , 772 So. 2d 1036, 1038 (Miss. 2000).
Summary judgment	De novo	This Court employs a de novo standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it -- admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his or her favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says to the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt. <i>McMillan v. Rodriguez</i> , 823 So. 2d 1173, 1176 (Miss. 2002).
Venue, change of	Abuse of discretion	A trial court's decision whether or not to grant a change of venue is reviewed for an abuse of discretion. <i>Grayson v. State</i> , 806 So. 2d 241, 250 (Miss. 2002).
Venue, transfer of	Abuse of discretion	An application for a change of venue is addressed to the discretion of the trial judge, and his or her ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case. <i>Donald v. Amoco Prod. Co.</i> , 735 So. 2d 161, 181 (Miss. 1999).

Voir dire, conduct of	Abuse of discretion	The standard of review in examining the conduct of voir dire is abuse of discretion. <i>Berry v. State</i> , 575 So. 2d 1, 9 (Miss.1990).
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**CHAPTER 11**  
**LIMITATIONS OF ACTIONS**

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## **CHAPTER 11**

### **LIMITATIONS OF ACTIONS**

#### **Abatement, Survival and Revival of Actions**

##### **§ 15-1-69      Commencement of new action:**

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

#### **Absence**

##### **§ 15-1-63      Person absent from state:**

If, after any cause of action has accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after he shall return.

#### **Accounts**

##### **§ 15-1-29      Actions on an open account or account stated; unwritten contracts:**

Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

[W]e conclude that an attorney's action against his client for fees for professional legal services rendered by the attorney to the client on open account pursuant to an unwritten agreement is subject to the three-year limitations period prescribed by § 15-1-29 for actions on an open account or any unwritten contract, not the one-year limitation period prescribed by the same statute for actions based on an unwritten contract of employment. *Michael S. Fawer v. Evans*, 627 So. 2d 829 (Miss. 1993).

**§ 15-1-31      Actions to recover upon a mutual and open current account:**

In all actions brought to recover the balance due upon a mutual and open current account, where both parties are merchants or traders, the cause of action shall be deemed to have accrued at the time of the true date of the last item proved in such account. In all other actions upon open accounts, the period of limitation shall commence to run against the several items thereof from the dates at which the same respectively became due and payable.

**Actions Accruing Out of State**

**§ 15-1-65      Cause of action barred in foreign jurisdiction:**

When a cause of action has accrued outside of this state, and by the laws of the place outside this state where such cause of action accrued, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; provided, however, that where such a cause of action has accrued in favor of a resident of this state, this state's law on the period of limitation shall apply.

**Adoption**

**§ 93-17-15      Limitations period, challenging final decree:**

No action shall be brought to set aside any final decree of adoption, whether granted upon consent or personal process or on process by publication, except within six (6) months of the entry thereof.

**Adverse Possession**

**§ 15-1-13      Adverse possession; exception:**

- (1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.
- (2) For claims of adverse possession not matured as of July 1, 1998, the provisions of subsection (1) shall not apply to a landowner upon whose property a

fence or driveway has been built who files with the chancery clerk within the ten (10) years required by this section a written notice that such fence or driveway is built without the permission of the landowner. Failure to file such notice shall not create any inference that property has been adversely possessed. The notice shall be filed in the land records by the chancery clerk and shall describe the property where said fence or driveway is constructed.

### **Alteration of Limitations by Contract**

#### **§ 15-1-5 Contractual change of period of limitation:**

The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various causes of action the same for all litigants.

### **Banks**

#### **§ 75-4-406 Customer's Duty to Discover and Report Unauthorized Signature or Alteration:**

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 75-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

#### **§ 81-5-27 Stockholder liability:**

The stockholders of every bank shall be individually liable, actually and ratably, and not for one another, for the benefit of the depositors in said bank at the amount of their stock at the par value thereof, and in addition to said stock. However, persons holding stock as executors, administrators, guardians or trustees shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living or competent to act. Persons holding stock as collateral security shall not be personally liable as stockholders, but the person pledging such stock shall be deemed the stockholder and liable under this section. Such double liability may be enforced in a suit at law or in equity by the receiver of any bank in process of

liquidation. Such suit, however, shall be brought within six years from the date the bank went into liquidation and not thereafter. . . .

**§ 15-1-79      Actions on debt issued by bank, moneyed corporation:**

None of the provisions of this chapter shall apply to suits brought to enforce payment of notes, bills, or evidences of debt issued by any bank or moneyed corporation.

**Bonds and Coupons**

**§ 31-19-33      Statute of limitations for action:**

Action against the state or any county, municipality, school district or political subdivision of the state of Mississippi for the payment of any bond issued thereby or for the payment of any coupon representing interest on such bond shall be commenced within twenty (20) years after the maturity date of such bond.

**§ 15-1-27      Actions by ward against a guardian or bond sureties:**

All actions against a guardian and the sureties on his bond, or either of them, by the ward, shall be commenced within five years next after the ward shall have arrived at the age of twenty-one years, and not after.

**Business Takeovers**

**§ 75-72-119      Investigation of violations:**

(4) No action may be maintained under this section unless commenced before the expiration of three (3) years after the discovery of the facts constituting the violation.

**Concurrent Jurisdiction**

**§ 15-1-77      Concurrent jurisdiction; law and equity:**

Whenever there be a concurrent jurisdiction in the courts of common law and in the courts of equity of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause in a court of chancery.

### **Completion of Limitations**

#### **§ 15-1-3      Completion of period of limitation:**

(1) The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. . . .

### **Concealment**

#### **§ 15-1-67      Fraudulent concealment of claim:**

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

### **Construction Contracts and Works**

#### **§ 31-3-23      Appeals and remedies:**

Within ten (10) days after any order, judgment or action of the board, any person aggrieved thereby may appeal such order, judgment or action either to the chancery court of the county wherein the appellant resides or to the Chancery Court of the First Judicial District of Hinds County, Mississippi. . . .

#### **§ 85-7-189      Suit on bond; commencement:**

(1) Suit on a performance claim by an obligee on a bond given in accordance with this chapter shall be commenced as follows:

(a) If the obligee is the owner of the project being constructed, such obligee shall bring suit within one (1) year after the earlier of final completion or actual use or occupancy of the project for its intended purpose; or

(b) If the obligee is other than an owner of the project being constructed, such obligee shall bring suit within one (1) year after such obligee receives final payment with respect to the project.

(2) When suit is instituted on a claim for payment on a payment bond given in accordance with this chapter, it shall be commenced within one (1) year after the day on which the last of the labor was performed or material or rental or lease equipment was supplied by the person bringing the action and not later. . . .

**§ 15-1-41      Actions arising from construction deficiencies:**

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity. This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury. This limitation shall not apply to actions for wrongful death.

**Criminal Procedure**

**§ 99-1-5      Limitations; exceptions:**

The passage of time shall never bar prosecution against any person for the offenses of murder, manslaughter, aggravated assault, aggravated domestic violence, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(1)(c), (d) or (2), exploitation of children as described in Section 97-5-33, promoting prostitution under Section 97-29-51(2) when the person involved is a minor, or for any human trafficking offense described in Section 97-3-54.1(1)(a), (1)(b) or (1)(c), Section 97-3-54.2, or Section 93-3-54.3. A person shall not be prosecuted for conspiracy, as described in Section 97-1-1, for felonious assistance-program fraud, as described in Section 97-19-71, or for felonious abuse of vulnerable persons, as described in Sections 43-47-18 and 43-47-19, unless the prosecution for the offense is commenced within five (5) years next after the commission thereof. A person shall not be prosecuted for larceny of timber as described in Section 97-17-59, unless the prosecution for the offense is commenced within six (6) years next after the commission thereof. A person shall not be prosecuted for any other offense not listed in this section unless the



prosecution for the offense is commenced within two (2) years next after the commission thereof. Nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

**§ 99-1-9      Limitations; additional year permitted:**

When an indictment shall be lost or destroyed, or quashed or abated, or the judgment thereon arrested or reversed for any defect therein or in the record, or for any matter of form or other cause, not being an acquittal on the merits, the further time of one year from the time when such indictment shall be lost, destroyed, quashed or abated, or the judgment thereon arrested or reversed, shall be allowed for the finding of a new indictment.

**§ 99-17-1      Trial within 270 days of arraignment:**

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

**§ 99-39-5      Post-Conviction Collateral Relief: Motion for relief; grounds; limitations:**

(2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:

- (a) (i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or
- (ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood

of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction. . . .

***See Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010) (holding errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA).**

### **Death of Party**

#### **§ 15-1-55      Death of person before expiration of period of limitation:**

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

### **Disability of Infancy or Unsoundness of Mind**

#### **§ 15-1-59      Person under disability of infancy or unsoundness of mind:**

If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

#### **§ 15-1-53      Actions against a trustee:**

When the legal title to property or a right in action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability and within the saving of any statute of limitations; and may be availed of in any suit or actions by such person.

## Easements - Highways

### **§ 65-1-49      Easements for highway purposes; procedures for conveyances and assignments:**

The conveyance or assignment of easements for highway purposes may be made by the owner thereof to the Mississippi State Highway Commission or the board of supervisors of any county for highway purposes. All actions by any person owning any interest in the land involved in such conveyance or assignment accruing as a result thereof must be brought within three years after the date of such conveyance or assignment; provided, however, that the land involved is actually used for highway purposes or notice is posted thereon that it will be used for highway purposes within said three-year period, otherwise said period shall be six years from the date of such conveyance or assignment. . . .

## Estates

### **§ 15-1-25      Action against executor or administrator:**

An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor or administrator.

### **§ 91-7-151      Limitations period; amending affidavits:**

All claims against the estate of deceased persons, whether due or not, shall be registered, probated and allowed in the court in which the letters testamentary or of administration were granted within ninety (90) days after the first publication of notice to creditors to present their claim. . . .

### **§ 91-7-153      Presentation and registration toll limitations:**

The presentation of a claim, and having it probated and registered as required by law, shall stop the running of the general statute of limitations as to such claim, whether the estate be solvent or insolvent.

### **§ 91-7-235      Actions for decedent's trespass:**

When any decedent shall in his lifetime have committed any trespass, the person injured, or his executor or administrator, shall have the same action against the executor or administrator of the decedent as he might have had or maintained against the testator or intestate, and shall have like remedy as in other actions against executors and administrators. Vindictive damages shall not be allowed, and such action shall be commenced within one year after publication of notice to creditors to probate and register their claims.

### **Fines, Penalties and Forfeitures**

#### **§ 15-1-33      Actions for penalty or forfeiture on a penal statute:**

All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

### **Game and Fish Prosecutions**

#### **§ 49-5-41      Application of section 99-1-5:**

Section 99-1-5 shall apply to all violations of the laws or regulations relating to wild animals, birds, or fish.

### **Governmental and Political Subdivisions, Actions Against**

#### **§ 11-46-11      Notice of claim requirements; infancy or unsoundness of mind:**

(3)(a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

(b) No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit; failure to file within the time allowed is an absolute bar to any further proceedings under this chapter.

(c) All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.

(d)(i) To determine the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim is effective upon delivery by the methods statutorily designated in this chapter.

(ii) The limitations period provided in this section controls and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations that would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter. . . .

*See University of Mississippi Med. Ctr. v. Robinson, 876 So. 2d 337 (Miss. 2004).*

**§ 15-1-51      Actions against and in favor of the state:**

Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof, except that any judgment or decree rendered in favor of the state, or any subdivision or municipal corporation thereof, shall not be a lien on the property of the defendant therein for a longer period than seven (7) years from the date of filing notice of the lien, unless an action is brought before the expiration of such time or unless the state or such subdivision or municipal corporation refiles notice of the lien. There shall be no limit upon the number of times that the state, or any subdivision or municipal corporation thereof, may refile such notices of lien. The statutes of limitation shall run in favor of the state, the counties, and municipal corporations beginning at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon. The provisions of this section shall apply to all pending and subsequently filed notices of liens.

**Insurance Policies - Time Limit Defense and Legal Actions**

**§ 83-9-5      Mandatory policy provisions:**

**Time limit on certain defenses:**

After two (2) years from the date of issue of this policy, no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period. . . .

After this policy has been in force for a period of two (2) years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements in the application.

**Legal actions:**

No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty (60) days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three (3) years after the time written proof of loss is required to be furnished. . . .

### **Jointly Interested Persons**

#### **§ 15-1-75      Parties jointly interested:**

In all cases where the interests are joint, one shall not be barred because another jointly interested is, and the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested.

### **Judgments**

#### **§ 15-1-43      Actions founded on domestic judgment or decree:**

All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, or last renewal of judgment or decree, whichever is later. . . .

#### **§ 15-1-45      Actions founded on foreign judgments:**

All actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after. However, if the person against whom such judgment or decree was or shall be rendered, was, or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within three years next after the rendition thereof, and not after.

### **Judicial Sale of Property**

#### **§ 15-1-37      Actions to recover property sold, partited in kind or sold for partition:**

An action shall not be brought to recover any property (a) sold by order of a chancery court, where the sale is in good faith and the purchase money paid, or (b) partited in kind or sold for partition where the purchase money is paid, unless such action is brought within two years after possession is taken by the purchaser under the sale of the property or by the taker under the decree of partition.

## Land

### **§ 15-1-7      Actions to recover land:**

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

### **§ 15-1-9      Action in equity to recover land:**

A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

### **§ 15-1-11      Right of action to recover land, instrument defects:**

Any person who has a right of action for the recovery of land because of any one or more of the following enumerated defects in any instrument, shall institute his suit therefor not later than 10 years next after the date when such instrument has been actually recorded in the office of the clerk of the chancery court of the county in which such real estate is situated and not afterwards. . . .

If, at the time at which the right of any person to bring an action for the recovery of land because of any such defects, shall have first accrued, such persons shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him, may, notwithstanding that the period of limitations hereinbefore provided for shall have expired, bring an action to recover the land at any time within the period of limitations provided herein next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability no time to bring an action to recover the land beyond the period of limitations provided herein next after the time at which such persons shall have died, shall be allowed by reason of the disability of any other person. Moreover, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years. This section shall not, however, apply to forged instruments.

### **Liens and Encumbrances**

#### **§ 15-1-47      Judgment lien:**

A judgment or decree rendered in any court held in this state shall not be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof, unless an action be brought thereon before the expiration of such time. However, the time during which the execution of a judgment or decree shall be stayed or enjoined by supersedeas, injunction or other process, shall not be computed as any part of the period of seven years.

#### **§ 89-5-19      Duration and barring of liens:**

Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred by the statute of limitations (which, as to a series of notes or a note payable in installments, shall begin to run from and after the maturity date of the last note or last installment), the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice, unless within six (6) months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. If the date of final maturity of such indebtedness so secured cannot be ascertained from the face of the record the same shall be



deemed to be due one year from the date of the instrument securing the same for the purpose of this section. And where a suit shall have been brought to keep a judgment alive within seven (7) years from the rendition of such judgment, the general lien of such judgment shall expire as to creditors and subsequent purchasers for a valuable consideration, without notice, at the end of seven (7) years from the rendition of such judgment, notwithstanding such suit to keep alive the judgment unless a notation to keep alive such judgment shall be made on the judgment roll within six (6) months after the expiration of seven (7) years from the time of the rendition of such judgment.

### **Loans**

#### **§ 75-67-111 Requirements as to records kept by licensees:**

Each licensee shall keep and use in his business such books, accounts and other records which shall be in accordance with sound and accepted business practices and shall be in such form as will clearly reflect all loan transactions for every borrower and will enable the commissioner to determine whether the licensee is complying with the provisions of this article, or the Small Loan Privilege Tax Law. Such records shall be kept with respect to each loan transaction for a period of at least twenty-four (24) months after the final transaction on such loan. . . .

### **Medical Malpractice**

#### **§ 15-1-36 Actions for medical malpractice:**

**(1) For any claim accruing on or before June 30, 1998,** and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

**(2) For any claim accruing on or after July 1, 1998,** and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

### **Military Justice Actions**

#### **§ 33-13-315 Statute of limitations:**

(1) A person charged with desertion or absence without leave in time of war, or with aiding the enemy or with mutiny, may be tried and punished at any time without limitation.

(2) Except as otherwise provided in this section, a person charged with offenses punishable under this code is not liable to be tried by court-martial if the offense was committed more than three (3) years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command. . . .

### **Mineral Interests**

#### **§ 11-17-33 Mineral interest, receivers for owners:**

The receiver shall hold, preserve and invest any such money so received in the same manner as other moneys held by the chancery clerk and on order of the court shall pay any money so held, with any interest accrued less costs of the receivership, to any person holding a valid claim thereto when said claim is asserted within ten (10) years of the date of the decree establishing the receivership. . . .

### Miscellaneous Actions

#### **§ 15-1-49      Actions without prescribed period of limitation; actions involving latent injury or disease:**

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. . . .

### Mortgages and Deed of Trust

#### **§ 15-1-15      Actual occupation under tax title:**

Actual occupation for three years, after two years from the day of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes, or in any precedent step to the sale, saving to minors and persons of unsound mind the right to bring suit within such time, after the removal of their disabilities, and upon the same terms as is provided for the redemption of land by such persons.

#### **§ 15-1-17      Actions to cancel tax titles:**

The owner, mortgagee or other person interested in any land which has been sold or forfeited to the state for delinquent taxes may bring a suit or action to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes within two years after the period of redemption shall have expired, and not thereafter. However, the limitations herein fixed shall not apply when the taxes on such land had been paid prior to the time it was sold for taxes. If any person entitled to bring any such suit or action shall, at the time at which the cause of action accrues, be under the disability of infancy, or unsoundness of mind, he may bring the suit or action within the time in this section respectively limited after his disability shall be removed but the saving of persons under disability shall never extend longer than twenty-one years. . . .

**§ 15-1-19      Suits to redeem mortgage:**

When a mortgagee, after condition broken, shall obtain the actual possession or receipt of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage except within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him. In such case a suit may not be brought except within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. Such acknowledgment shall be effectual only as against, and to the extent of the interest of the party signing it.

**§ 89-1-309      Tolling of limitations:**

The statutes of limitation which would otherwise apply to any mortgage or mortgage debt, or to any other cause of action under Sections 89-1-301 through 89-1-329, shall cease to run upon the filing of any legal pleadings in the aforesaid court; and the period during which the same be pending in court under Sections 89-1-301 through 89-1-329 shall be added to the period of statutory limitations which would apply to said debt or mortgage or other obligation in which the cause of action arose.

**Motor Vehicle Warranty Enforcement**

**§ 63-17-159      Manufacturer's rights and duties; remedies:**

(6) Any action brought under Sections 63-17-151 et seq. shall be commenced within one (1) year following expiration of the terms, conditions or limitations of the express warranty, or within eighteen (18) months following the date of original delivery of the motor vehicle to a consumer, whichever is earlier, or, if a consumer resorts to an informal dispute settlement procedure as provided in Sections 63-17-151 et seq., within ninety (90) days following the final action of the panel.

**Municipal Employee's Retirement**

**§ 21-29-47      Review:**

Appeal may be taken from any decision of the board by any member of the system or other person entitled to the benefits under this article to the chancery court. However, no appeal may be taken from any finding or decision of the board after the expiration of one year from the date of the finding or decision.

### **Oil and Gas Production**

#### **§ 53-3-11      Permit for well drilling:**

(2)(b) The Secretary of State is hereby designated as the agent upon whom process may be served in any action against such nonresident operator to recover damages to the surface estate arising from mineral exploration and/or production. Any such action for damages shall be commenced within six (6) years next after the closing of the well.

### **Prohibition to Sue**

#### **§ 15-1-57      Person prohibited from commencing an action or remedy:**

When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

### **Public Utilities**

#### **§ 77-3-85      Jurisdiction; statute of limitations:**

Actions to recover penalties under this article, and criminal prosecutions under subsection (2) of Section 77-3-81, shall be brought in the name of the State of Mississippi in any court of competent jurisdiction. No action for penalty under subsection (1) of Section 77-3-81 may be maintained after the expiration of one (1) year from the date of the act of which complaint is made.

### **Racketeer Influenced and Corrupt Organization Act (RICO)**

#### **§ 97-43-9      Seizure; forfeiture; proceedings; injunctions:**

(8) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this chapter may be commenced at any time within five (5) years after the conduct in violation of a provision of this chapter terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent or restrain any violation of the provisions of this chapter, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsections (5) or (6) of this section which is based in whole or in part upon any matter complained of in any such prosecution, action or proceeding shall be

suspended during the pendency of such prosecution, action or proceeding and for two (2) years following its termination.

### **Road Districts**

#### **§ 65-19-17    Appeal by aggrieved parties:**

Any party aggrieved by the order of the board of supervisors creating a road district or bringing territory therein, as herein provided, may appeal to the circuit court from the order of said board of supervisors as now provided by law for appeals from the orders of boards of supervisors, or may sue at law or in equity for relief therefrom; however, no action or suit attacking the validity of the said order, or in any manner questioning the same, shall be begun after the expiration of sixty days from the date of making or entering the said order. . . .

### **Sales Contract**

#### **§ 75-2-725    Statute of Limitations in Contracts for Sale:**

(1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued.

## Taxes

### Corporation Franchise Tax

#### **§ 27-13-49      Limitation of actions; examination period; revisions:**

(1) Returns shall be examined by the commissioner or his duly authorized agents within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner after the expiration of the three-year period except as provided in this section. . . .

### Gas (Liquified, Compressed) Tax

#### **§ 27-59-25      Maintenance of distributor records:**

All actions by the state for the recovery of additional amounts claimed as tax due under this chapter must be commenced within a period of three (3) years from the date of the filing of the required report with the commission, provided that in the case of fraudulent or false report with intent to evade tax or of a failure to file a report, action may be commenced at any time. . . .

### Gas (Natural) Tax

#### **§ 27-25-717      Time of payment:**

Provided, however, the statute of limitations for examining returns or to recover taxes and interest on funds held in escrow on price increases shall be three (3) years from the time the tax and interest is withdrawn from the State Depository for distribution to the State Treasury and to the county or counties in which the gas was produced. . . .

### Gasoline and Motor Fuel Tax

#### **§ 27-55-37      Maintenance of gasoline transaction records:**

All actions by the state for the recovery of additional amounts claimed as tax due under this article must be commenced within a period of three (3) years from the date of the filing of the required report with the commission, provided, that in the case of a fraudulent or false report with intent to evade tax or of a failure to file a report, action may be commenced at any time. . . .

## **Income Tax**

### **§ 27-7-49 Returns to be examined:**

(1) Returns shall be examined by the commissioner or his or her duly authorized agents within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner after the expiration of the three-year period, except as provided in this section and as provided in Section 27-7-307. . . .

(5) Where the reported taxable income of a taxpayer has been increased or decreased by the Internal Revenue Service, the three-year examination period provided in subsection (1) of this section shall not be applicable, insofar as the Mississippi income tax liability is affected by the specific changes made by said Internal Revenue Service. However, no additional assessment or no refund shall be made under the provisions of this article after three (3) years from the date the Internal Revenue Service disposes of the tax liability in question.

(6) Where the reportable taxable income of a taxpayer has been decreased by the carryback of a net casualty loss deduction under Section 27-7-20 or the carryback of a net operating loss deduction under Section 27-7-17, the three-year examination period provided under subsection (1) of this section shall not be applicable insofar as the Mississippi income tax liability is affected by the carryback of the net casualty loss deduction or the carryback of the net operating loss deduction.

## **Oil (Lubricating) Tax**

### **§ 27-57-25 Maintenance of distributor records:**

All actions by the state for the recovery of additional amounts claimed as tax due under this article must be commenced within a period of three (3) years from the date of the filing of the required report with the commission, provided, that in the case of a fraudulent or false report with intent to evade tax or of a failure to file a report, action may be commenced at any time. . . .

## **Refunds**

### **§ 27-73-5 Statute of limitations:**

Except as otherwise provided in Sections 27-7-49, 27-13-49 and 27-65-42, all suits by any taxpayer for the recovery of any privilege, income,



franchise, or other excise tax, and all applications or proceedings for any refund or credit of these taxes shall be filed or made within three (3) years next after the return was filed, or from the date the assessment of the tax was made, or from the date the tax was paid, as the case may be, whichever is the earlier, and no recovery of taxes under any such suit shall be had and no refund of taxes shall be made unless the suit or application was filed within the period of limitation. However, as to income taxes the three-year statute of limitations shall be extended to six (6) years in cases where the reported net income of a taxpayer has been reduced by the Internal Revenue Service for any taxable period.

### **Property Tax**

#### **§ 27-3-41      Restriction:**

The power of the Commissioner of Revenue to institute proceedings for the assessment of property which has escaped taxation by reason of not being assessed shall expire at the end of seven (7) years from the date when his right so to do first accrued, and it shall bring all suits he is authorized to bring within six (6) years after the cause of action accrues and not thereafter.

### **Sales Tax**

#### **§ 27-65-42      Time for collection proceeding:**

(1) The amount of taxes due on any return which has been filed as required by this chapter shall be determined and assessed within thirty-six (36) months from the date the return was filed except as otherwise provided in this section and Section 27-65-55.

(2) When an examination of a taxpayer's records to verify returns made under this chapter has been initiated and the taxpayer notified of the examination, either by certified mail or personal delivery by an agent of the commissioner, within the thirty-six-month examination period provided for in subsection (1) of this section, the determination of the correct tax liability shall be made by the commissioner within one (1) year after the expiration of the thirty-six-month examination period; however, this limitation shall not apply:

(a) To any tax period for which the taxpayer failed to file a return, in which case the tax, including any applicable penalties and interest, may be assessed by the commissioner at any time and the tax, penalties and/or interest so assessed may be collected by the commissioner as otherwise provided by law.

(b) In the case of a false or fraudulent return with the intent to evade tax. In such a case the commissioner is authorized to compute, determine, and assess at any time

the estimated amount of tax due on the return, including any applicable penalties and interest, from any information in his or her possession, and after the tax, penalties and/or interest are assessed, to collect them as otherwise provided by law.

(c) In the case of an agreement in writing entered into by the commissioner and the taxpayer, made prior to the expiration of the applicable time periods provided for in subsections (1) and (2) of this section, consenting to the examination of a return. In such a case the determination of a tax overpayment or deficiency and/or the issuance of an assessment may be made within the agreed upon period. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the previously agreed upon period.

(d) In a case in which a taxpayer requests an extension of time for filing any return required by this chapter, and the request is granted. In such a case the limitation of time for examining the return and determining any tax overpayment or assessing any tax deficiency from the return shall be extended for a like period.

(3) A taxpayer may apply to the commissioner for revision of the tax assessed against him or her, or paid by him or her, at any time within thirty-six (36) months from the date of the assessment or from the date the return was filed. Unless a claim for credit or refund is filed by the taxpayer within thirty-six (36) months from the time the return was filed or assessment made, no credit or refund shall be allowed.

(4) Taxpayers shall keep and maintain an accurate and complete set of records and other information sufficient to allow the department to determine the correct amount of tax due. The records and other information shall be open and available for inspection by the department upon request at a reasonable time and location. Refusal or delay by the taxpayer to provide documentation for examination upon the department's request shall result in an assessment being made from any information available, which shall be prima facie correct.

### **Trespass**

#### **§ 95-5-29      Limitations; preclusive effect:**

An action for the remedies and penalties provided by Section 95-5-10 may be prosecuted in any court of competent jurisdiction within twenty-four (24) months from the time the injury was committed and not after. All other actions for any specific penalty given by this chapter may be prosecuted in any court of competent jurisdiction within twelve (12) months from the time the injury was committed, and not after; and a recovery of any penalty herein given shall not be a bar to any action for further damages, or to any criminal prosecution for any such offense as herein enumerated. A party, if he so elect, may, under any of the provisions of this chapter, claim less than the penalty given.

## Torts

### **§ 15-1-35      Actions for certain torts:**

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

### **§ 15-1-49      Actions without prescribed period of limitation; actions involving latent injury or disease:**

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. . . .

## Unclaimed Property Held by Financial/Business Organizations

### **§ 89-12-35      Limitation periods:**

The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by the provisions of this chapter, or to pay or deliver abandoned property to the treasurer.

## Wills

### **§ 91-7-23      Time to contest probated will:**

Any person interested may, at any time within two years, by petition or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced be the will of the testator or not. If some person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. In case of concealed fraud, the limitation shall commence to run at, and not before, the time when such fraud shall be, or with reasonable diligence might have been, first known or discovered.

## **Workers' Compensation**

### **§ 71-3-35      Notice to employer of injury:**

(1) No claim for compensation shall be maintained unless, within thirty (30) days after the occurrence of the injury, actual notice was received by the employer or by an officer, manager, or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior shall be sufficient. Absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice. Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred. . . .

## **CHAPTER 12**

### **ANNULMENT & DIVORCE**

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## **CHAPTER 12**

### **ANNULMENT**

[A]n annulment proceeding is one maintained upon the theory that for some reason existing at the time of a pretended marriage, no valid marriage ever existed. *United Timber & Lumber Co. v. Alleged Dependents of Hill*, 84 So. 2d 921, 924 (Miss. 1956).

#### **Void Marriages**

##### **§ 93-1-1      Incestuous marriages void:**

(1) The son shall not marry his grandmother, his mother, or his stepmother; the brother his sister; the father his daughter, or his legally adopted daughter, or his grand-daughter; the son shall not marry the daughter of his father begotten of his stepmother, or his aunt, being his father's or mother's sister, nor shall the children of brother or sister, or brothers and sisters intermarry being first cousins by blood. The father shall not marry his son's widow; a man shall not marry his wife's daughter, or his wife's daughter's daughter, or his wife's son's daughter, or the daughter of his brother or sister; and the like prohibition shall extend to females in the same degrees. All marriages prohibited by this subsection are incestuous and void.

(2) Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.

***But see Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).**

Obergefell “is the law of the land and, consequently, the law of this circuit.” *Campaign for S. Equal. v. Bryant*, 197 F. Supp. 3d 905, 917 (S.D. Miss. 2016) (citation omitted).

It is hereby ordered that the State of Mississippi and all its agents, officers, employees, and subsidiaries . . . are hereby preliminarily enjoined from enforcing Section 263A of the Mississippi Constitution and Mississippi Code Section 93–1–1(2). *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 954 (S.D. Miss. 2014), *aff'd*, 791 F.3d 625 (5th Cir. 2015).

**§ 93-1-3      Incestuous marriages outside state:**

Any attempt to evade section 93-1-1 by marrying out of this state and returning to it shall be within the prohibitions of said section.

**§ 93-7-1      Declaration of nullity obtainable:**

All bigamous or incestuous marriages are void, and a declaration of nullity may be obtained at the suit of either party.

[Wife] filed for a divorce from [husband 2] based on the ground of habitual cruel and inhuman treatment. [Husband 2] counterclaimed for an annulment, alleging that [wife] had never obtained a divorce from her first husband, before she married [husband 2]. [Wife] was married to [husband 1] on June 26, 1962. On September 26, 1969, [wife] married [husband 2]; however, there was no evidence that [wife] and [husband 1] were ever divorced. The chancellor ruled that [wife's] rendered the marriage void and granted an annulment. ***Cotton v. Cotton*, 44 So. 3d 371, 373 (Miss. Ct. App. 2010).**

Arguably, pursuant to case law, a void marriage may be attacked collaterally since the marriage was never valid. ***See Ellis v. Ellis*, 119 So. 304, 305 (Miss. 1928).**



## Voidable Marriages

### § 93-7-3 Causes recognized:

A marriage may be annulled for any one (1) of the following causes existing at the time of the marriage ceremony:

- (a) Incurable impotency.
- (b) Adjudicated mental illness or incompetence of either or both parties.  
Action of a spouse who has been adjudicated mentally ill or incompetent may be brought by guardian, or in the absence of a guardian, by next friend, provided that the suit is brought within six (6) months after marriage.
- (c) Failure to comply with the provisions of §§ 93-1-5 through 93-1-9 when any marriage affected by that failure has not been followed by cohabitation.

Or, in the absence of ratification:

- (d) When either of the parties to a marriage is incapable, from want of age or understanding, of consenting to any marriage, or is incapable from physical causes of entering into the marriage state, or where the consent of either party has been obtained by force or fraud, the marriage shall be void from the time its nullity is declared by a court of competent jurisdiction.
- (e) Pregnancy of the wife by another person, if the husband did not know of the pregnancy.

Suits for annulment under paragraphs (d) and (e) shall be brought within six (6) months after the ground for annulment is or should be discovered, and not thereafter. The causes for annulment of marriage set forth in this section are intended to be new remedies and shall in no way affect the causes for divorce declared elsewhere to be the law of the State of Mississippi as they presently exist or as they may from time to time be amended.

We think it may be stated, as the general rule, that “a voidable marriage is valid for all purposes until avoided or annulled, and it cannot be attacked collaterally, but only in a direct proceeding during the lifetime of the parties. Hence, on the death of either, the marriage cannot be impeached, and is made good ab initio.” *Ellis v. Ellis*, 119 So. 304, 305 (Miss. 1928).

A voidable marriage can not be attacked collaterally: “[S]uch a marriage was not void, but voidable, and that the right to annul it was barred by the death of the party.” *Parkinson v. Mills*, 159 So. 651, 655 (Miss. 1935).

### **Jurisdiction and Venue**

#### **§ 93-7-11      Jurisdiction; procedure:**

The chancery courts of the State of Mississippi shall have jurisdiction to hear and determine all suits for annulment and all suits for annulment shall be tried in term time or vacation, and the same rules of pleading and procedure shall apply as in divorce cases, and the laws of process now in force in divorce cases in this state shall apply in all suits for annulment.

#### **§ 93-7-9      Place of filing:**

The complaint for annulment shall be filed  
in the county where the defendant resides, or  
in the county where the marriage license was issued, or  
in the county where the plaintiff resides, if the defendant be a nonresident  
of this state.

### **Annulment and Legitimacy of Children**

#### **§ 93-7-5      Legitimacy of children:**

Except for incestuous marriages, the issue of the parties to a void marriage conceived subsequent to the date thereof is legitimate, whether the marriage be declared void because of a prior existing marriage, or is annulled for some other cause.

### **Annulment and Custody of any Children of the Marriage**

#### **§ 93-7-7      Children:**

When an annulment shall be adjudged or a marriage declared void, the chancery court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage; and the court may, afterwards, on complaint, change the judgment and make from time to time such new judgment as the case may require.

**Prior Award of Alimony and the Effect of a Subsequent Annulled Marriage**

The duty of the husband to pay, and the right of the wife to receive, alimony should not depend upon whether the divorced wife decides to treat her subsequent marriage as voidable or valid. Appellant was mentally competent when she undertook to marry [her second husband]. She was under no compulsion, except the misrepresentations already mentioned. When she undertook to enter into this marriage she made an election to look to [her second husband] as the man from whom she would receive her support, and relinquished her right to receive further alimony from [her first husband]. If she had been forced to marry him under duress that made her act wholly involuntary or if she had been mentally incompetent to enter into a contract of marriage, we would have a different kind of case, and undoubtedly would reach a different result. We are of the opinion that the chancellor correctly decided the case and that appellant was not entitled to any further alimony from [her first husband] after the date of the ceremonial marriage to [her second husband]. ***Bridges v. Bridges*, 217 So. 2d 281, 283-84 (Miss. 1968).**

We see no reason why our holding in *Bridges* should not be extended to encompass a situation where the subsequent marriage of a wife is void rather than voidable. Regardless of whether the subsequent marriage is void or voidable the revival of alimony from a wife's first husband upon annulment of the second marriage will depend upon the facts and circumstances of each case. ***Boren v. Windham*, 425 So. 2d 1353, 1355 (Miss. 1983).**

Void and Voidable Marriages			
Void	Voidable	Voidable Within 6 months of marriage	Voidable Absent Ratification & Brought within 6 months after the ground was discovered or should have been discovered
Bigamous marriage	Incurable impotency	Adjudicated mental illness or incompetence of either or both parties	Lack of age to consent
Incestuous marriage	Non-compliance with marriage license statutes IF marriage is not followed by cohabitation		Lack of understanding to consent
Marriage between persons of the same gender <i>But see Obergefell v. Hodges</i> , 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).			Physical Incapacity
			Consent obtained by fraud
			Pregnancy of wife by another person if the husband did not know of such pregnancy

## **DIVORCE**

### **Jurisdiction**

#### **§ 93-5-5      Residence requirements:**

The jurisdiction of the chancery court in suits for divorce shall be confined to the following cases:

(a) Where one (1) of the parties has been an actual bona fide resident within this state for six (6) months next preceding the commencement of the suit. If a member of the armed services of the United States is stationed in the state and residing within the state with his spouse, such person and his spouse shall be considered actual bona fide residents of the state for the purposes of this section, provided they were residing within the state at the time of the separation of the parties.

(b) In any case where the proof shows that a residence was acquired in this state with a purpose of securing a divorce, the court shall not take jurisdiction thereof, but dismiss the bill at the cost of complainant.

### **Venue**

#### **§ 93-5-11      Place of filing; nonresidents; transfers:**

All complaints, except those based solely on the ground of irreconcilable differences, must be filed in the county in which the plaintiff resides, if the defendant be a nonresident of this state, or be absent, so that process cannot be served; and the manner of making such parties defendants so as to authorize a judgment against them in other chancery cases, shall be observed.

If the defendant be a resident of this state, the complaint shall be filed in the county in which such defendant resides or may be found at the time, or in the county of the residence of the parties at the time of separation, if the plaintiff be still a resident of such county when the suit is instituted.

A complaint for divorce based solely on the grounds of irreconcilable differences shall be filed in the county of residence of either party where both parties are residents of this state. If one (1) party is not a resident of this state, then the complaint shall be filed in the county where the resident party resides.

Transfer of venue shall be governed by Rule 82(d) of the Mississippi Rules of Civil Procedure.

Objections to venue in a divorce action cannot be waived. Our divorce statute is an “exclusive venue statute,” and thus it is jurisdictional in nature. While the general rule is that objections to venue are procedurally barred if not first asserted in the underlying suit, the issue of bringing a divorce action in the proper venue is a matter concerning jurisdiction of the subject matter of the suit and thus cannot be waived. Having disposed of the matter of waiver, the analysis turns to the issue of whether the chancellor lacked jurisdiction to hear the divorce. We note that even if proper venue is lacking in a divorce action, dismissal is not the proper remedy, but rather the case is to be transferred to the proper venue. *Hampton v. Hampton*, 977 So. 2d 1181, 1184 (Miss. Ct. App. 2007) (citations omitted).

***See Mississippi Rule of Civil Procedure 82(d):***

**Improper Venue.** When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

## **Requirements for Complaint for Divorce**

### **§ 93-5-33      Reports to board of health:**

All complaints for divorce shall name  
the parties to the suit,  
when married, and  
the number and names of the living minor children born of the marriage.  
It shall be the duty of each chancery clerk in the state to make a report of each divorce granted in his county; and on forms furnished by the State Board of Health, to show the following information, as correctly as he is able to make such report: Names of parties; when married; state of residence; children under eighteen (18) in this family as of date couple last resided in same household; custody of children; and the page and book in which judgment is recorded. He shall certify to the said report and affix thereunto his seal, and he shall forward it to the State Board of Health within ten (10) days after adjournment of each term of court in his county. . . .

### **§ 93-5-7      Procedure:**

The proceedings to obtain a divorce shall be by complaint in chancery, and shall be conducted as other suits in chancery, except that

- (1) the defendant shall not be required to answer on oath;
- (2) no judgment by default may be granted but a divorce may be granted on the ground of irreconcilable differences in termtime or vacation;
- (3) admissions made in the answer shall not be taken as evidence;
- (4) the clerk shall not set down on the issue docket any divorce case unless upon the request of one (1) of the parties;
- (5) the plaintiff may allege only the statutory language as cause for divorce in a separate paragraph in the complaint; provided, however, the defendant shall be entitled to discover any matter, not privileged, which is relevant to the issues raised by the claims or defenses of the other;
- (6) the court shall have full power in its discretion to grant continuances in such cases without the compliance by the parties with any of the requirements of law respecting continuances in other cases; and
- (7) in all cases, except complaints seeking a divorce on the ground of irreconcilable differences, the complaint must be accompanied with an affidavit of plaintiff that it is not filed by collusion with the defendant for the purpose of obtaining a divorce, but that the cause or causes for divorce stated in the complaint are true as stated.

In all uncontested divorce cases, except irreconcilable differences, the testimony of the plaintiff must be substantially corroborated. ***U.C.C.R. 8.03.***

**Additional Information to Be Filed with the Complaint**

**§ 93-27-209 Information to be submitted to court:**

(1) Subject to any law providing for the confidentiality of procedures, addresses, and other identifying information, in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five (5) years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

- (a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;
- (b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and
- (c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished. . . .

***See Uniform Child Custody Jurisdiction and Enforcement Act, § 93-27-101 et seq.***

**Uniform Chancery Court Rule 8.05, Financial Statement Required, states:**

Unless excused by Order of the Court for good cause shown, each party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known, the following disclosures:

- (a) A detailed written statement of actual income and expenses and assets and liabilities, such statement to be on the forms attached hereto as Exhibit "A", copies of the preceding year's Federal and State Income Tax returns,



in full form as filed, or copies of W-2s if the return has not yet been filed; and, a general statement of the providing party describing employment history and earnings from the inception of the marriage or from the date of divorce, whichever is applicable; or,

(b) By agreement of the parties, or on motion and by order of the Court, or on the Court's own motion, a more detailed statement on the form attached hereto as Exhibit "B".

The party providing the required written statement shall immediately file a Certificate of Compliance with the Chancery Clerk for filing in the court file.

A party filing a document containing personal identifiers and/or sensitive information and data may (1) file an un-redacted document under seal; this document shall be retained by the court as part of the record; or, (2) file a reference list under seal. The reference list shall contain the complete personal data identifiers and/or the complete sensitive information and data required by this Rule.

The disclosures shall be made by the plaintiff not later than the time that the defendant's Answer is due, and by the defendant at the time that the defendant's Answer is due, but not later than 45 days from the date of the filing of the commencing pleading. The Court may extend or shorten the required time for disclosure upon written motion of one of the parties and upon good cause shown.

The disclosures shall include any and all assets and liabilities, whether marital or non-marital. A party is under a duty to supplement prior disclosures if that party knows that the disclosure, though correct when made, no longer accurately reflects any and all actual income and expenses and assets and liabilities, as required by this Rule.

When offered in a trial or a conference, the party offering the disclosure statement shall provide a copy of the disclosure statement to the Court, the witness and opposing counsel.

This rule shall not preclude any litigant from exercising the right of discovery, but duplicate effort shall be avoided.

The failure to observe this rule, without just cause, shall constitute contempt of Court for which the Court shall impose appropriate sanctions and penalties.

**Defendant May Waive Service of Process**

**Mississippi Rule of Civil Procedure 4, Summons**, states:

**(e) Waiver.** Any party defendant who is not an unmarried minor, or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

## Grounds for Divorce

The term “divorce” means the legal dissolution of a lawful union for a cause arising after marriage. . . . *United Timber & Lumber Co. v. Alleged Dependents of Hill*, 84 So. 2d 921, 924 (Miss. 1956).

### **§ 93-5-1 Causes allowed:**

Divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the following twelve (12) causes:

First. Natural impotency.

Second. Adultery, unless it should appear that it was committed by collusion of the parties for the purpose of procuring a divorce, or unless the parties cohabited after a knowledge by complainant of the adultery.

Third. Being sentenced to any penitentiary, and not pardoned before being sent there.

Fourth. Willful, continued and obstinate desertion for the space of one (1) year.

Fifth. Habitual drunkenness.

Sixth. Habitual and excessive use of opium, morphine or other like drug.

Seventh. Habitual cruel and inhuman treatment, including spousal domestic abuse. Spousal domestic abuse may be established through the reliable testimony of a single credible witness, who may be the injured party, and includes, but is not limited to:

That the injured party's spouse attempted to cause, or purposely, knowingly or recklessly caused bodily injury to the injured party, or that the injured party's spouse attempted by physical menace to put the injured party in fear of imminent serious bodily harm; or That the injured party's spouse engaged in a pattern of behavior against the injured party of threats or intimidation, emotional or verbal abuse, forced isolation, sexual extortion or sexual abuse, or stalking or aggravated stalking as defined in Section 97-3-107, if the pattern of behavior rises above the level of unkindness or rudeness or incompatibility or want of affection.

Eighth. Having mental illness or an intellectual disability at the time of marriage, if the party complaining did not know of that infirmity.

Ninth. Marriage to some other person at the time of the pretended marriage between the parties.

Tenth. Pregnancy of the wife by another person at the time of the marriage, if the husband did not know of the pregnancy.

Eleventh. Either party may have a divorce if they are related to each other within the degrees of kindred between whom marriage is prohibited by law.

Twelfth. Incurable mental illness. However, no divorce shall be granted upon this ground unless the party with mental illness has been under regular treatment for mental illness and causes thereof, confined in an institution for persons with mental illness for a period of at least three (3) years immediately preceding the commencement of the action. However, transfer of a party with mental illness to his or her home for treatment or a trial visit on prescription or recommendation of a licensed physician, which treatment or trial visit proves unsuccessful after a bona fide effort by the complaining party to effect a cure, upon the reconfinement of the party with mental illness in an institution for persons with mental illness, shall be regular treatment for mental illness and causes thereof, and the period of time so consumed in seeking to effect a cure or while on a trial visit home shall be added to the period of actual confinement in an institution for persons with mental illness in computing the required period of three (3) years confinement immediately preceding the beginning of the action. No divorce shall be granted because of mental illness until after a thorough examination of the person with mental illness by two (2) physicians who are recognized authorities on mental diseases. One (1) of those physicians shall be either the superintendent of a state psychiatric hospital or institution or a veterans hospital for persons with mental illness in which the patient is confined, or a member of the medical staff of that hospital or institution who has had the patient in charge. Before incurable mental illness can be successfully proven as a ground for divorce, it shall be necessary that both of those physicians make affidavit that the patient is a person with mental illness at the time of the examination, and both affidavits shall be made a part of the permanent record of the divorce proceedings and shall create the prima facie presumption of incurable mental illness, such as would justify a divorce based on that ground. Service of process shall be made on the superintendent of the hospital or institution in which the defendant is a patient. If the patient is in a hospital

or institution outside the state, process shall be served by publication, as in other cases of service by publication, together with the sending of a copy by registered mail to the superintendent of the hospital or institution. In addition, process shall be served upon the next blood relative and guardian, if any. If there is no legal guardian, the court shall appoint a guardian ad litem to represent the interest of the person with mental illness. The relative or guardian and superintendent of the hospital or institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the person with mental illness shall not be altered in any way by the granting of the divorce. However, in the discretion of the chancery court, and in those cases as the court may deem it necessary and proper, before any such decree is granted on the ground of incurable mental illness, the complainant, when ordered by the court, shall enter into bond, to be approved by the court, in such an amount as the court may think just and proper, conditioned for the care and keeping of the person with mental illness during the remainder of his or her natural life, unless the person with mental illness has a sufficient estate in his or her own right for that purpose.

### Natural Impotency

The bill for divorce charged the wife with natural impotency and habitual cruel and inhuman treatment as set out in the first and seventh paragraphs of section [§ 93-5-1]. As to the ground of natural impotency, there was no evidence, in our opinion, tending to support the allegation thereof. ***Sarphie v. Sarphie*, 177 So. 358, 358 (Miss. 1937).**

We must first decide whether appellant's "sexual dysfunction" is sufficient evidence on which to base a finding of impotence. As the trial court noted, there is little appellate case law in Pennsylvania dealing with the subject of male impotence, and even less with female impotence. In *Wilson v. Wilson*, 126 Pa. Super. 423, 191 751 A. 666 (1937), this court held that impotence as a cause for divorce means the incapacity for sexual intercourse. We agree with the lower court that this definition includes "incapacity not only resulting from physical malfunction or impairment of the sexual organs, but also incapacity based upon emotional or psychological factors." Instantly, appellant's own witness testified that a person diagnosed as having a sexual dysfunction would be someone that cannot participate with normal sexual intercourse. We find that appellant's sexual dysfunction makes her incapable of normal sexual intercourse and thus is a valid ground for annulment of the parties' marriage. Appellant next claims that appellee failed to prove that she is "incurably" impotent. It is true that no doctor testified that appellant's condition was incurable. It is also true, however, that there was no testimony that appellant's sexual dysfunction was curable. Of course, appellee bore the burden of proving his wife's "incurability." Since no medical testimony established whether appellant's condition was incurable or not, we must look at the other evidence presented in order to determine whether appellee met his burden of proof. The majority of appellee's evidence on the annulment ground had to do with the parties' failure to consummate the marriage over a twenty-four (24) year period. Appellee testified that he had attempted to have intercourse with his wife on innumerable occasions. Each attempt was ultimately rebuffed when appellant told her husband that she was tired or didn't feel well. Appellant admits that no vaginal intercourse had, in fact, occurred throughout the marriage. As the lower court aptly stated:

The sexual problems in this unhappy union commenced on the honeymoon and have persisted for the last twenty-four years.

***Manbeck v. Manbeck*, 489 A.2d 748, 750-51 (Pa. Super. Ct. 1985) (affirming annulment granted on the basis of incurable impotency).**

***See Cherry v. Cherry*, 593 So. 2d 13 (Miss. 1991) (impotence may provide a basis to grant a divorce on another ground).**

## Adultery

[T]he offense [of adultery is defined as] voluntary sexual intercourse of a married person with a person other than the offender's spouse. ***Owen v. Gerity*, 422 So. 2d 284, 287 (Miss. 1982).**

A charge of adultery may be grounds for divorce upon a showing of either an infatuation for a particular person of the opposite sex or a generally adulterous nature on the part of the defendant. There must be evidence of one or the other before a divorce may be granted on these grounds. [T]he proper evidentiary standard to be applied [is as follows:]

In Mississippi one seeking a divorce on the grounds of adulterous activity must show by ***clear and convincing evidence*** both an adulterous inclination and a reasonable opportunity to satisfy that inclination. Where the plaintiff relies on circumstantial evidence as proof for his allegations, he or she retains the burden of presenting satisfactory evidence sufficient to lead the trier of fact to a conclusion of guilt. However, such evidence need not prove the alleged acts beyond a reasonable doubt and the plaintiff is not required to present direct testimony as to the events complained of due to their secretive nature. Nevertheless, the burden of proof is a heavy one in such cases because the evidence must be logical, tend to prove the facts charged, and be inconsistent with a reasonable theory of innocence.

***Holden v. Frasher-Holden*, 680 So. 2d 795, 798 (Miss. 1996) (emphasis added); *Brooks v. Brooks*, 652 So. 2d 1113, 1116 (Miss. 1995).**

A charge of adultery may be grounds for divorce upon a showing of either an infatuation for a particular person of the opposite sex or a generally adulterous nature on the part of the defendant. Proof of either of these elements must be supported by evidence of a reasonable opportunity to satisfy the infatuation or proclivity before divorce on grounds of adultery will be granted. ***McAdory v. McAdory*, 608 So. 2d 695, 700 (Miss. 1992).**

Our statutory law provides that adultery is a valid ground for dissolving the matrimonial bonds with two exceptions: where it appears the adulterous activity was done in collusion to gain a divorce or unless the parties cohabited after the ascertaining knowledge of the alleged adultery. ***Dorman v. Dorman*, 737 So. 2d 426, 429 (Miss. Ct. App. 1999).**

### Findings of Fact Required

Furthermore, in cases concerning an allegation of adultery, the chancellor is required to make a finding of fact. Where chancellors make such findings of fact, this Court has consistently held that their decisions will not be set aside on appeal

unless they are manifestly wrong. *McAdory v. McAdory*, 608 So. 2d 695, 699 (Miss. 1992).

[In the instant case, the chancellor stated that the wife proved adultery against her husband] by a preponderance of the evidence since the final separation of the parties. Hence, the chancellor erred by applying an incorrect legal standard. That is, the chancellor found that the evidence supporting a finding of adultery, on the part of [the husband], was only a “preponderance of the evidence,” not the higher quantum of evidence, “clear and convincing evidence,” which is required to prove adultery. Where a lower court misperceives the correct legal standard to be applied, the error becomes one of law, and we do not give deference to the findings of the trial court. Instead, this Court reviews questions of law de novo. *Brooks v. Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995).

### *Adultery and Alimony*

Where, as here, alimony is otherwise appropriate, it should not be denied the wife solely because she is adjudged at fault in the divorce judgment. *Hammonds v. Hammonds*, 597 So. 2d 653, 654 (Miss. 1992).

### *Adultery and Child Custody*

The question addressed by this child custody appeal is whether the fact of adultery precludes, per se, the award of custody to the offending spouse. This Court holds that the fact of adultery alone does not disqualify a parent from custodianship but that the polestar consideration in original custody determinations is the best interest and welfare of the minor child. *Carr v. Carr*, 480 So. 2d 1120, 1121 (Miss. 1985).

### *Chancellor May Prohibit Re-Marriage of the Offending Party*

#### **§ 93-5-25      Effect of divorce:**

And the judgment may provide, in the discretion of the court, that a party against whom a divorce is granted, because of adultery, shall not be at liberty to marry again; in which case such party shall remain in law as a married person. Provided, however, that after one (1) year, the court may remove the disability and permit the person to marry again, on petition and satisfactory evidence of reformation, or for good cause shown, on the part of the party so barred from remarriage; but the actions of the court under the foregoing proviso shall not be construed as affecting any judgment of divorce granted in any case where the discretion of the chancellor has been exercised in barring one (1) party from remarriage on account of adultery.



**Being Sentenced to Any Penitentiary and Not Pardoned Before Being Sent There**

**§ 93-5-1 Causes allowed:**

Being sentenced to *any* penitentiary, and not pardoned before being sent there.  
(Emphasis added).

***Contra Daughdrill v. Daughdrill*, 180 Miss. 589, 178 So. 106, 107 (1938)**

(It will be noted that the language of the statute is “being sentenced to the penitentiary.”) (discussing a prior version of the statute which was subsequently amended in 1938 after the holding in *Daughdrill*).

[Wife] was granted a divorce from [husband], pursuant to § 93-5-1, on the ground that he was sentenced to a penitentiary and not pardoned before incarceration. [Husband] appeals the judgment of divorce and asserts that the chancellor erred in awarding lump sum alimony, child support, and reimbursement for [husband’s] criminal defense fees and counseling fees. [Wife and husband] were married in 1970 and separated in 2001. . . . At the time of divorce, [husband] was fifty-five years old, and was in the custody of the Mississippi Department of Corrections, [upon conviction of] child fondling and was sentenced to serve fifteen years, with ten years suspended, resulting in five years to serve in prison. We find no reversible error and affirm. ***Avery v. Avery*, 864 So. 2d 1054, 1055 (Miss. Ct. App. 2004).**

**Desertion for One Year**

This ground of divorce may also be referred to as abandonment. ***Smith v. Smith*, 856 So. 2d 717, 718 (Miss. Ct. App. 2003).**

Desertion requires a showing of wilful, continued and obstinate desertion for the space of one year. ***Deen v. Deen*, 856 So. 2d 736, 738 (Miss. Ct. App. 2003).**

**Constructive Desertion**

[T]he principle of constructive desertion may be applied in extreme cases. Constructive desertion may occur if either party by reason of such conduct on the part of the other, as would reasonably render the continuance of the marital relation, unendurable or dangerous to life, health or safety, is compelled to leave the home and seek safety, peace and protection elsewhere; or if the husband negligently or wilfully fails or refuses to support the wife, reasonably, in accordance with his means and ability, then the innocent one will, ordinarily, be

justified in severing the marital relation and leaving the domicile of the other so long as such conditions shall continue. And in such event the one so leaving will not be guilty of desertion but the one whose conduct caused the separation will be guilty of constructive desertion. ***Deen v. Deen*, 856 So. 2d 736, 738 (Miss.Ct. App. 2003).**

Inexcusable long-continued refusal of sexual relations warrants divorce, on the ground of constructive desertion. . . . ***Tedford v. Tedford*, 856 So. 2d 753, 757 (Miss. Ct. App. 2003).**

#### **Not Deserting the Marital Home**

The court below was correct in its finding of facts, but we cannot agree with the learned chancellor in the opinion that there can be no desertion where the parties live under the same roof for part of the two years. Abandonment-- desertion--may be as complete under the same shelter as if oceans rolled between. ***Graves v. Graves*, 41 So. 384, 384 (Miss. 1906).**

#### **Effort to Reconcile Effects One-Year Time Limit**

But if it could be said that appellee did make an unconditional effort in good faith to bring about a reconciliation and resumption of the marital relation, and that appellant's refusal to changed the character of the separation that it became wilful and obstinate desertion on her part, so as to set in motion the running of the one year period required by the statute, nevertheless, this period could be computed only from the date of the offer of reconciliation. . . . ***Criswell v. Criswell*, 182 So. 2d 587, 589 (Miss. 1966).**

### Habitual Drunkenness

A court may grant a divorce on the ground of habitual drunkenness if the plaintiff proves that:

- (1) the defendant frequently abused alcohol;
- (2) the alcohol abuse negatively affected the marriage; and
- (3) the alcohol abuse continued at the time of the trial.

***Lee v. Lee*, 154 So. 3d 904, 906 (Miss. Ct. App. 2014) (citation omitted).**

There is ample proof that it was [husband's] conduct that caused the dissolution of the marriage and that [wife] was entitled to a divorce on the grounds of cruel and inhuman treatment and habitual drunkenness. Three persons, his wife, his mother-in-law, and his wife's apartment neighbor, testified to [husband's] constant state of intoxication. ***Sproles v. Sproles*, 782 So. 2d 742, 747 (Miss. 2001).**

### Antenuptial Knowledge

Condonation or antenuptial knowledge, as affirmative defenses, must be specifically pleaded or else the defenses are waived. ***Lee v. Lee*, 154 So. 3d 904, 907 (Miss. Ct. App. 2014) (citations omitted).**

The charge in the divorce bill was habitual drunkenness. The proof overwhelmingly sustained this accusation. The wife's testimony was amply corroborated. It would serve no useful purpose to discuss these facts further, except to say that on them appellant was entitled to a divorce. However, the appellee defended on the ground that she had antenuptial knowledge of his drinking habits, and was, therefore, estopped to claim a divorce because thereof. The general rule relative to this contention is announced to be that knowledge by complainant of the cause for divorce at the time the marriage was consummated is a bar to the suit on that ground. . . . In order to bar relief in such a case it must appear that the complainant actually knew or had reasonable knowledge of the particular fact. Neither is it sufficient to show that the complainant knew that the defendant occasionally used intoxicating liquors. . . . In the case at bar, we are dealing with habitual drunkenness alone, and hence, limit our decision to that issue, as being the only one involved. This leads to the inquiry, did appellee sufficiently establish that appellant, at the time of the marriage, have knowledge or good reason to believe he was an habitual drunkard? The answer must be, no. The evidence offered by appellee on that point was very weak, and, allowing full latitude to it, fails sufficiently to establish the required antenuptial knowledge by appellant that he was an habitual drunkard at the time of the marriage. At the most, she knew only that he was an occasional and moderate social drinker. There was no evidence that he was drunk prior to marriage, much less that he was an habitual drunkard before marriage; and that being so, his wife, of course, could

not have had antenuptial knowledge of a condition not shown to have existed. We, therefore, are of the opinion that appellee's evidence failed to establish such defense, and the court below should not have permitted it to bar appellant's demand for divorce. ***Kincaid v. Kincaid*, 43 So. 2d 108, 109-10 (Miss. 1949).**

**Ground for Divorce Must Exist When Complaint is Filed**

All of the cases upon the subject, wherein the precise question was involved, hold that a divorce should not be granted in cases where the conditions authorizing a divorce did not exist when the complaint was filed. ***Smithson v. Smithson*, 74 So. 149, 151 (Miss. 1917).**

### **Habitual and Excessive Use of Opium, Morphine or Other Drug**

Habitual and excessive drug use is one of the twelve grounds for divorce pursuant to Section 93-5-1. One seeking a divorce on this basis must establish that the spouse's use of drugs:

(1) was habitual and frequent;

The *Ladner* court observed that the term “habitual” meant more than mere occasional use and required a showing that the defendant customarily and frequently used drugs.

(2) was excessive and uncontrollable;

Excessive was defined as the abuse of drugs to the extent that “the guilty spouse must be so addicted to the use of drugs that he cannot control his appetite for drugs whenever the opportunity to obtain drugs is present.”

(3) and was of morphine, opium or drugs with the similar effect as morphine or opium.

The *Ladner* court explained the language “other like drug” to mean “other like drug in effect.” The *Ladner* court further clarified that so far as the kind of drug is concerned, chemical content is not important, but effect caused by use is the test. There is an exclusion from this definition where the drugs are properly and legitimately prescribed by a physician for legitimate reasons.

***Lawson v. Lawson*, 821 So. 2d 142, 145 (Miss. Ct. App. 2002); *Ladner v. Ladner*, 436 So. 2d 1366, 1375 (Miss. 1983).**

[Wife] was entitled to a divorce based on [husband's] habitual and excessive use of marijuana. [Husband] conceded that his drug use was habitual and frequent. Evidence that [husband] continuously used marijuana for approximately forty years and continuously failed at sobriety supports the chancellor's finding that [husband's] drug use was excessive and uncontrollable. Furthermore, evidence that [husband's] marijuana use caused him to isolate himself from the family and affected his work productivity, which impacted the family's finances, supports the chancellor's finding that [husband's] marijuana use was similar in effect to opium or morphine. As a result, we affirm the chancellor's judgment of divorce.

***Carambat v. Carambat*, 72 So. 3d 505, 514 (Miss. 2011).**

### **Antenuptial Knowledge**

If one spouse has knowledge at the time of the marriage, that the other is . . . an habitual drug addict, . . . he or she takes the risks incident to such a marriage and may not be heard to complain thereafter on account of any such known fact. . . . In such a case it must be shown that the complainant knew the fact, or had such reliable information as would lead a reasonably prudent person to believe the particular fact. Nor is it sufficient to show merely that the complainant had such information, as if it had been diligently pursued would have led to a discovery of

the fact. In order to bar relief in such a case it must appear that the complainant actually knew or had reasonable knowledge of the particular fact. Neither is it sufficient to show that the complainant knew that the defendant occasionally used narcotic drugs. It must, in such a case, be shown that complainant knew or had good reason to believe that the defendant habitually used narcotic drugs to excess. ***Kincaid v. Kincaid*, 43 So. 2d 108, 109 (Miss. 1949).**

### **Habitual Cruel and Inhuman Treatment**

The ground of habitual cruel and inhuman treatment may be established by a ***preponderance of the evidence***, rather than clear and convincing evidence, and the charge means something more than unkindness or rudeness or mere incompatibility or want of affection. ***Daigle v. Daigle*, 626 So. 2d 140, 144 (Miss. 1993) (emphasis added).**

Such ground for divorce is established by evidence that the conduct of the spouse either:

- (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or
- (2) is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance. ***Jones v. Jones*, 43 So. 3d 465, 469 (Miss. Ct. App. 2009).**

### **Physical Violence Not Required**

The conduct must consist of something more than unkindness or rudeness or mere incompatibility or want of affection. However, a finding of physical violence is not a prerequisite to establishing habitual cruel and inhuman treatment. The cruel treatment must be routine and continuous. ***Jackson v. Jackson*, 922 So. 2d 53, 56 (Miss. Ct. App. 2006) (citations omitted).**

As a general rule the charge of cruel and inhuman treatment is not established by a single act or an isolated incident, there must be more to show habitual cruel or inhuman treatment. On the other hand, one incident of personal violence may be of such a violent nature as to endanger the life of the complainant spouse and be of sufficient gravity to establish the charge of habitual cruel and inhuman treatment. ***Ellzey v. Ellzey*, 253 So. 2d 249, 250 (Miss. 1971).**

### **Continuous/Systematic Behavior**

In order for a divorce to be granted on the ground of habitual cruel and inhuman treatment, there must be proof of systematic and continuous behavior on the part of the offending spouse which goes beyond mere incompatibility. ***Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988).**

### **Conduct Which May Establish Habitual Cruel and Inhuman Treatment**

#### **§ 93-5-1 Causes Allowed:**

Seventh. Habitual cruel and inhuman treatment, including spousal domestic abuse.

Spousal domestic abuse may be established through the reliable testimony of a single credible witness, who may be the injured party, and includes, but is not limited to:

That the injured party's spouse attempted to cause, or purposely, knowingly or recklessly caused bodily injury to the injured party, or that the injured party's spouse attempted by physical menace to put the injured party in fear of imminent serious bodily harm; or

That the injured party's spouse engaged in a pattern of behavior against the injured party of threats or intimidation, emotional or verbal abuse, forced isolation, sexual extortion or sexual abuse, or stalking or aggravated stalking as defined in Section 97-3-107, if the pattern of behavior rises above the level of unkindness or rudeness or incompatibility or want of affection.

This Court has held that although divorce granted on the grounds of cruel and inhuman treatment is usually due to acts of physical violence or such acts that result in apprehension thereof, false accusations of infidelity, made habitually over a long period of time without reasonable cause also constitute cruel and inhuman treatment. ***Richard v. Richard*, 711 So. 2d 884, 889 (Miss. 1998).**

Although [wife] testified only to three specific instances of physical abuse on the part of October, and only one instance occurred during the course of the parties' marriage, her own testimony and her corroborating witnesses' testimony demonstrated a pattern of abuse that enabled the chancellor to grant a divorce on the grounds of habitual cruel and inhuman treatment. ***Fulton v. Fulton*, 918 So. 2d 877, 881 (Miss. Ct. App. 2006).**

We find no error in the chancellor's decision that [husband's gambling] behavior, taken as a whole, constitutes habitual cruelty. His qualifying conduct includes not

only his gambling losses of over \$300,000, but his series of intentional, often dishonest, and possibly criminal acts, through which he dissipated the parties' assets to fund his gambling addiction. His sexual and personal-hygiene issues that rendered the relationship revolting to [wife] also factored into the chancellor's cruelty finding. ***Smith v. Smith*, 90 So. 3d 1259, 1265 (Miss. Ct. App. 2011).**

### **Subjectivity of Offended Spouse**

A sensitive spouse or a spouse from a society and environment of breeding, education or culture, may be physically, mentally and emotionally affected and injured by slightly cruel and less severe treatment, while another spouse, who is hardened and calloused to physical abuse and treatment, might be unaffected by the same treatment which would injure the sensitive person. In the case sub judice, the testimony of the witnesses is undisputed as to the conduct of the appellee, which the physician testified was injurious to appellant's health to the extent that she required medical attention and hospitalization. ***Parker v. Parker*, 519 So. 2d 1232, 1235 (Miss. 1988).**

### **Actions After Separation of the Parties May Establish Habitual Cruel and Inhuman Treatment**

It is true that the parties were not cohabiting during that thirteen and a half month period of time. [The husband] seizes upon this fact to argue, in effect, that habitual cruel and inhuman treatment may only occur when the parties to a marriage are living together. There is simply no reason on principle why this should always be so. Concededly, where the parties have not lived together during such a time interval, common sense suggests the cases will be infrequent where one party is able to prove that the other has been guilty of cruel and inhuman treatment of the other, habitual or otherwise. We have reiterated many times recently that habitual cruel and inhuman treatment, like any other ground for divorce, must be proved. That a phenomenon is not likely often to occur establishes not that it may never occur. ***Bias v. Bias*, 493 So. 2d 342, 344 (Miss. 1986).**



### **Mental Illness at the Time of Marriage**

Rodney contends that the chancellor erred in granting Courtney a divorce on the grounds of habitual cruel and inhuman treatment and mental illness because the evidence was insufficient to support either ground. Rodney also contends that the chancellor abused his discretion in basing his findings on certain involuntary-commitment files, which he argues were not credible evidence because they were not properly submitted to the court under Mississippi Code Annotated section 41-21-69 (Rev. 2013). He further contends that the evidence was insufficient to support the divorce because an insane person is incapable of the deliberate conduct required by Mississippi law to prove cruelty. Also, Rodney insists that the evidence failed to establish that he was ever a physical danger to Courtney. Of course, Courtney sees things differently, as she argues that the chancellor did not err in granting the divorce. Because the chancellor granted the divorce on the ground of habitual cruel and inhuman treatment, we do not discuss Rodney's insanity argument. . . . Courtney's testimony was supported by the commitment files, which establish that Rodney required treatment for a mental illness that, when left untreated, rendered it impossible for her to discharge the duties of the marriage. . . . ***Williams v. Williams*, 179 So. 3d 1242, 1247-50 (Miss. Ct. App. 2015).**

The appellant and the appellee were married in Lauderdale county in November, 1907, and lived together as husband and wife until February, 1927, when the appellant filed his bill for a divorce, alleging that at the time of his marriage the appellee was insane, and that said fact was unknown to him. He testified that he first knew of her insanity after the marriage, discovering her mental condition shortly thereafter. Notwithstanding this discovery, he continued to live with her, and there were born to the couple four children. The first question for decision is whether, under the facts stated, appellant is entitled at this late day to a divorce on account of the insane condition of the appellee existing at the time of the marriage. We think that it was the duty of the appellant to have elected his course at once, or at least within a reasonable time after discovering the appellee's insanity; and, inasmuch as he did not elect to divorce his wife promptly on discovering her mental condition, he elected to treat the marriage as valid, and it was, in fact, valid under our statute. . . . The law will not permit the complainant, appellant here, after discovering insanity, to go ahead and treat the marriage as binding so long as suited his interest or convenience, and then to repudiate it when he ceases to be satisfied with the relation. The law requires the party injured, under such circumstances, promptly to elect whether he will abide by the relation, or whether he will disavow and dissolve it, or obtain a divorce. ***McIntosh v. McIntosh*, 117 So. 352, 352 (Miss. 1928).**

### **Marriage to Some Other Person at the Time of the Pretended Marriage Between the Parties**

In *Case v. Case*, 150 So. 2d 148 (Miss. 1963), this Court said that marriage to another person at the time of a pretended marriage is a ground for divorce and annulment is not maintainable thereon. A divorce decree entered on such ground for divorce should recite that the marriage is invalid and void ab initio. We hold that the ground for divorce stated in the amended bill of complaint was a proper one and that the lower court erred in sustaining the plea in bar and in dismissing the bill of complaint. ***Callahan v. Callahan*, 381 So. 2d 178, 179-80 (Miss. 1980).**

While we do not condone [wife's] actions in entering into a second marriage while still married to [husband], we note that this conduct does not constitute a ground for divorce from [husband]. Marriage to some other person at the time of the pretended marriage between the parties is a ground for divorce in Mississippi. [The wife's] bigamy would be a ground for divorce [sought by the second husband], not [the first husband]. ***Harmon v. Harmon*, 757 So. 2d 305, 309 (Miss. Ct. App. 2000).**

### **Pregnancy of the Wife by Another Person at the Time of the Marriage**

Appellee filed his bill against appellant for a divorce. The sole ground therefor was: "Pregnancy of the wife by another person at the time of the marriage, if the husband did not know of such pregnancy." The bill showed that appellee had sexual relations with his wife before marriage and he knew before he married her that appellant was pregnant; but he charged that prior to the marriage appellant had led him to believe that she was pregnant by appellee when in fact she was pregnant by another person, a fact appellee learned after the marriage. Appellant asserted that appellee could not maintain the divorce action on the stated ground even if she were pregnant by another person (which she denied) because the appellee knew of such pregnancy. This was overruled by the court. An interlocutory appeal was allowed. The action of the lower court in overruling what in fact was a demurrer raises the question whether in a divorce case where the only ground for divorce is "pregnancy of the wife by another person at the time of the marriage, if the husband did not know of such pregnancy," the action is maintainable when the complaining husband had had premarital sexual relations with the defendant and knew before the marriage that she was pregnant, and where the complaining husband was led to believe that the defendant was pregnant by him when in fact she was pregnant by another. . . . Our Court has not passed on the precise point, but the general rule seems to be that "where the parties have had sexual relations prior to marriage, it has been held in a majority of the cases in which a divorce has been sought on the ground of premarital pregnancy, either unknown to the plaintiff, or where he has been falsely led to

believe that he is the father of the expected child, that no divorce will be granted.” We have weighed the considerations involved: Those which tend toward the allowance of the action by the husband under the circumstances here involved, and those which tend to deny it. We are of the considered opinion that the denial of the right will best serve the interests of society. We hold that the lower court was in error in its ruling and it is reversed and the cause remanded. ***Burdine v. Burdine***, 112 So. 2d 522, 522-23 (Miss. 1959).

**Related to Each Other within the Degrees of Kindred Prohibited by Law**

**§ 93-1-1      Incestuous marriages void:**

(1) The son shall not marry his grandmother, his mother, or his stepmother; the brother his sister; the father his daughter, or his legally adopted daughter, or his grand-daughter; the son shall not marry the daughter of his father begotten of his stepmother, or his aunt, being his father's or mother's sister, nor shall the children of brother or sister, or brothers and sisters intermarry being first cousins by blood. The father shall not marry his son's widow; a man shall not marry his wife's daughter, or his wife's daughter's daughter, or his wife's son's daughter, or the daughter of his brother or sister; and the like prohibition shall extend to females in the same degrees. All marriages prohibited by this subsection are incestuous and void.

**§ 93-1-3      Incestuous marriages outside state:**

Any attempt to evade section 93-1-1 by marrying out of this state and returning to it shall be within the prohibitions of said section.

### *Incurable Mental Illness*

#### **§ 93-5-1      Causes allowed:**

However, no divorce shall be granted upon this ground unless the party with mental illness has been under regular treatment for mental illness and causes thereof, confined in an institution for persons with mental illness for a period of at least 3 years immediately preceding the commencement of the action. However, transfer of a party with mental illness to his or her home for treatment or a trial visit on prescription or recommendation of a licensed physician, which treatment or trial visit proves unsuccessful after a bona fide effort by the complaining party to effect a cure, upon the reconfinement of the party with mental illness in an institution for persons with mental illness, shall be regular treatment for mental illness and causes thereof, and the period of time so consumed in seeking to effect a cure or while on a trial visit home shall be added to the period of actual confinement in an institution for persons with mental illness in computing the required period of 3 years confinement immediately preceding the beginning of the action. No divorce shall be granted because of mental illness until after a thorough examination of the person with mental illness by 2 physicians who are recognized authorities on mental diseases. One of those physicians shall be either the superintendent of a state psychiatric hospital or institution or a veterans hospital for persons with mental illness in which the patient is confined, or a member of the medical staff of that hospital or institution who has had the patient in charge. Before incurable mental illness can be successfully proven as a ground for divorce, it shall be necessary that both of those physicians make affidavit that the patient is a person with mental illness at the time of the examination, and both affidavits shall be made a part of the permanent record of the divorce proceedings and shall create the prima facie presumption of incurable mental illness, such as would justify a divorce based on that ground. Service of process shall be made on the superintendent of the hospital or institution in which the defendant is a patient. If the patient is in an hospital or institution outside the state, process shall be served by publication, as in other cases of service by publication, together with the sending of a copy by registered mail to the superintendent of the hospital or institution. In addition, process shall be served upon the next blood relative and guardian, if any. If there is no legal guardian, the court shall appoint a guardian ad litem to represent the interest of the person with mental illness. The relative or guardian and superintendent of the hospital or institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the person with mental illness shall not be altered in any way by the granting of the divorce. However, in the discretion of the chancery court, and in those cases as the court may deem it necessary and proper, before any such decree is granted on the ground of incurable mental illness, the

complainant, when ordered by the court, shall enter into bond, to be approved by the court, in such an amount as the court may think just and proper, conditioned for the care and keeping of the person with mental illness during the remainder of his or her natural life, unless the person with mental illness has a sufficient estate in his or her own right for that purpose.

Mississippi law specifically allows for divorce when one spouse is suffering from incurable mental illness. But the Legislature, in the exercise of its exclusive authority to make laws, does not allow divorce for just any mental illness; it must be so severe that the “offending” spouse has been institutionalized for three years prior to the commencement of the divorce action. *Williams v. Williams*, 179 So. 3d 1242, 1256 (Miss. Ct. App. 2015) (Fair, J., dissenting).

## Defenses to Divorce

### Antenuptial Knowledge

The general rule relative to this contention is announced to be that knowledge by complainant of the cause for divorce at the time the marriage was consummated is a bar to the suit on that ground.

If one spouse has knowledge at the time of the marriage, that the other is impotent, or an habitual drunkard, or an habitual drug addict, or has been sentenced to serve a term in the penitentiary, or is insane, or is afflicted with an incurable venereal disease; or if at the time of the marriage the husband knows or has reason to suspect that his wife is pregnant, he or she takes the risks incident to such a marriage and may not be heard to complain thereafter on account of any such known fact. But mere suspicion based on rumor, or other unreliable information, is not sufficient. In such a case it must be shown that the complainant knew the fact, or had such reliable information as would lead a reasonably prudent person to believe the particular fact. Nor is it sufficient to show merely that the complainant had such information, as if it had been diligently pursued would have led to a discovery of the fact. In order to bar relief in such a case it must appear that the complainant actually knew or had reasonable knowledge of the particular fact. Neither is it sufficient to show that the complainant knew that the defendant occasionally used intoxicating liquors or narcotic drugs. It must, in such a case, be shown that complainant knew or had good reason to believe that the defendant was an habitual drunkard or habitually used narcotic drugs to excess.

***Kincaid v. Kincaid*, 43 So. 2d 108, 109 (Miss. 1949) (citation omitted).**

### Collusion

In divorce proceedings, collusion is an agreement between husband and wife that one of them shall commit or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce. ***Cain v. Cain*, 795 So. 2d 614, 617 (Miss. Ct. App. 2001) (citing *Black's Law Dictionary* 6th Ed.1990).**

The rule seems to be well established in all other jurisdictions, and we approve and adopt it, that collusion between husband and wife to obtain a divorce is illegal and contrary to public policy, and that any contract or agreement made by virtue of or in connection with such collusive agreement is unenforceable in the courts, and cannot be set up as a binding contract. ***Gurley v. Gorman*, 102 So. 65, 66 (Miss. 1924).**

### Condonation

#### § 93-5-4      **Failure to leave or separate:**

It shall be no impediment to a divorce that the offended spouse did not leave the marital domicile or separate from the offending spouse on account of the conduct of the offending spouse.

[T]he defense of condonation is recognized in our law. Condonation is the express or implied forgiveness of a marital wrong on the part of the wronged party. The mere resumption of residence does not constitute condonation, and condonation is conditioned on the offending spouse's good behavior. *Fulton v. Fulton*, 918 So. 2d 877, 881 (Miss. Ct. App. 2006).

If the injurious acts are renewed or repeated, the right to make the condoned offense a ground for divorce is revived. *Brewer v. Brewer*, 919 So. 2d 135, 139 (Miss. Ct. App. 2005).

The mere resumption of residence does not constitute a condonation of past marital sins and does not act as a bar to a divorce being granted. *Cheatham v. Cheatham*, 537 So. 2d 435, 442 (Miss. 1988).

### Connivance

First [husband] argues that [wife's] actions amount to connivance which is generally a valid defense. He cites this passage:

To connive means to encourage or assent to a wrong by silence or feigned ignorance, and connivance means the act of causing, encouraging or assenting thereto in the same manner. In connivance there is not concert as in the case of collusion, but there must be consent, either express or implied.

What he does not cite is the following passage:

But, "Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains evidence. He must not, however, make

opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed.”

***Cheatham v. Cheatham*, 537 So. 2d 435, 441 (Miss. 1988) (citations omitted).**

### **Death of a Party**

Upon review, we find the chancellor lacked authority to enter the divorce judgment after Charles's death. ***McGrew v. McGrew*, 184 So. 3d 302, 306 (Miss. Ct. App. 2015).**

The general rule is that the death of a party in a divorce action prior to the final decree ends the marriage of the parties and cancels the bill of complaint for divorce. The case of *Thrash v. Thrash*, 385 So. 2d 961 (Miss. 1980), is directly analogous to the case sub judice.

In *Thrash*, the wife petitioned the court for a divorce on the ground of habitual cruel and inhuman treatment. The husband answered and filed a cross-bill in which he prayed for a divorce upon similar grounds. The case was fully tried and submitted to the chancellor for final decision. The chancellor took the matter under advisement and on March 31, 1978, determined all issues on the merits and rendered his decision by written opinion. The opinion was signed and filed with the clerk on April 1, 1978. The chancellor awarded the husband a divorce upon the grounds set forth in the cross-bill. A decree was drafted, approved by both solicitors, and forwarded to the chancellor for signature. This decree was duly received by the chancellor on April 8, 1978, signed by him on that same date, but dated April 10, 1978. The husband was killed on April 9, 1978. On May 16, 1978, Pearl Marie Thrash filed a suggestion of death and motion to dismiss. The motion was based on the fact that the appellee had died prior to the decree's being filed. The chancellor dismissed the motion and ordered the decree of divorce theretofore signed by the chancellor, to be entered nunc pro tunc, the date it was signed by the first chancellor, April 8, 1978. The appellant in *Thrash* claimed that the decree signed by the chancellor on April 8, 1978, and dated April 10, 1978, was without effect and a nullity because appellee died on April 9, 1978, before the decree was filed with the clerk. The majority opinion in *Thrash* relied on Section 11-7-25, which in pertinent part provides:

Where either party shall die between verdict and judgment, such death need not be suggested in abatement, but judgment may be entered as if both parties were living. . . .

Applying Section 11-7-25, this Court determined that "in a case such as this, where the case has been fully tried and finally decided on its merits and nothing remains to be done except the entry of a decree, the decree



would follow as if both parties were living." We have concluded that, in the absence of some special circumstances such as would cause a miscarriage of justice by so doing, the provisions of that section [Section 11-7-25] apply in a case such as this, the death of the husband having occurred long after the formal decision of all issues by the trier of facts. To hold otherwise, we think, would work a manifest miscarriage of justice.

In the present case, from a technical standpoint, [husband] died while married, since his death was prior to the entry of the decree. However, the record clearly indicates that all submitted issues had been litigated and ruled upon by the chancellor on November 2, 1992. Nothing more was to be accomplished in the interim between the ruling and formal filing of the judgment. The general rule, so far as a general rule may be deduced from the few cases falling within this subdivision, is that, if the facts justifying the entry of a decree were adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately, but for some reason was not entered as such on the judgment record, the death of one of the parties to the action subsequently to the rendition thereof, but before it is in fact entered upon the record, does not prevent the entry of a decree nunc pro tunc to take effect as of a time prior to the death of the party. But if no such final adjudication was made during the lifetime of the parties, a decree nunc pro tunc may not be entered after the death of one of the parties, to take effect as of a prior date. *White v. Smith*, 645 So. 2d 875, 880-81 (Miss. 1994).

#### **Divorce Proceeding Pending in Another Jurisdiction**

That there is another action regarding the same subject matter pending in the courts of a sister state poses no jurisdictional obstacle to a court of this state of otherwise competent jurisdiction hearing and adjudging the matter in controversy. The question is not whether the Chancery Court has jurisdiction of this matter but how it should exercise such jurisdiction as it has. Whether under these facts Mississippi should defer to [another state] is a matter committed to the sound discretion of the Chancery Court, informed by the presence or absence of exigent circumstances, the legitimate needs and conveniences of the parties, and considerations of interstate comity and the need to avoid unseemly forum shopping. *Brown v. Brown*, 493 So. 2d 961, 963 (Miss. 1986).

## **Fraud**

The appellant filed a bill for divorce from the appellee in the chancery court of Lamar county, alleging that the appellant was a citizen of Lamar county, and that the defendant, when last heard from, was in the state of Alabama; . . . The bill did not set out the residence and post office address of the defendant, and the affidavit thereto did not state that diligent inquiry had been made to ascertain such post office address. On the filing of this bill publication was made for the defendant as a defendant whose post office address is unknown. A decree of divorce was granted on the 17th day of June, 1919. On the 29th day of August, 1919, the defendant filed her petition in the above styled and numbered suit to have the decree therein granted set aside for fraud practiced upon her and upon the court by the complainant in securing such decree of divorce, alleging that at the time of the filing of said bill by the complainant he well knew her address, and that she was living in the home of the complainant, and that both before and after the filing of the bill he was in correspondence with her, and sent her some money after the filing of the bill, but never let her know he contemplated a suit for divorce, but fraudulently concealed the same from her, and fraudulently kept a notice or summons from being mailed to her, as required by statute. That the allegations of the bill were false and fraudulent, and that the real reason for wanting the divorce was to marry a named person, with whom he had been maintaining adulterous relations. . . . The complainant filed a demurrer to the petition to set same aside for fraud on the ground, mainly, that the term of the court had adjourned at which the decree was rendered, and that the court had no power to act on said matter. . . . The demurrer admits the truth of the allegations of defendant's petition and the petition clearly shows fraud of the most vicious kind. It is settled law in this state that fraud vitiates a judgment. We do not think it makes any difference whether the attack for fraud is made by original bill, or whether made by petition or by motion. The court looks to the substance of things, rather than to mere names, and will not permit a person practicing fraud to benefit by his fraudulent act. ***Watts v. Watts*, 86 So. 353, 353-54 (Miss. 1920).**

The public policy of Mississippi will not allow to stand a decree of divorce obtained by fraud, and such decree may be attacked successfully at any time whether the basis of the attack appears on the face of the record or not. . . . The court will look to the substance of things rather than mere procedure and will not permit a person practicing fraud to benefit by his or her acts. ***Zwerg v. Zwerg*, 179 So. 2d 821, 823-26 (Miss. 1965).**

### **Lack of Jurisdiction**

#### **§ 93-5-5      Residence requirements:**

The jurisdiction of the chancery court in suits for divorce shall be confined to the following cases:

(a) Where one (1) of the parties has been an actual bona fide resident within this state for six (6) months next preceding the commencement of the suit. If a member of the armed services of the United States is stationed in the state and residing within the state with his spouse, such person and his spouse shall be considered actual bona fide residents of the state for the purposes of this section, provided they were residing within the state at the time of the separation of the parties.

(b) In any case where the proof shows that a residence was acquired in this state with a purpose of securing a divorce, the court shall not take jurisdiction thereof, but dismiss the bill at the cost of complainant.

It is undisputed that [wife], at the time, had been in Mississippi since the latter part of June 1951--almost five years. The learned chancellor resolved the issue in favor of [husband] and awarded him a divorce [on the ground of desertion]. Obviously the evidence was sufficient to warrant the conclusion that [wife] was a bona fide resident of Mississippi and amply justified the relief granted. ***Carter v. Carter*, 97 So. 2d 529, 530 (Miss. 1957).**

When a woman marries, her domicile, and therefore her legal residence, becomes that of her husband. ***Weisinger v. McGehee*, 134 So. 148, 150 (Miss. 1931).**

### **Personal Jurisdiction**

This summons does not confer personal jurisdiction over the defendant without answer or general appearance by the defendant. This publication method under M.R.C.P. 4(c)(4)(C) does not authorize rendition of a personal judgment against the defendant without his appearance. Had the plaintiff followed the procedure of Rule 4(c)(5) and secured service of process by certified mail, return receipt requested, restricted delivery, personal jurisdiction over the defendant to render a personal judgment would have been accomplished under the facts of this case. It is noteworthy to add, however, that notwithstanding this Court's holding that the Chancery Court of Jones County properly held that it could not render

a personal monetary judgment against the non-resident defendant on this summons, it was not totally without jurisdiction. The Chancery Court did have jurisdiction over the subject matter of the divorce action and personal jurisdiction over one of the parties to the marriage who did meet residency requirements for a divorce action. This statutory authority and the publication notice gives the chancery court its authority to grant a divorce on constructive notice by publication. ***Noble v. Noble*, 502 So. 2d 317, 320 (Miss. 1987).**

### **No Valid Marriage**

[Second wife] filed suit against [husband] in the Chancery Court of Rankin County on July 28, 1977, seeking a divorce on the ground of uncondoned adultery. An answer to the bill of complaint was filed, together with a plea in abatement, setting up the fact that [husband and wife] were married in the State of Arkansas June 23, 1969, that [husband] was not divorced from [his first wife], until July 5, 1969, and that [husband] did not have the legal capacity to consummate a legal marriage on June 23, 1969. The plea in abatement was sustained by the lower court and, on appeal here, the judgment was affirmed for the reason that [second wife] was not lawfully married to [husband] and, therefore, she was not entitled to a divorce on the ground of adultery. Subsequently, on November 28, 1978, [second wife] filed an amended bill of complaint for divorce in the Rankin County Chancery Court, averring that [husband] was lawfully married to another woman on June 23, 1969, and that she was entitled to a divorce from him since he was married to another person at the time of the pretended marriage of the parties. [Husband] filed a plea in bar to the amended divorce complaint, the plea was sustained by the lower court and the amended bill of complaint was dismissed. [Second wife] has appealed and assigns the following errors:

- (1) The chancellor erred in ruling that, since [husband] was never legally married to [second wife], prior existing marriage is not a valid ground of divorce. . . .

Appellant and appellee cohabited as man and wife until March 28, 1977, when appellant was informed by appellee for the first time that he was married to another person, at the time of his marriage to appellant, and that, therefore, appellant and appellee were not legally married. . . . [T]his Court [has] said that marriage to another person at the time of a pretended marriage is a ground for divorce and annulment is not maintainable thereon. A divorce decree entered on such ground for divorce should recite that the marriage is invalid and void ab initio. . . . We hold that the ground for divorce stated in the amended bill of complaint was a proper one and that the lower court erred in sustaining the plea in bar and in dismissing the bill of complaint. ***Callahan v. Callahan*, 381 So. 2d 178, 179-80 (Miss. 1980) (citations omitted).**

### **Plea in Abatement**

The plea in abatement was the proper pleading to bring the prior suit to the attention of the Jackson County Chancery Court. “It is fundamental that a plaintiff is not authorized simply to ignore a prior action and bring a second, independent action on the same state of facts while the original action is pending. Hence a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction within the same state or jurisdictional territory, between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the rights of the parties may be determined and adjudged.” Mississippi subscribes to this general rule. *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 1970).

### **Provocation**

The bill alleged “cruel and inhuman treatment” as the cause for divorce, and the chancellor, after hearing the proof, granted the appellee a divorce, the custody of the children, and \$50 per month alimony. In cases of divorce, the complainant must not only establish grounds for the divorce, but must be free from provoking the defendant into the acts which constitute the alleged grounds for divorce.

[Quoting a treatise:]

Where Plaintiff Alleges Cruelty.--Where the plaintiff alleges cruelty as a ground for divorce the defendant may plead that the plaintiff provoked the misconduct, or that the defendant is repentant and will reform, or that the injury was not intended and will not be repeated.

It will thus be seen that a plaintiff cannot bring about a situation and then take advantage of its result to secure a divorce. . . . But after a most painstaking and thorough examination and consideration of the whole record, we think the plaintiff has failed to establish her right to a divorce, and that the unpleasantness which existed between her and her husband was largely due to her own conduct and attitude. In other words, that she materially contributed to bringing about the status on which she relies to obtain a divorce. *Ammons v. Ammons*, 109 So. 795, 795-96 (Miss. 1926).

### **Recrimination**

#### **§ 93-5-3 Recrimination:**

If a complainant or cross-complainant in a divorce action shall prove grounds entitling him to a divorce, it shall not be mandatory on any chancellor to deny such party a divorce, even though the evidence might establish recrimination on the part of such complainant or cross-complainant.

That a divorce plaintiff continues to live under the same roof with the defendant after filing the complaint most assuredly is a heavy factor to be weighed in considering whether he or she has a valid cause; it does not in and of itself compel a denial of divorce. ***Jethrow v. Jethrow*, 571 So. 2d 270, 274 (Miss. 1990).**

The doctrine of recrimination is founded on the basis that the equal guilt of a complainant bars his/her right to divorce, and the principal consideration is that the complainant must come into court with clean hands. The complainant's offense need not be the same offense charged against his spouse, but it must be an offense sufficient to constitute a ground for divorce. ***Parker v. Parker*, 519 So. 2d 1232, 1235 (Miss. 1988).**

[T]he Court [has] held that the defense of recrimination should not have been invoked to prevent granting of divorce to the wife where there was no marital stability, the marriage had deteriorated to the point where there was no marriage, and the wife did not commit adultery during the time the parties lived together and cohabited as husband and wife. ***Sproles v. Sproles*, 782 So. 2d 742, 747 (Miss. 2001).**

### Third-Party Intervention in Divorce Proceedings

In *Hulett v. Hulett*, 152 Miss. 476, 119 So. 581 (1928), we declared a rule which prohibits intervention by third parties in divorce proceedings, in the absence of a statute permitting such intervention. In *Hulett*, several men were accused of engaging in adulterous behavior and sought to intervene in the underlying divorce proceeding to file answers denying the allegations. However, their purpose for intervention was merely to deny the allegations and basically clear their good names. This was insufficient to allow third-party intervention in the divorce proceeding. In the eighty-two years since this rule was announced, the lone exception to that general rule is found in *Cohen*, a post-Rules decision which involved a “specific set of rare, unusual facts.” *Cohen* sought and was granted a divorce from his first wife, then later married his second wife, Carolyn. Shortly after the marriage, Edward's first wife filed a motion to set aside the divorce. As Carolyn was then married to Edward, she was faced with a most unique legal dilemma, not of her own making, and the potential of an outcome which would invalidate her marriage. Thus, Carolyn filed a motion to intervene, claiming she had an interest in the divorce proceedings. This Court, recognizing the uniqueness of Carolyn's quandary, granted a “rare exception” to the general rule prohibiting the intervention of third parties in divorce proceedings. Yet even in *Cohen*, we reiterated that this Court has long held that it is not permissible for a person not a party to the suit, to intervene in a divorce suit. We emphasized that “there would seldom be factual situations which would warrant intervention by a third party in a divorce proceeding and that *Cohen* should not be construed to routinely allow third party interventions. *Hulett* remains valid law as it relates to most attempts at intervention in divorce proceedings by third parties. ***Dare v. Stokes*, 62 So. 3d 958, 960 (Miss. 2011) (citations omitted).**

Carolyn claims that she has an interest in this matter because she is now married to Cohen and her marital situation would be affected by the Chancellor's order declaring the judgment of divorce between Cohen and Suzette to be void. She also claims that her economic interests could also be affected in the underlying matter. She and Cohen own a house and other real property together. Additionally, she claims an interest in his business. Carolyn has since separated from Cohen, but is interested in preserving her marriage. First, an economic interest alone in the litigation is insufficient to allow intervention under Rule 24. Thus, if Carolyn's claim for intervention was based solely on her property and monetary concerns, it necessarily fails when applying this lone factor. She also asserts that she has an interest in the divorce proceedings because of her claimed marriage relationship with Cohen. In order to intervene, a party must assert a “direct, substantial, legally protectable interest in the proceedings.” The Court has long held that it is not permissible for a person “not a party to the suit, to intervene in a divorce suit.” Additionally, the Court [has] held that “only the parties to the suit are concerned

with the issues, and . . . in the absence of a statute permitting such intervention, the same is not permissible.” Divorce actions are for the exclusive use of the parties to the divorce itself. Third party intervention is not to be allowed. . . . Looking to other jurisdictions for guidance, we find that a majority of them seem to allow intervention in divorce actions. . . . When faced with a similar issue, an Illinois court held that intervention is allowed in instances where the intervenor may stand to gain or lose by the direct legal operation and effect of a judgment, and that one who intervenes must have an enforceable or recognizable right in the subject matter of the proceedings. Today, as it pertains solely to the facts of this case, we apply the view of our sister states and . . . allow intervention by Carolyn. We find that she has met her burden and demonstrated an interest which outweighs any substantial privacy interest of Cohen and Suzette. We further find that allowing her to intervene is necessary under these unusual facts to secure justice and to protect her property and marital rights. . . . In so holding however, we note generally that there would seldom be factual situations which would warrant intervention by a third party in a divorce proceeding. Accordingly, the bench and bar are reminded and, indeed are cautioned that this is a very narrowly written opinion based strictly upon a specific set of rare, unusual facts. This Court's opinion should not be construed to routinely allow third party interventions. [*Hulett*] remains valid law as it relates to most attempts at intervention in divorce proceedings by third parties. ***Cohen v. Cohen*, 748 So. 2d 91, 93-95 (Miss. 1999).**



### **Irreconcilable Differences Divorce**

#### **§ 93-5-2      Irreconcilable differences:**

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the ground of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

### **Jurisdiction**

#### **§ 93-5-5      Residence requirements:**

The jurisdiction of the chancery court in suits for divorce shall be confined to the following cases:

(a) Where one (1) of the parties has been an actual bona fide resident within this state for six (6) months next preceding the commencement of the suit. If a member of the armed services of the United States is stationed in the state and residing within the state with his spouse, such person and his spouse shall be considered actual bona fide residents of the state for the purposes of this section, provided they were residing within the state at the time of the separation of the parties.

(b) In any case where the proof shows that a residence was acquired in this state with a purpose of securing a divorce, the court shall not take jurisdiction thereof, but dismiss the bill at the cost of complainant.

### **Venue**

#### **§ 93-5-11      Place of filing; nonresidents; transfers:**

All complaints, except those based solely on the ground of irreconcilable differences, must be filed in the county in which the plaintiff resides, if the defendant be a nonresident of this state, or be absent, so that process cannot be served; and the manner of making such parties defendants so as to authorize a judgment against them in other chancery cases, shall be observed. If the defendant be a resident of this state, the complaint shall be filed in the county in which such

defendant resides or may be found at the time, or in the county of the residence of the parties at the time of separation, if the plaintiff be still a resident of such county when the suit is instituted.

A complaint for divorce based solely on the grounds of irreconcilable differences shall be filed in the county of residence of either party where both parties are residents of this state. If one (1) party is not a resident of this state, then the complaint shall be filed in the county where the resident party resides.

Transfer of venue shall be governed by Rule 82(d) of the Mississippi Rules of Civil Procedure.

Objections to venue in a divorce action cannot be waived. Our divorce statute is an “exclusive venue statute,” and thus it is jurisdictional in nature. While the general rule is that objections to venue are procedurally barred if not first asserted in the underlying suit, the issue of bringing a divorce action in the proper venue is a matter concerning jurisdiction of the subject matter of the suit and thus cannot be waived. Having disposed of the matter of waiver, the analysis turns to the issue of whether the chancellor lacked jurisdiction to hear the divorce. We note that even if proper venue is lacking in a divorce action, dismissal is not the proper remedy, but rather the case is to be transferred to the proper venue.

***Hampton v. Hampton*, 977 So. 2d 1181, 1184 (Miss. Ct. App. 2007) (citations omitted).**

***See Mississippi Rule of Civil Procedure 82(d):***

**Improper Venue.** When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

## **Requirements for a Complaint for an Irreconcilable Differences Divorce**

### **§ 93-5-2      Irreconcilable differences:**

#### **Complaint**

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

#### **Agreement on Child Custody and Property**

(2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

#### **Consent for Court to Decide Unresolved Issues**

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to

issues that the parties consented to have decided by the court.

In *Massingill v. Massingill*, the Mississippi Supreme Court addressed a similar issue. In that case, the parties both sought a divorce on the ground of irreconcilable differences but failed to sign a written consent. The court held that the parties must do more than implicitly consent to a divorce on the ground of irreconcilable differences and raise issues in their pleadings. The parties must ensure that the consent adheres to the statutory requirements, meaning it must:

- (1) be in writing and signed personally by both parties;
- (2) state “the parties voluntarily consent to permit the court to decide” the specific issues on which they cannot agree; and
- (3) state “that the parties understand that the decision of the court shall be a binding and lawful judgment.”

***Reno v. Reno*, 119 So. 3d 1154, 1156 (Miss. Ct. App. 2013) (citation omitted).**

The sole issue on appeal is if verbal consent to a divorce on the ground of irreconcilable differences, where no written consent agreement was filed, is sufficient to satisfy the consent requirement under section 93-5-2(3). . . . The chancellor committed manifest error by failing to strictly follow section 93-5-2(3). ***Reno v. Reno*, 119 So. 3d 1154, 1156 (Miss. Ct. App. 2013).**

### **Time Requirements**

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in termtime or vacation, the provisions of Section 93-5-17 to the contrary notwithstanding.

In divorce cases, the Mississippi Rules of Civil Procedure have only limited applicability. However, where the statutes are silent, the Rules govern. The applicable statute does not cover computation of the sixty day period. Therefore, the language of Rule 6 controls. Rule 6 reads in pertinent part as follows:

- (a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable

statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

The joint complaint for divorce based on irreconcilable differences was filed on Oct. 30, 1995. The final judgment of divorce was entered on Friday Dec. 29, 1995. Rule 6 dictates that the last day of the period shall be included in computing any period of time prescribed by statute. Following this rationale, December 29 is included and calculated as the sixtieth day. The statutory requirement that a complaint for divorce on the ground of irreconcilable differences must be on file for sixty days before being heard has been met. *In re Dissolution of Marriage of Robbins*, 744 So. 2d 394, 396 (Miss. Ct. App. 1999).

**Additional Information to Be Filed with the Complaint**

**§ 93-27-209 Information to be submitted to court:**

(1) Subject to any law providing for the confidentiality of procedures, addresses, and other identifying information, in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five (5) years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;

(b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and

adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished. . . .

***See Uniform Child Custody Jurisdiction and Enforcement Act, § 93-27-101 et seq.***

**Uniform Chancery Court Rule 8.05, Financial Statement Required, states:**

Unless excused by Order of the Court for good cause shown, each party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known, the following disclosures:

(a) A detailed written statement of actual income and expenses and assets and liabilities, such statement to be on the forms attached hereto as Exhibit “A”, copies of the preceding year's Federal and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet been filed; and, a general statement of the providing party describing employment history and earnings from the inception of the marriage or from the date of divorce, whichever is applicable; or,

(b) By agreement of the parties, or on motion and by order of the Court, or on the Court's own motion, a more detailed statement on the form attached hereto as Exhibit “B”.

The party providing the required written statement shall immediately file a Certificate of Compliance with the Chancery Clerk for filing in the court file.

A party filing a document containing personal identifiers and/or sensitive information and data may (1) file an un-redacted document under seal; this document shall be retained by the court as part of the record; or, (2) file a reference list under seal. The reference list shall contain the complete personal data identifiers and/or the complete sensitive information and data required by this Rule.

The disclosures shall be made by the plaintiff not later than the time that the

defendant's Answer is due, and by the defendant at the time that the defendant's Answer is due, but not later than 45 days from the date of the filing of the commencing pleading. The Court may extend or shorten the required time for disclosure upon written motion of one of the parties and upon good cause shown.

The disclosures shall include any and all assets and liabilities, whether marital or non-marital. A party is under a duty to supplement prior disclosures if that party knows that the disclosure, though correct when made, no longer accurately reflects any and all actual income and expenses and assets and liabilities, as required by this Rule.

When offered in a trial or a conference, the party offering the disclosure statement shall provide a copy of the disclosure statement to the Court, the witness and opposing counsel.

This rule shall not preclude any litigant from exercising the right of discovery, but duplicate effort shall be avoided.

The failure to observe this rule, without just cause, shall constitute contempt of Court for which the Court shall impose appropriate sanctions and penalties.

### **Contest or Denial Prohibits Irreconcilable Differences Divorce**

#### **§ 93-5-2      Irreconcilable differences:**

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

### **Procedure**

#### **§ 93-5-7      Procedure:**

The proceedings to obtain a divorce shall be by complaint in chancery, and shall be conducted as other suits in chancery, except that . . .

(2) . . . a divorce may be granted on the ground of irreconcilable differences in termtime or vacation; . . .

(4) the clerk shall not set down on the issue docket any divorce case unless upon the request of one (1) of the parties. . . .

**Uniform Chancery Court Rule 8.04, Irreconcilable Differences Divorce,**

states:

In all irreconcilable differences divorce actions (no-fault), the attorney is required to appear before the Court with the file to request approval of the Agreement and to obtain the signature of the Chancellor to the Judgment for Divorce – Irreconcilable Differences. The attorney must be prepared to answer all inquiries that may be raised by the Court.

The divorce to these parties was granted on the ground of irreconcilable differences under Section 93-5-2. That section requires among other things that the parties to such a divorce reach an adequate and sufficient settlement of any property rights between them by written agreement. ***Traub v. Johnson*, 536 So. 2d 25, 26 (Miss. 1988).**

**Requirements in Statute Must be Strictly Met**

Divorce is a creature of statute; it is not a gift to be bestowed by the chancellor based upon a perception that declining to grant the divorce will not restore the couple to a harmonious relationship. It is a statutory act and the statutes must be strictly followed as they are in derogation of the common law. ***Reno v. Reno*, 119 So. 3d 1154, 1156 (Miss. Ct. App. 2013) (citation omitted).**

We hold the statutory requirements of § 93-5-2(3) were not met in this case and that the chancellor exceeded his authority in granting a divorce on the ground of irreconcilable differences. Specifically, there was no valid consent in writing signed by both parties personally. The mere fact that irreconcilable differences was asserted in the pleadings filed by both parties as an alternate ground for divorce does not, in and of itself, meet all the statutory requirements. ***Massingill v. Massingill*, 594 So. 2d 1173, 1177 (Miss. 1992).**

Even if the pleadings met the requirement of a writing, signed by both parties, personally, the other statutory requirements of § 93-5-2(3) were not met. Specifically, there was no valid writing stating that the parties voluntarily consented to permit the court to decide the issues upon which the parties could not agree; there was no writing specifically setting forth the issues upon which the parties were unable to agree; there was no statement that the parties understood that the decision of the court would be a binding and lawful judgment. These elements are required by statute. It must be emphasized that the language of the statute is framed in mandatory rather than permissive terms. ***Gardner v. Gardner*, 618 So. 2d 108, 112-13 (Miss. 1993).**



**Final Order**

**Uniform Chancery Court Rule 8.04, Irreconcilable Differences Divorce**, states in part:

In all irreconcilable differences divorce actions (no-fault), the attorney is required to appear before the Court with the file to request approval of the Agreement and to obtain the signature of the Chancellor to the Judgment for Divorce – Irreconcilable Differences.

The first issue is whether Bullard or his wife may proceed pro se in this civil case. There are constitutional provisions that relate to this question. . . . Considering all of these provisions, it is without question that the Mississippi Constitution permits a person to represent himself, pro se, in a civil proceeding. It is not necessary that an attorney be employed. . . . The second issue presented is whether a chancery judge may refuse to hear an uncontested divorce based upon irreconcilable differences, assuming that the pleadings are in order, unless one of the co-complainants or their attorney personally presents the decree to him. . . . [No statutory provision] indicates a requirement that the person seeking a divorce must personally appear before the chancellor. . . . Rule 8.04 . . . [discusses the] approach in cases in which an attorney is employed. . . . The instant case, however, does not have an attorney involved, making the above rule inapplicable. It appears, therefore, that the final analysis comes to the chancellor's discretion in this requirement of personal attendance in court. This Court's review of his action is reviewed by the standard of whether the chancellor has abused his discretion. In this particular case, the facts show the inability of the complainant Bullard to attend court due to his incarceration. His wife resides in California, and has expressed no reason for her ability or inability in this regard. Assuming that there are no procedural shortcomings that have been overlooked, it appears to this Court that there was an abuse of discretion by the chancellor under these facts. There is no reasonable alternative to the complainant Bullard's attendance other than his pending Petition for Writ of Habeas Corpus Ad Testificandum before this Court asking that he be allowed to appear before the chancellor. This avenue would be costly in time and effort on the part of law enforcement in bringing and returning an inmate from prison for this personal legal matter. The advantages gained by the complainant's personal appearance would by far be outweighed by the expense of securing his presence. Therefore, under these particular facts, this Court holds that the chancellor abused his discretion and direct that he proceed to evaluate the pending divorce action and the proposed decree for their property without the presence of the resident co-complainant. ***Bullard v. Morris*, 547 So. 2d 789, 790-92 (Miss. 1989).**

When the statute has been complied with, the custody, support, alimony and property settlement agreement becomes a part of the final decree for all legal intents and purposes. This is so, whether the agreement is copied verbatim into the text of the decree, whether it is attached as an exhibit and incorporated by reference, or whether it is simply on file with the clerk of the court. If the agreement is sufficient to comply with the statute, that is enough to render it a part of the final decree of divorce the same as if a decree including the same provisions as may be found in the property settlement agreement had been rendered by the Chancery Court following a contested divorce proceeding. *Switzer v. Switzer*, 460 So. 2d 843, 845-46 (Miss. 1984).

### **Withholding Order**

#### **§ 93-11-103 Orders, generally; income withholding; lump-sum payments by employers:**

(1) Upon entry of any order for support by a court of this state where the custodial parent is a recipient of services under Title IV-D of the federal Social Security Act, issued on or after October 1, 1996, the court entering such order shall enter a separate order for withholding which shall take effect immediately without any requirement that the obligor be delinquent in payment. . . .

## Modification of Divorce

### **§ 93-5-23 Children; spousal maintenance or alimony; referrals for failure to pay child support:**

When a divorce shall be decreed from the bonds of matrimony, the court may . . . afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. . . .

But, although we recognize that the chancellor may order an equitable modification of divorce settlements under certain circumstances, modification may not be granted based on expectations alone. Instead, the rule remains that it requires proof of mistake, fraud, duress, or unconscionability. *Lestrade v. Lestrade*, 49 So. 3d 639, 644-45 (Miss. Ct. App. 2010).

Property settlement agreements entered into by divorcing parties and incorporated into the divorce decree are not subject to modification, except in limited situations. These types of agreements are “fixed and final, and may not be modified absent fraud or contractual provision allowing modification,” or when there has been a mutual mistake of fact occurring in the drafting of the instrument. A true and genuine property settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character. When parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts. *Kelley v. Kelley*, 953 So. 2d 1139, 1143 (Miss. Ct. App. 2007) (citations omitted).

Gregory Lee Sr. filed a petition in . . . Chancery Court, seeking a modification of the judgment of divorce between him and Sonia Alicia Lee. In the petition, Gregory sought to reverse the adjudication that he is the biological father of one of the parties' minor children. The chancellor denied the petition. . . . Gregory and Sonia were married on April 2, 1994. Two children were born during the marriage: Gregory Jr., born August 2, 1995, and Morgan, born July 23, 1998. On March 29, 2004, Gregory had a home DNA test performed to determine whether he was Morgan's biological father. The test revealed that there was a zero percent chance that Gregory was her father. . . . On April 14, 2005, the parties filed a joint bill for divorce in which they swore that both Gregory Jr. and Morgan were born to the marriage. . . . Gregory also argues that the *Williams* case,

which was relied upon by the chancellor as authority for dismissing his petition, favors his position. He explains that the facts in *Williams* are very similar to his and that the *Williams* court's pronouncement - that the Mississippi Supreme Court refuses to sanction the manifest injustice of forcing a man to support a child which science has proven not to be his - requires a reversal of the chancellor's order. We find Gregory's arguments unpersuasive and his reliance on *Williams* misplaced. Our supreme court has stated: To justify changing or modifying a divorce decree there must have been a material or substantial change in the circumstances of the parties. The material or substantial change is relative to only the after-arising circumstances of the parties following the original decree. On appeal [of the *Williams* case], our supreme court found that Willie had rebutted the presumption of paternity and held that "in the absence of consanguinity, legal adoption, or a knowing and voluntary assumption of the obligation to provide support, the law will not compel one who has stood in the place of a parent to support the child after the relationship has ceased." One key fact distinguishes our case from *Williams* - Willie, unlike Gregory, was completely unaware of the fact that he was not Marcus's biological father at the time that the divorce was granted. . . . On the other hand, Gregory knew a year before the judgment of divorce was entered that Morgan was not his child. Despite this knowledge, he voluntarily agreed to support Morgan and to exercise parental visitation with her. This contention of error is without merit. We agree with the chancellor's finding that *Williams* does not require that Gregory be granted the requested relief, and as there has been no material change in circumstances since the judgment of divorce was entered, the chancellor did not err in dismissing Gregory's petition for modification. ***Lee v. Lee*, 12 So. 3d 548, 551 (Miss. Ct. App. 2009) (citations omitted).**

### **Modification of Irreconcilable Differences Divorce**

Mississippi divorce actions are primarily controlled by the provisions of Mississippi Code Annotated section 93-5-1 (Rev. 2004). . . . Our divorce statutes provide for the modification of support agreements for divorces granted on the ground of irreconcilable differences. Section 93-5-23 of the Mississippi Code provides:

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders . . . touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. The court may afterwards, on petition, change the decree, and make from time

to time such new decrees as the case may require.

Section 93-5-2 provides that in divorces granted on the ground of irreconcilable differences, the parties may execute a written agreement for child custody and maintenance and that such agreement may be incorporated by the court into the judgment which “may be modified as other judgments for divorce. In accordance with the above-cited statutes, Mississippi case law holds that support agreements for divorces granted on the ground of irreconcilable differences are subject to modification based upon a material change in circumstances with one or more of the parties which occurs as a result of after-arising circumstances not reasonably anticipated at the time of the agreement. *Austin v. Austin*, 981 So. 2d 1000, 1003-04 (Miss. Ct. App. 2007) (citations omitted).

### **Standard of Review - Divorce Proceedings**

This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Under the standard of review utilized to review a chancery court's findings of fact, particularly in the areas of divorce, alimony and child support, this Court will not overturn the court on appeal unless its findings were manifestly wrong. *In re Dissolution of Marriage of Wood*, 35 So. 3d 507, 512 (Miss. 2010) (citations omitted).

## Revocation of Divorce

### § 93-5-31      **Revocation of divorce:**

The judgment of divorce from the bonds of matrimony may be revoked at any time by the court which granted it, under such regulations and restrictions as it may deem proper to impose, upon the joint application of the parties, and upon the production of satisfactory evidence of their reconciliation.

Here, the Legislature drafted and passed legislation which allows chancellors to revoke divorces upon fulfillment of all the statutory requirements, even after the death of one of the parties. In the present matter, the chancellor found that all the requirements of Mississippi Code Section 93–5–31 had been met. Therefore, because the matter is one touching upon the marital status of the parties and is an in rem action, the trial court maintained jurisdiction in order to make that determination. ***Carlisle v. Allen*, 40 So. 3d 1252, 1258 (Miss. 2010).**

Nothing in this statute authorizes the chancellor to find that this statute revokes the prior decree to such an extent as though the parties were never divorced so that any act by either of the parties in the interim between the divorce decree and the revocation of that decree could be construed by the law to be an offense against their marital status. The purpose of the statute is to encourage the reconciliation of broken marriages, not to place the parties in the position of unknowingly giving offense to the marital status once it has been restored. ***Devereaux v. Devereaux*, 493 So. 2d 1310, 1313 (Miss. 1986).**

## **CHAPTER 13**

### **PROPERTY DIVISION & ALIMONY**

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## CHAPTER 13

### PROPERTY DIVISION & ALIMONY

#### Division of Property

When dividing marital property, chancellors are directed to

- (1) classify the parties' assets as marital or separate;
- (2) determine the value of those assets;
- (3) divide the marital estate equitably based upon the factors set forth in *Ferguson*; and
- (4) consider the appropriateness of alimony if either party is left with a deficiency.

Fairness is the prevailing guideline in marital division. ***Baker v. Baker*, 250 So. 3d 502, 505 (Miss. Ct. App. 2018) (citations omitted).**

In dividing the property of the divorcing couple, the chancellor must first classify their assets and liabilities as belonging to the marriage, to the husband, or to the wife. Once this is done, the chancellor must [then] look to the factors set out by the supreme court in *Ferguson*. The *Ferguson* factors are used to determine how to divide the marital assets between the divorcing couple. From the bench, the chancellor did not clearly classify the property as marital or nonmarital. However, a failure to classify property does not automatically result in reversible error if the division of property is fair. . . . We do not have the benefit of the chancellor's analysis as to how [an asset was classified as] . . . a marital asset. As a result, we must reverse the judgment and remand for a clear classification of the marital property. ***Foreman v. Foreman*, 223 So. 3d 178, 182-83 (Miss. Ct. App. 2017) (citations omitted).**

In Mississippi, the division of marital assets begins with determining which assets are marital and non-marital under the criteria established in *Hemsley v. Hemsley*, 639 So.2d 909 (Miss.1994). For the purpose of divorce, our supreme court defined marital property as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. For the purpose of calculating whether or not assets are marital or non-marital, the course of the marriage runs until the date of the divorce judgment. . . . ***Striebeck v. Striebeck*, 911 So. 2d 628, 632 (Miss. Ct. App. 2005).**

In dividing the property of the divorcing couple, the chancellor must first classify their assets and liabilities as belonging to the marriage, to the husband, or to the wife. ***Smith v. Smith*, 856 So. 2d 717, 719 (Miss. Ct. App. 2003).**

With regard to a division of property, this Court has recognized that the chancery courts of Mississippi have the authority to order an equitable division of jointly accumulated property, regardless of the formal state of title. ***Brooks v. Brooks*, 652 So. 2d 1113, 1121 (Miss. 1995) (citations omitted).**

We must recognize that married parties usually create estates together. . . . Likewise, today in acquiring a marital estate, courts cannot tell who is the most important, the man or the woman. Presently the law often deals with a fiction that the parties are deemed to enter into marriage with two separate estates. Most parties enter into marriage with no estate and proceed to build an estate together. Therefore, in the event of a divorce, there is more often than not one estate. If the breadwinner happens to be the husband and has all property in his name, this serves to relegate the non-breadwinner wife to the equivalent of a maid-and upon division of the marital estate entitled to a minimum wage credit for her homemaking service. We abandon such an approach. We, today, recognize that marital partners can be equal contributors whether or not they both are at work in the marketplace. We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value. In arriving at an equitable distribution the chancellor should follow those guidelines as set out in *Ferguson v. Ferguson*, 639 So. 2d 921, decided July 7, 1994. ***Hemsley v. Hemsley*, 639 So. 2d 909, 914-15 (Miss. 1994).**

#### **Assets of the Husband or Wife**

[The court considers] the value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse. . . . ***Baker v. Baker*, 250 So. 3d 502, 506 (Miss. Ct. App. 2018).**

Generally, “property brought to the marriage by the parties” will not be subject to division, absent equitable factors to the contrary. ***See Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994).**

Marital property must be divided, while nonmarital property is generally not subject to equitable distribution. ***Harmon v. Harmon*, 141 So. 3d 37, 42 (Miss. Ct. App. 2014).**

This Court recognizes that property clearly obtained by one party through inheritance or acquired by one party by gift is nonmarital property not subject to equitable distribution. ***Johnson v. Johnson*, 650 So. 2d 1281, 1286 n.2 (Miss. 1994) (citations omitted).**

### **Marital Assets**

Marital property is defined as any and all property acquired during the marriage. ***A & L, Inc. v. Grantham*, 747 So. 2d 832, 838 (Miss. 1999) (citation omitted).**

We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value. ***Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994).**

Assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage. ***Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994).**

A spouse who has made a material contribution toward the acquisition of an asset titled in the name of the other may claim an equitable interest in such jointly accumulated property. ***Pittman v. Pittman*, 791 So. 2d 857, 862 (Miss. Ct. App. 2001) (citation omitted) overruled on other grounds by *Collins v. Collins*, 112 So. 3d 428 (Miss. 2013).**

It is true that in some instances chancellors have been granted greater discretion in classifying assets acquired later in the marriage. In *Aron*, this Court found that the chancellor has discretion in determining whether acquisitions made in a marriage's dying stages qualify as marital or separate property. ***Striebeck v. Striebeck*, 911 So. 2d 628, 632 (Miss. Ct. App. 2005) (citation omitted).**

Mississippi does not recognize the concept of legal separation, but the entry of a separate maintenance order may be a line of demarcation for classifying property as marital or separate. ***Aron v. Aron*, 832 So. 2d 1257, 1259 (Miss. Ct. App. 2002).**

**Factors to Evaluate Division of Marital Assets - The Ferguson Factors**

In *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994), the Mississippi Supreme Court held:

Therefore, this Court directs the chancery courts to evaluate the division of marital assets by the following guidelines and to support their decisions with findings of fact and conclusions of law for purposes of appellate review. Although this listing is not exclusive, this Court suggests the chancery courts consider the following guidelines, where applicable, when attempting to effect an equitable division of marital property:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
  - a. Direct or indirect economic contribution to the acquisition of the property;
  - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
  - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
8. Any other factor which in equity should be considered.

### **Findings of Fact are Required**

To aid appellate review, findings of fact by the chancellor, together with the legal conclusions drawn from those findings, are required. *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994).

Because the chancellor failed to make specific findings of fact and conclusions of law on the record as required by *Ferguson* and *Sandlin*, to guide this Court in appellate review, the trial court's division of property must be reversed, and this case is remanded for the chancellor to divide the property after making specific findings of fact and conclusions of law on the *Ferguson* factors it considered in the division of property. *Johnson v. Johnson*, 823 So. 2d 1156, 1162 (Miss. 2002).

Failure to make findings of fact and conclusions of law as required by *Ferguson* is reversible error. *Lauro v. Lauro*, 847 So. 2d 843, 847 (Miss. 2003) (citation omitted).

As a result, this Court finds that the failure to make findings of fact and conclusions of law was manifest error requiring reversal and remand. *Sandlin v. Sandlin*, 699 So. 2d 1198, 1204 (Miss. 1997).

### **Standard of Review**

This Court's standard of review regarding property division and distribution in divorce cases is a limited one. A chancellor's division and distribution will be upheld if it is supported by substantial credible evidence. However, this Court will not hesitate to reverse if it finds the chancellor's decision is manifestly wrong, or that the court applied an erroneous legal standard. *Jenkins v. Jenkins*, 67 So. 3d 5, 8–9 (Miss. Ct. App. 2011) (citation omitted).

This Court employs a limited standard of review of property division and distribution in divorce cases. This Court has repeatedly stated that the chancellor's division and distribution will be upheld if it is supported by substantial credible evidence. The chancery court has authority, where equity demands, to order a fair division of property accumulated through the joint contributions and efforts of the parties. This Court will not substitute its judgment for that of the chancellor even if this Court disagrees with the lower court on the finding of fact and might arrive at a different conclusion. This Court [has] stated that the chancellor's findings will be upheld unless those findings are clearly erroneous or an erroneous legal standard was applied. *Owen v. Owen*, 928 So. 2d 156, 160 (Miss. 2006) (citations omitted).

## **Issues Relevant to Division of Marital Property**

### **Equitable, Not Equal**

Equitable distribution does not mean equal distribution. No requirement exists dictating that [each] must receive half of the equity in the marital home. As we noted in *Seymour*, the goal as it pertains to equitable division is a fair division of marital property based on the facts of each case. ***Jenkins v. Jenkins*, 67 So. 3d 5, 11 (Miss. Ct. App. 2011).**

The Mississippi Supreme Court has declined to interpret equitable distribution to mean equal distribution. It is well-settled law that the courts, when making an equitable distribution of marital property, are not required to divide the property equally. Mississippi is not a community property state. This point cannot be stressed enough. Divorcing parties have no right to equal distribution even where the parties jointly accumulated the property. ***McLaurin v. McLaurin*, 853 So. 2d 1279, 1283 (Miss. Ct. App. 2003) (citations omitted).**

### **Title to Property**

The chancellor in a divorce case now has the authority to divest title from one spouse, and vest it in the other spouse, when equitably dividing the marital assets. ***Draper v. Draper*, 627 So. 2d 302, 305 (Miss. 1993).**

### **Debts of the Parties**

It is apparent that the items listed above, specifically the MasterCard debt, were considered marital debt, the burden of payment of such debts [was] split evenly between the [parties]. ***Deal v. Wilson*, 922 So. 2d 24, 29 (Miss. Ct. App. 2005).**

Any property acquired or debt incurred after the entry of a temporary support order may be classified as separate property. ***Hults v. Hults*, 11 So. 3d 1273, 1281 (Miss. Ct. App. 2009).**

A review of the record shows that the chancellor granted an equitable distribution of the marital assets. Each party was adjudged responsible for debts created by them individually. . . . ***Gray v. Gray*, 745 So. 2d 234, 239 (Miss. 1999).**

### **Personal Injury Award Proceeds**

While proceeds from personal injury actions are not generally deemed marital assets, they can lose their non-marital status through commingling with marital assets. ***Ory v. Ory*, 936 So. 2d 405, 412 (Miss. Ct. App. 2006).**

[When determining the character of a personal injury award,] [t]he lines that a chancellor must draw, as difficult as they may be, are these:

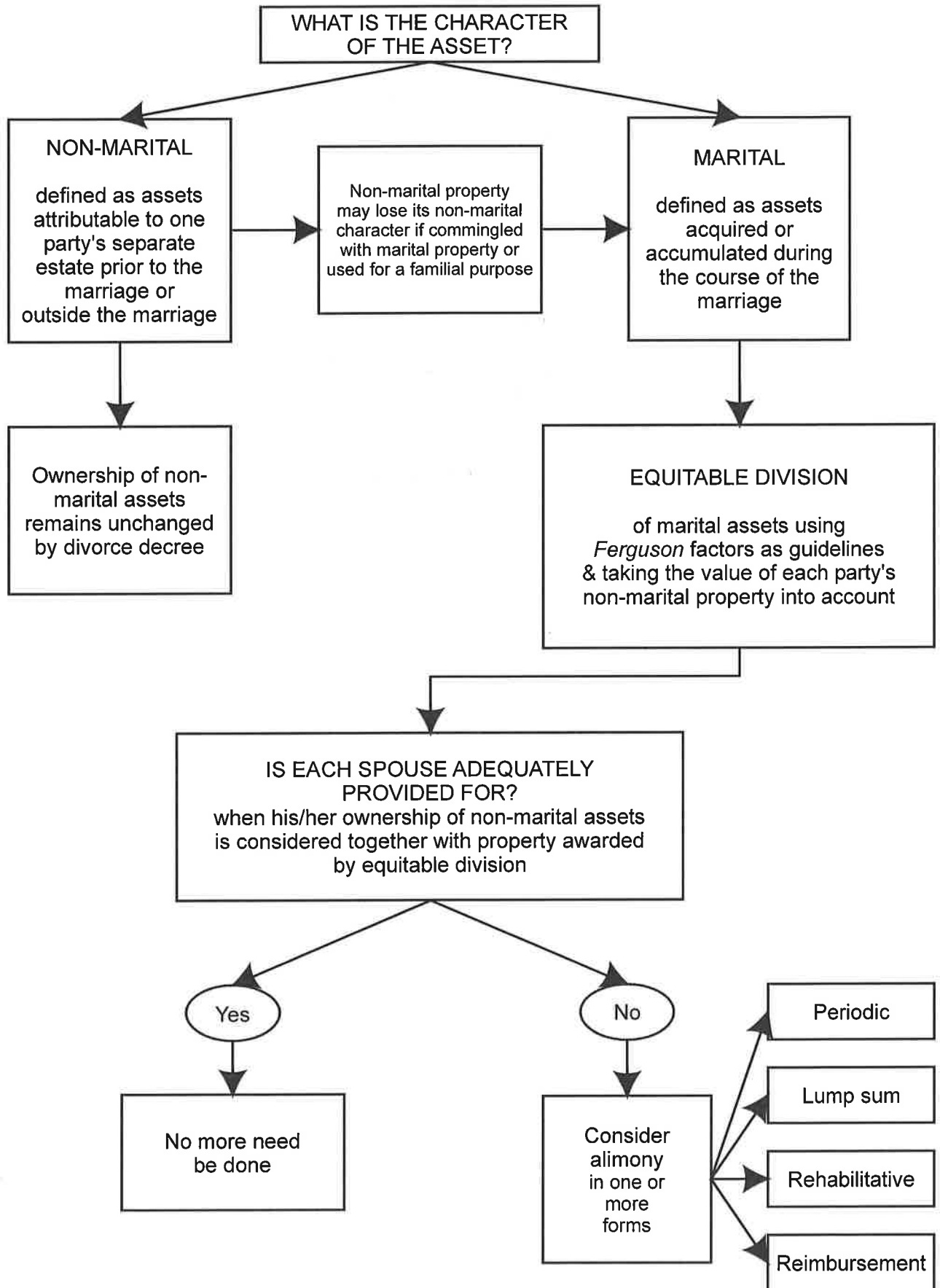
- 1) that portion of the proceeds allocable to compensation to the initially injured spouse for pain, suffering, and disfigurement should be awarded in its entirety to the injured spouse;
- 2) that portion of the proceeds allocable to lost wages, lost earnings capacity, and medical and hospital expenses, to the extent those apply to the time period of the marriage, are marital assets and are to be divided according to equitable distribution principles; and,
- 3) that portion of the proceeds allocable to loss of consortium should be awarded in its entirety to the spouse who suffered that loss.

***Tramel v. Tramel*, 740 So. 2d 286, 291 (Miss. 1999).**

### **Lottery Winnings**

Because the chancellor did not utilize either *Hemsley* or *Ferguson* in determining [wife's] entitlement to part of [husband's] winnings, this Court must reverse the judgment of the trial court and remand this cause for a determination under the applicable case law as to whether the lottery ticket, which was acquired during the marriage, constitutes marital property under *Hemsley* and is therefore subject to equitable distribution. This Court further instructs the trial court to consider the *Ferguson* factors in dividing the lottery winnings should the chancellor conclude that the winnings are, in fact, marital property. ***Kalman v. Kalman*, 905 So. 2d 760, 763-64 (Miss. Ct. App. 2004).**

## PROPERTY DIVISION





## ALIMONY

### § 93-5-23      **Children; spousal maintenance or alimony:**

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. . . .

### Court's Discretion

Our law vests in the chancery courts of this state broad authority to provide for the material needs of spouses incident to divorce. *Hubbard v. Hubbard*, 656 So. 2d 124, 129 (Miss. 1995).

Over the years our cases have recognized several general forms of aid including, but not limited to:

- (a) periodic alimony, sometimes called permanent or continuing alimony;
- (b) lump sum alimony or alimony in gross;
- (c) division of jointly accumulated property; and
- (d) award of equitable interest in property.

There are no clear lines of demarcation between these, nor should there be, and our courts have long been authorized in their sound discretion to use one or several or all in combination. *Hubbard v. Hubbard*, 656 So. 2d 124, 129 (Miss. 1995).

The amount of alimony awarded is a matter primarily within the discretion of the chancery court because of “its peculiar opportunity to sense the equities of the situation before it.” *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992).

### Standard of Review

Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion. In the case of a claimed inadequacy or outright denial of alimony, we will interfere only where the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion. If we find the chancellor's decision manifestly wrong, or that the court applied an erroneous legal standard, we will not hesitate to reverse. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

### *Types of Alimony*

In Mississippi there are four types of alimony: periodic, lump sum, rehabilitative, and reimbursement. We must look to the substance, rather than the label, to determine whether alimony is periodic or lump sum. *West v. West*, 891 So. 2d 203, 212 (Miss. 2004).

### *Periodic Alimony*

Periodic alimony is monthly alimony awarded on the basis of need. As a general rule, periodic alimony has no fixed termination date; instead, it automatically terminates at the death of the obligor or the remarriage of the obligee. Periodic alimony may be modified or even terminated subsequent to the decree awarding alimony in the event of a material change of circumstances. . . . The alimony only vests when payment becomes due. *West v. West*, 891 So. 2d 203, 212 (Miss. 2004).

Periodic alimony is for an indefinite period vesting as it comes due and [is] modifiable. Periodic alimony terminates upon the remarriage of the receiving spouse or the death of the paying spouse. In the event of a material change in circumstances, it may be modified or terminated upon an order of the court. *Hubbard v. Hubbard*, 656 So. 2d 124, 129-30 (Miss. 1995).

All periodic alimony is subject to change, depending upon the condition of the parties. To set a fixed termination date . . . was error. *Cleveland v. Cleveland*, 600 So. 2d 193, 197 (Miss. 1992).

### *Rehabilitative Periodic Alimony*

Therefore, we hold that a chancellor may place a time limitation on periodic alimony which is called "rehabilitative periodic alimony" for rehabilitative purposes. We do not disturb the Chancellor's ruling today or our holding in *Cleveland*, but rather uphold the award as "rehabilitative periodic alimony" instead of "periodic alimony." It is still the law in Mississippi that "periodic alimony" can not have a fixed termination date. We hold today that "rehabilitative periodic alimony," synonymous with "periodic transitional alimony" is a separate and equitable tool for chancellors to use in their discretion and provide an instructive explanation herein. Rehabilitative periodic alimony is an equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim. Rehabilitative periodic alimony is modifiable as well, but is for a fixed period of time vesting as it accrues. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995).

Rehabilitative alimony, recognized in 1995, is a monthly payment that is modifiable, but has a fixed termination date, and is designed to help the recipient reenter the

workforce. *Smith v. Little*, 834 So. 2d 54, 58 (Miss. Ct. App. 2002).

[W]e find that automatic termination upon the recipient spouse's remarriage is not part of the current definition of rehabilitative periodic alimony. *Waldron v. Waldron*, 743 So. 2d 1064, 1065 (Miss. Ct. App. 1999).

### **Lump Sum Alimony**

Lump sum is a fixed and irrevocable amount, used either as alimony or as a part of property division. It may be payable in a single lump sum or in fixed periodic installments and is a final settlement between husband and wife. A specific period of time for which payments are to run and a fixed sum of money are two characteristics of lump sum alimony. Even though a situation in which payments of lump sum alimony “may give said payments a superficial similarity to payments of periodic alimony, said fact does not change the vested, non-modifiable nature thereof.” Unless it is clear from the record what sort of alimony award is given, we must construe the alimony as being periodic and not lump sum. *West v. West*, 891 So. 2d 203, 212 (Miss. 2004) (citations omitted).

[W]hat is commonly referred to as lump sum alimony is that which from the outset becomes fixed and irrevocable. Lump sum alimony may be payable in a single lump sum or in fixed periodic installments. It may be payable in cash or in kind or in combination thereof. It is a final settlement between the husband and wife and may not be changed or modified by either party, absent fraud. Lump sum alimony is vested in the obligee when the judgment awarding it becomes final, retroactive to the date the judgment is entered. It becomes an obligation of the estate of the obligor if he or she dies before payment. *Bowe v. Bowe*, 557 So. 2d 793, 795 (Miss. 1990).

Lump sum alimony may be paid in a single lump sum or in fixed periodic installments and is a final settlement between husband and wife. *Creekmore v. Creekmore*, 651 So. 2d 513, 518 (Miss. 1995).

Lump sum alimony is not affected by remarriage of the payee spouse. *Creekmore v. Creekmore*, 651 So. 2d 513, 518 (Miss. 1995).

### **Reimbursement Alimony**

The fourth type, reimbursement alimony, recognized in 1999, is available to one who has supported a spouse in obtaining training or education which carries the possibility of future earnings, but which has not yet produced substantial property for division. *Smith v. Little*, 834 So. 2d 54, 58 (Miss. Ct. App. 2002).

### **Factors Considered in Making Alimony Awards**

The following factors, *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993), are to be considered by the chancellor in arriving at findings and entering judgment for alimony:

1. The income and expenses of the parties;
2. The health and earning capacities of the parties;
3. The needs of each party;
4. The obligations and assets of each party;
5. The length of the marriage;
6. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care;
7. The age of the parties;
8. The standard of living of the parties, both during the marriage and at the time of the support determination;
9. The tax consequences of the spousal support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party; or
12. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

### **Factors Considered in Awarding Lump Sum Alimony**

In *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988), the following factors were considered in awarding lump sum alimony:

- 1) substantial contribution to accumulation of wealth by quitting job to become housewife or assisting in husband's business;
- 2) long marriage;
- 3) separate income or separate estate meager in comparison to that of payor spouse; and
- 4) financial security without lump sum alimony.

Most important is a comparison of the estates. Subsequent to the decision in *Cheatham*, this Court has consistently employed these four factors when reviewing lump sum alimony. Disparity of the separate estates has continued to be the most compelling factor. *Creekmore v. Creekmore*, 651 So. 2d 513, 517 (Miss. 1995) (citations omitted).

### **To Determine Whether Alimony is Lump Sum or Periodic**

[I]n determining whether an alimony award is lump sum or periodic, we look to the substance of what has been provided, and not the label. We inquire not what the court entering the judgment meant but what the judgment means. ***Hubbard v. Hubbard*, 656 So. 2d 124, 129 (Miss. 1995).**

We still adhere to our prior decisions that unless it is clear from the record what sort of award is given that we will construe any ambiguity as being periodic alimony and not lump sum alimony. ***Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995).**

### **Modification of Alimony**

The law in Mississippi is well settled; alimony obligations are subject to modification only where there has been a material change in circumstances not reasonably anticipated when the divorce decree was entered. ***Harris v. Harris*, 879 So. 2d 457, 462 (Miss. Ct. App. 2004) (citation omitted).**

One of the factors utilized in initially calculating periodic alimony is the income and expenses of both parties. A material change in this factor should be considered in determining any modification of periodic alimony. ***Tillman v. Tillman*, 809 So. 2d 767, 770 (Miss. Ct. App. 2002) (citations omitted).**

[A party] cannot modify his alimony payments simply because he has incurred other debts. ***Magee v. Magee*, 754 So. 2d 1275, 1280 (Miss. Ct. App. 1999).**

### **Escalation Clauses**

To be enforceable, an escalation clause must be tied to (1) the inflation rate, (2) the non-custodial parent's increase or decrease in income, (3) the child's expenses, and (4) the custodial parent's separate income. ***Ligon v. Ligon*, 743 So. 2d 404, 406–07 (Miss. Ct. App. 1999) (citation omitted).**

This action . . . confronts . . . whether a property settlement agreement that contains an escalation clause for periodic alimony payments is enforceable, as opposed to an escalation clause that deals with child support payments. . . . No public policy was breached when the alimony escalation clause was originally agreed to and judicially approved. No evidence of fraud, mistake or overreaching was shown by [the party] to have influenced the execution of the property settlement agreement by the parties, and the evidence shows that he was at all times able to comply with the terms of the settlement agreement. Therefore, the escalation agreement is enforceable. . . . ***Speed v. Speed*, 757 So. 2d 221, 226 (Miss. 2000).**

<b>ALIMONY</b>			
	<b>Periodic</b>	<b>Rehabilitative</b>	<b>Lump Sum</b>
<b>Duration</b>	<p>Until death or remarriage of recipient spouse or death of paying spouse.</p> <p>In the event of ambiguity in the decree, presumption is generally for periodic and not lump sum alimony.</p>	<p>Paid for a definite and fixed period of time.</p> <p>Does not automatically terminate at remarriage of recipient spouse.</p>	<p>Payable in single installment or in multiple fixed sums over definite period.</p> <p>In the event of ambiguity in the decree, presumption is generally for periodic and not lump sum alimony.</p>
<b>Modification</b>	Modifiable upon a showing of a material change in circumstances of either party.	Modifiable during period in which it accrues upon a showing of a material change in circumstances of either party.	Not modifiable, absent showing of fraud.
<b>Vesting</b>	Sums vest as they accrue.	Sums vest as they accrue.	Sum vests when judgment awarding it is final.

### **SEPARATE MAINTENANCE**

We acknowledge that separate maintenance is court-created equitable relief based upon the marriage relationship and is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other. ***Jackson v. Jackson*, 114 So. 3d 768, 774 (Miss. Ct. App. 2013).**

A decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance for her until such time as they may be reconciled to each other. . . . The American rule is that a wife who is abandoned by her husband without means of support has a remedy in courts of equity to compel her husband to support her without asking for a decree of divorce. Maintenance was considered to be a vested right arising from the marriage relationship and of the husband's legal duty and contract to support the wife. . . . [T]he equity courts of this state have permitted maintenance when the wife was separated from the husband with just cause. The chancery court has equity powers to determine the amount of maintenance needed for the abandoned wife, together with suit money and attorneys' fees. ***Thompson v. Thompson*, 527 So. 2d 617, 621 (Miss. 1988).**

### **Basis for Award of Separate Maintenance**

Additionally and significant to our review of this case, the power of the court to grant the equitable relief of separate maintenance must be based on the requisites of a separation without material fault of the petitioner or requesting spouse and willful abandonment of her by the husband with refusal to support her. ***Jackson v. Jackson*, 114 So. 3d 768, 773 (Miss. Ct. App. 2013).**

The power of the chancellor to grant a wife's request for separate maintenance is based on:

- (a) separation without fault on the part of the wife and
- (b) willful abandonment of the wife by the husband accompanied by a refusal to support her.

***Lynch v. Lynch*, 616 So. 2d 294, 296 (Miss. 1993).**

Moreover, the wife need not be totally blameless to allow an award of separate maintenance, but her misconduct must not have materially contributed to the separation. ***Shorter v. Shorter*, 740 So. 2d 352, 355 (Miss. 1999).**

### **Factors Considered in Awarding Separate Maintenance**

Six criteria must be considered in setting awards of separate maintenance:

- 1) the health of the husband and the wife;
- 2) their combined earning capacity;
- 3) the reasonable needs of the wife and children;
- 4) the necessary living expenses of the husband;
- 5) the fact that the wife has free use of the home and furnishings; and
- 6) other such facts and circumstances.

While the amount of separate maintenance should provide for the wife as if the couple were still cohabiting, the allowance should not unduly deplete the husband's estate. ***Shorter v. Shorter*, 740 So. 2d 352, 357 (Miss. 1999).**

### **Findings of Fact**

Under the chancellor's findings, which are supported in the record, this Court agrees that there should be no award of separate maintenance. ***Robinson v. Robinson*, 554 So. 2d 300, 304 (Miss. 1989).**

For seven years beginning in 1987, [husband] paid [wife] \$556.00 per month in separate maintenance. Nowhere in the chancellor's findings of fact and conclusions of law does he address the termination of the separate maintenance payments and its effect on the parties' positions after the divorce. Under the unique facts of this case, such a failure constitutes an abuse of discretion. ***Godwin v. Godwin*, 758 So. 2d 384, 387-88 (Miss. 1999).**

### **Modification of Separate Maintenance**

In *Kennedy v. Kennedy*, 650 So. 2d 1362, 1368 (Miss. 1995), the supreme court compared the modification of separate-maintenance awards to the modification of child-support payments. The party that seeks to modify the chancellor's order must demonstrate a 'substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified. ***Collins v. Collins*, 132 So. 3d 1066, 1068 (Miss. Ct. App. 2014).**

Separate maintenance may be modified by increasing, decreasing or terminating the award, in the event of a material change in circumstances subsequent to the decree awarding separate maintenance. ***Kennedy v. Kennedy*, 650 So. 2d 1362, 1367 (Miss. 1995).**



### Termination of Separate Maintenance

Termination of such a separate maintenance obligation would be proper if the husband should, in good faith, offer to cohabit and treat the wife with conjugal kindness. *Watkins v. Watkins*, 957 So. 2d 440, 442 (Miss. Ct. App. 2007).

[Husband] claims the chancellor erred when he refused to terminate the separate-maintenance obligation. According to [husband], the chancellor placed undue emphasis on [husband's] financial motivation for returning to the marital home. [Husband] concedes that curtailing his living expenses was one of his motives for returning to [wife]. However, [husband] goes on to state that his primary purpose was to cohabit with [wife] as required by law. . . . A decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance for her until such time as they may be reconciled to each other. . . . If the husband should, in good faith, offer to cohabit and treat the wife with conjugal kindness, the wife's right to separate maintenance ceases and would . . . be discontinued. For reconciliation to occur it must be accepted that the appellant was honest in his intention to remedy his fault, and that his offers of reconciliation and request to return were made in good faith, with honest intention to abide thereby, and that the defendant deliberately refused his offers. These issues are essentially questions of fact, which this Court shall not disturb so long as they are supported by substantial evidence. [Husband] initially moved to terminate the monthly separate-maintenance obligation less than two weeks after the chancellor had entered the final judgment ordering [husband] to begin paying monthly separate maintenance to [wife]. . . . Finally, it is noteworthy that [husband] attempted to resume cohabitation by moving some of his things back into an apartment attached to the marital home at approximately 10:00 p.m. the night before the hearing on his motion to terminate the separate-maintenance obligation. . . . One acting under this time frame and the circumstances that attend such does not equal good faith on his part. . . . The Mississippi Supreme Court held in the case of *Day*, that any attempt at reconciliation must be in good faith and honest in the husband's intention to remedy his fault. . . . Within the bounds of the previously mentioned standard of review, we conclude that the chancellor was not manifestly wrong when he found that [husband] did not seek to resume cohabitation in good faith. . . . It was not unreasonable for the chancellor to conclude that, by declining to discuss openly any lingering issues regarding his capacity for fidelity, [husband] had not made a good-faith attempt to resume cohabitation and his marital relationship with [wife]. . . . Accordingly, we find that the chancellor did not abuse his discretion when he denied [husband's] requests to terminate the separate-maintenance obligation. *McDonald v. McDonald*, 69 So. 3d 61, 66-67 (Miss. Ct. App. 2011) (citations omitted).

### **Standard of Review**

Decisions to allow separate maintenance and amounts awarded are “matters within the discretion of the chancellor. Further, these decisions will not be reversed unless they are against the overwhelming weight of the evidence.” On appeal, this Court will not overturn the chancery court unless its findings were manifestly wrong. *Huseth v. Huseth*, 135 So. 3d 846, 851 (Miss. 2014) (citations omitted).

We acknowledge that on appeal, the amount of a separate-maintenance award is reviewed for abuse of discretion. *Jackson v. Jackson*, 114 So. 3d 768, 773 (Miss. Ct. App. 2013).

**CHAPTER 14**  
**CHILD CUSTODY & VISITATION**

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## APPENDIX

### Uniform Child Custody Jurisdiction & Enforcement Act

## **CHAPTER 14**

### **CHILD CUSTODY & VISITATION**

#### **In Divorce Proceedings**

##### **§ 93-5-23      Children; spousal maintenance or alimony:**

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed.

Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. For the purposes of orders touching the maintenance and alimony of the wife or husband, “property” and “an asset of a spouse” shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such interest be considered as an economic circumstance or other factor.

The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.

Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case. At the discretion of the court,

any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance, the court may direct the party and his attorney making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public. The duty of support of a child terminates upon the emancipation of the child. The court may determine that emancipation has occurred pursuant to Section 93-11-65. Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

Our statute allows a chancery court that issued a divorce decree to retain jurisdiction over the subject matter and the parties, and, on petition, to change the decree. *McDonald v. McDonald*, 39 So. 3d 868, 885 (Miss. 2010).

***See 25 U.S.C.A. § 1901 et seq. (Indian Child Welfare Act).***

*Not in Divorce Proceedings*

**§ 93-11-65 Additional remedies available:**

(1)(a) In addition to the right to proceed under Section 93-5-23, Mississippi Code of 1972, and in addition to the remedy of habeas corpus in proper cases, and other existing remedies, the chancery court of the proper county shall have jurisdiction to entertain suits for the custody, care, support and maintenance of minor children and to hear and determine all such matters, and shall, if need be, require bond, sureties or other guarantee to secure any order for periodic payments for the maintenance or support of a child. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support. Proceedings may be brought by or against a resident or nonresident of the State of Mississippi, whether or not having the actual custody of minor children, for the purpose of judicially determining the legal custody of a child. All actions herein authorized may be brought in the county where the child is actually residing, or in the county of the residence of the party who has actual custody, or of the residence of the defendant. Process shall be had upon the parties as provided by law for process in person or by publication, if they be nonresidents of the state or residents of another jurisdiction or are not found therein after diligent search and inquiry or are unknown after diligent search and inquiry; provided that the court or chancellor in vacation may fix a date in termtime or in vacation to which process may be returnable and shall have power to proceed in termtime or vacation. Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, the chancellor may consider the preference of a child of twelve (12) years of age or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child. The chancellor shall place on the record the reason or reasons for which the award of custody was made and explain in detail why the wishes of any child were or were not honored. . . .

In addition, Father contends that the chancellor failed to consider E.C.P.'s preference to live with him. Section 93-11-65 allows a child who has attained the age of 12 to state her preference to the court as to whether she would rather live with her mother or father. However, the trial court is not bound to follow the child's preference. *In re E.C.P.*, 918 So. 2d 809, 824 (Miss. Ct. App. 2005).

(11) Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

## Concurrent Jurisdiction with Youth Court

### § 43-21-151 Exclusive original jurisdiction; exceptions; children under 13:

(1) The youth court shall have exclusive original jurisdiction in all proceedings concerning a delinquent child, a child in need of supervision, a neglected child, an abused child or a dependent child except in the following circumstances: . . .

(c) When a charge of abuse of a child first arises in the course of a custody action between the parents of the child already pending in the chancery court and no notice of such abuse was provided prior to such chancery proceedings, the chancery court may proceed with the investigation, hearing and determination of such abuse charge as a part of its hearing and determination of the custody issue as between the parents, notwithstanding the other provisions of the Youth Court Law. The proceedings in chancery court on the abuse charge shall be confidential in the same manner as provided in youth court proceedings.

The current subsection 43-21-151(1)(c) was adopted after *In re D.L.D.* and has been noted to have been a response to that decision by the Legislature. But, as we said, the statute allows the chancery court the option of resolving the abuse allegations under certain circumstances. This reading of the statute was confirmed in the more recent case of *McDonald v. McDonald*, 39 So. 3d 868, 886-87 (Miss. 2010), where the supreme court explained that both the chancery court and the youth court had jurisdiction over abuse allegations that arose after an adjudication of custody in chancery court. There, the chancery court actually exercised its option to assume jurisdiction and adjudicated the abuse allegations, and that decision was affirmed. But, in the instant case, the chancery court never asserted jurisdiction, and it was the youth court that adjudicated the abuse allegations. It had jurisdiction to do so from the statute. We conclude that the youth court's judgment is not void for want of jurisdiction. This issue is without merit. *In Interest of V.M.H.*, 223 So. 3d 187, 190 (Miss. Ct. App. 2017) (citation omitted).

The Appellants claim the youth court's decision should be vacated and transferred to the chancery court because the youth court had no jurisdiction over L.H. According to the Appellants, the chancery court had continuing jurisdiction over L.H., by virtue of the custody proceedings involving L.H., under Mississippi Code Annotated section 43-21-151(1)(c). Jurisdiction is a question of law. This Court reviews questions of law de novo. Section 43-21-151(1)(c) provides: The youth court shall have exclusive original jurisdiction in all



proceedings concerning a delinquent child, a child in need of supervision, a neglected child, an abused child or a dependent child except [w]hen a charge of abuse of a child first arises in the course of a custody action between the parents of the child already pending in the chancery court and no notice of such abuse was provided prior to such chancery proceedings. A charge of abuse did not first arise during the course of a pending chancery court custody action between L.H.'s parents because there was not a pending custody action between L.H.'s parents. The youth court did not err by exercising subject-matter jurisdiction over the charge that L.H. had been sexually abused by her cousins while she was visiting the Appellants. We find no merit to this issue. *In re L.H.*, 87 So. 3d 1139, 1141-42 (Miss. Ct. App. 2012).

### **Definitions of the Types of Custody**

#### **§ 93-5-24(5) Custody order; access to information; custody by parent with history of perpetrating family violence:**

(5)(a) For the purposes of this section, “joint custody” means joint physical and legal custody.

(b) For the purposes of this section, “physical custody” means those periods of time in which a child resides with or is under the care and supervision of one (1) of the parents.

(c) For the purposes of this section, “joint physical custody” means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents.

(d) For the purposes of this section, “legal custody” means the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of a child.

(e) For the purposes of this section, “joint legal custody” means that the parents or parties share the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of a child. An award of joint legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and to confer with one another in the exercise of decision-making rights, responsibilities and authority. An award of joint physical and legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and unless allocated, apportioned or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities and authority.

**Types of Custody that May be Awarded**

**§ 93-5-24      Custody order; access to information; custody by parent with history of  
perpetrating family violence:**

(1) Custody shall be awarded as follows according to the best interests of the child:

(a) Physical and legal custody to both parents jointly pursuant to subsections (2) through (7).

(b) Physical custody to both parents jointly pursuant to subsections (2) through (7) and legal custody to either parent.

(c) Legal custody to both parents jointly pursuant to subsections (2) through (7) and physical custody to either parent.

(d) Physical and legal custody to either parent.

(e) Upon a finding by the court that both of the parents of the child have abandoned or deserted such child or that both such parents are mentally, morally or otherwise unfit to rear and train the child the court may award physical and legal custody to:

(i) The person in whose home the child has been living in a wholesome and stable environment; or

(ii) Physical and legal custody to any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

In making an order for custody to either parent or to both parents jointly, the court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order. . . .

(5)(a) For the purposes of this section, “joint custody” means joint physical and legal custody.

(b) For the purposes of this section, “physical custody” means those periods of time in which a child resides with or is under the care and supervision of one (1) of the parents.

(c) For the purposes of this section, “joint physical custody” means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents.

(d) For the purposes of this section, “legal custody” means the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of a child.

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joint physical and legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and unless allocated, apportioned or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities and authority.

#### **Application for Custody**

##### **§ 93-5-24      Custody order; access to information; custody by parent with history of perpetrating family violence:**

(2) Joint custody may be awarded where irreconcilable differences is the ground for divorce, in the discretion of the court, upon application of both parents.

(3) In other cases, joint custody may be awarded, in the discretion of the court, upon application of one or both parents.

#### **Presumption of Best Interests**

##### **§ 93-5-24      Custody order; access to information; custody by parent with history of perpetrating family violence:**

(4) There shall be a presumption that joint custody is in the best interest of a minor child where both parents have agreed to an award of joint custody.

#### **No Presumption of Best Interests**

##### **§ 93-5-24      Custody order; access to information; custody by parent with history of perpetrating family violence:**

(7) There shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody.

#### **Rebuttable Presumption Against Custody**

##### **§ 93-5-24      Custody order; access to information; custody by parent with history of perpetrating family violence:**

(9)(a) (i) In every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence. The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one

(1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party. The court shall make written findings to document how and why the presumption was or was not triggered.

(ii) This presumption may only be rebutted by a preponderance of the evidence.

(iii) In determining whether the presumption set forth in subsection (9) has been overcome, the court shall consider all of the following factors:

1. Whether the perpetrator of family violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child because of the other parent's absence, mental illness, substance abuse or such other circumstances which affect the best interest of the child or children;

2. Whether the perpetrator has successfully completed a batterer's treatment program;

3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate;

4. Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate;

5. If the perpetrator is on probation or parole, whether he or she is restrained by a protective order granted after a hearing, and whether he or she has complied with its terms and conditions; and

6. Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(iv) The court shall make written findings to document how and why the presumption was or was not rebutted. . . .

### Modification of Custody Authorized by Statute

**§ 93-5-24      Custody order; access to information; custody by parent with history of  
perpetrating family violence:**

(6) Any order for joint custody may be modified or terminated upon the petition of both parents or upon the petition of one (1) parent showing that a material change in circumstances has occurred.

**§ 93-5-23      Children; spousal maintenance or alimony; referrals for failure to pay child  
support:**

The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.

### Determination of Custody

We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child. *Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983).

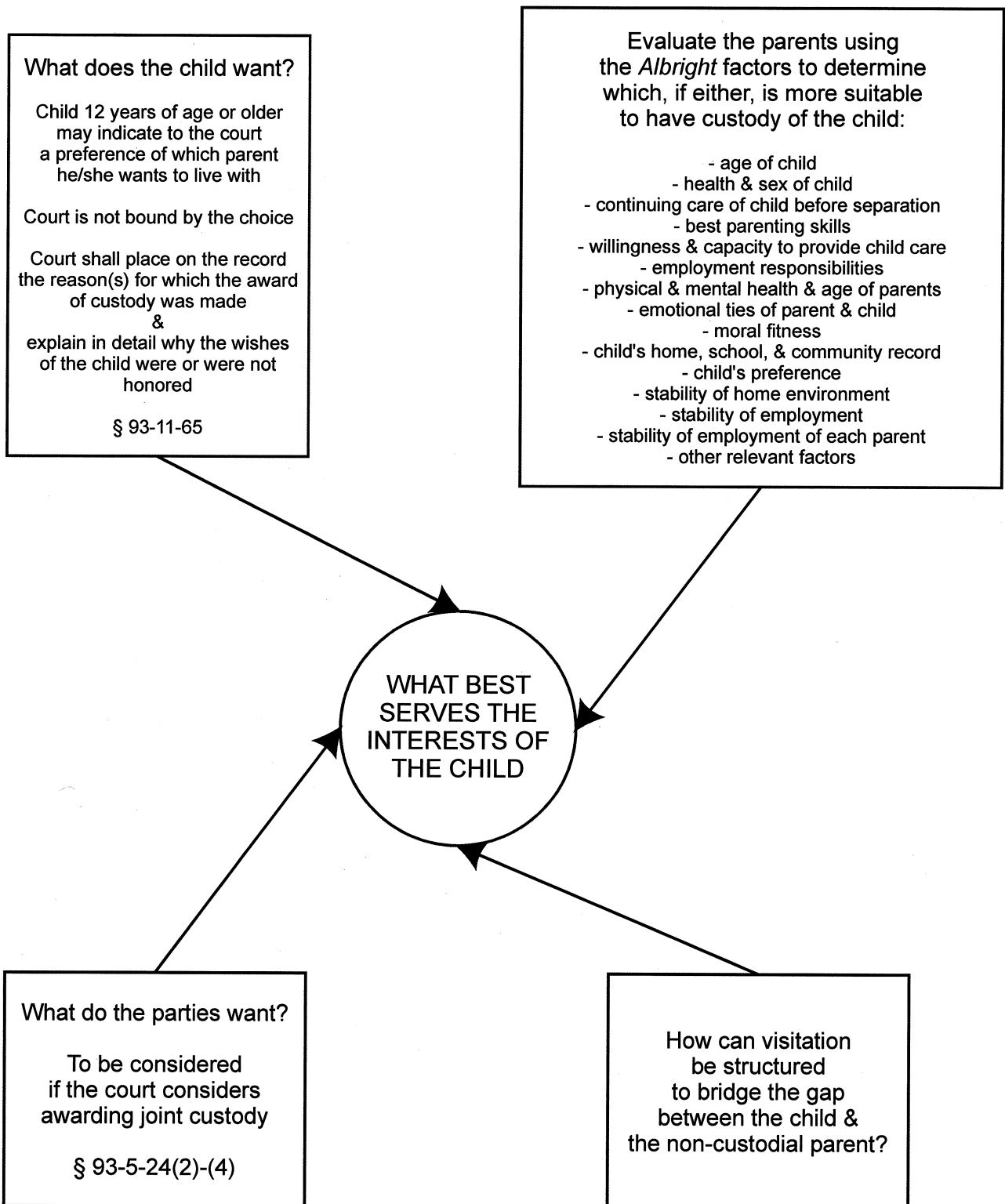
Age should carry no greater weight than other factors to be considered, such as:

- health, and sex of the child;
- a determination of the parent that has had the continuity of care prior to the separation;
- which has the best parenting skills and
- which has the willingness and capacity to provide primary child care;
- the employment of the parent and responsibilities of that employment;
- physical and mental health and age of the parents;
- emotional ties of parent and child;
- moral fitness of parents;
- the home, school and community record of the child;
- the preference of the child at the age sufficient to express a preference by law;
- stability of home environment and employment of each parent, and
- other factors relevant to the parent-child relationship.

*Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

# CHILD CUSTODY

## Factors Considered in an Initial Custody Determination



### **Findings of Fact**

In order to arrive at a custody arrangement that is in the child's best interest, the chancellor must make specific findings on each of the factors listed in *Albright*. ***Street v. Street*, 936 So. 2d 1002, 1009 (Miss. Ct. App. 2006).**

While we cannot say that the chancellor's conclusion is so lacking in evidentiary support as to be manifest error, in the absence of specific findings we cannot affirm with confidence that the best result has been reached. Because it is unclear how the court found that the best interest of [the child] was served by placing custody [with his mother], the court alluded to an inappropriate analysis regarding abandonment, and there are no specific findings applying the *Albright* factors, we conclude that the best course is to reverse and remand this case for the chancellor to provide specific findings of fact and conclusions of law using the *Albright* analysis. ***Hayes v. Rounds*, 658 So. 2d 863, 866 (Miss. 1995).**

#### **Uniform Chancery Court Rule 4.01 Findings by the Court:**

In all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the Court Reporter for record and called to the attention of the Chancellor.

### **Standard of Review**

The standard of review in child custody cases is strictly limited. A chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard in order for an appellate court to reverse. Findings of fact made by a chancellor may not be set aside or disturbed on appeal if they are supported by substantial, credible evidence. ***C.W.L. v. R.A.*, 919 So. 2d 267, 270 (Miss. Ct. App. 2005) (citations omitted).**

The standard of review in child custody cases is quite limited. A chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard in order for this Court to reverse. ***Johnson v. Gray*, 859 So. 2d 1006, 1012 (Miss. 2003).**

### **Modification of Custody - A Material Change in Circumstances**

The polestar consideration in child custody cases is the best interest of the child. The test for a modification of child custody is: (1) whether there has been a material change in circumstances which adversely affects the welfare of the child and (2) whether the best interest of the child requires a change of custody. In considering such changes, the chancery court should view the evidence within the totality of the circumstances. Once a material change is found, a modification of custody is warranted only if it would be in the best interest of the child. ***Floyd v. Floyd*, 949 So. 2d 26, 29 (Miss. 2007).**

In cases involving a request for modification of custody, the chancellor's duty is to determine if there has been a material change in the circumstances since the award of initial custody which has adversely affected the child and which, in the best interests of the child, requires a change in custody. [T]he non-custodial parent must satisfy a three part test:

- (1) a substantial change in circumstances of the custodial parent since the original custody decree,
- (2) the substantial change's adverse impact on the welfare of the child, and
- (3) the necessity of the custody modification for the best interests of the child.

This Court has also noted that the totality of the circumstances must be considered. Further, it is well settled that the polestar consideration in any child custody matter is the best interest and welfare of the child. We stress that in a custody modification proceeding, the non-custodial parent's request does not simply mean a re-weighing of the *Albright* factors to see who now is better suited to have custody of the child. Although a re-weighing of *Albright* factors may be triggered, in reviewing the circumstances, there must be shown, we reiterate, a material change not just a change in circumstances, that has had an adverse affect on the child and which requires, or mandates, a change in custody for the best interests of the child. In order to clarify the type or magnitude of material changes that warrant a modification of custody, our supreme court explained that when the totality of the circumstances display a material change in the overall living conditions in which the child is found which are likely to remain changed in the foreseeable future and such change adversely affects the child, a modification of custody is legally proper. . . . [T]he court [has] also made it clear that a modification of custody should never be made for the purpose of punishing or rewarding either parent. Plainly stated, a modification of custody is warranted in the event that the moving parent successfully shows that an application of the *Albright* factors reveal that there has been a material change in those circumstances which has an adverse effect on the child and a modification of custody would be in the child's best interests. ***Sanford v. Arinder*, 800 So. 2d 1267, 1271-72 (Miss. Ct. App. 2001) (citations omitted).**



This Court has articulated the law of modification of child custody as follows:

First, the moving party must prove by a preponderance of evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child.

Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.

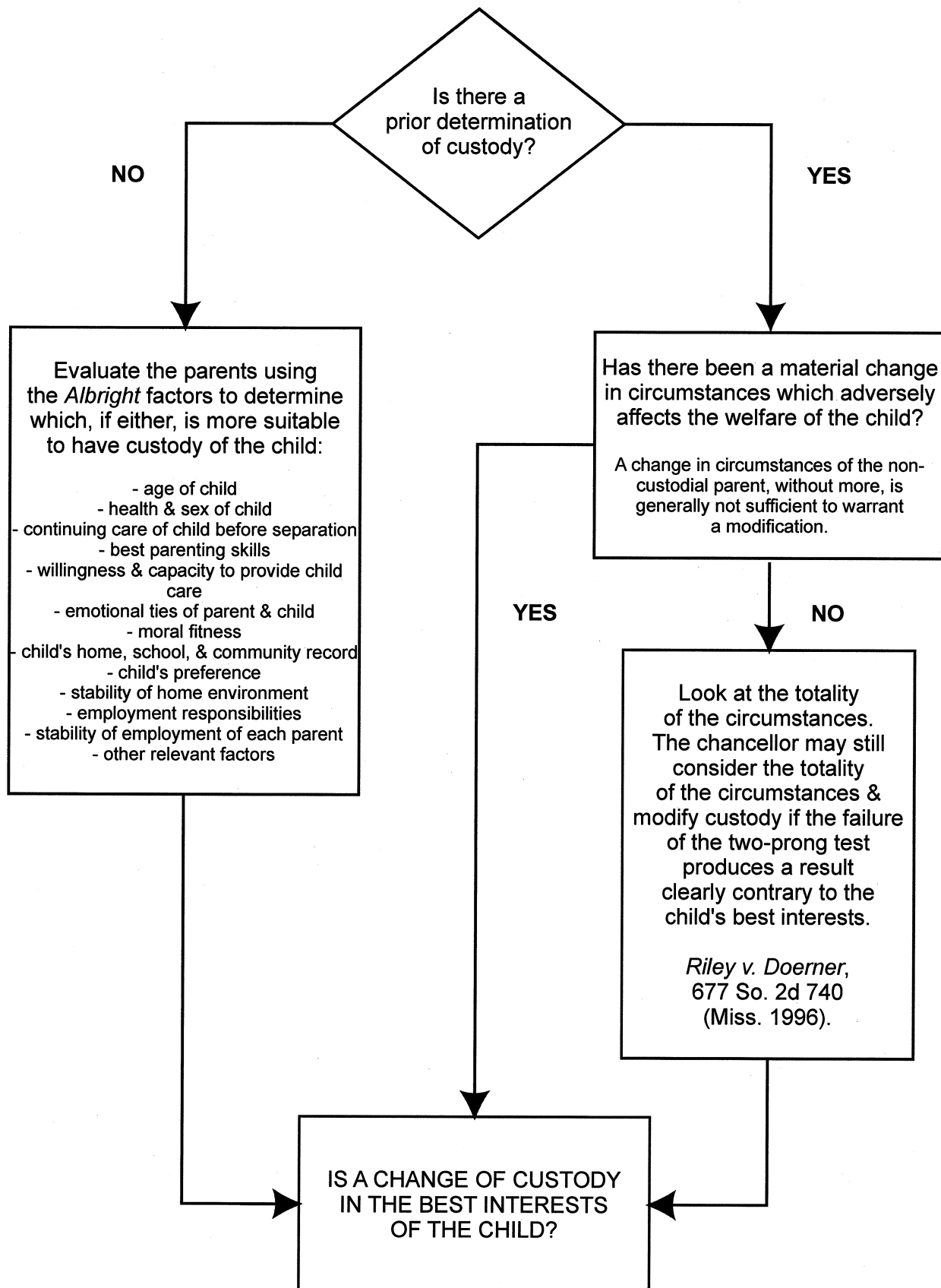
The change in circumstances is one in the overall living conditions in which the child is found. The totality of the circumstances must be considered. . . . In earlier opinions on this subject, we have held that a change in the circumstances of the non-custodial parent does not, by itself, merit a modification of custody. We adhere to that holding today. However, we further hold that when the environment provided by the custodial parent is found to be adverse to the child's best interest, and that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly. This must be so, for in all child custody cases, the polestar consideration is the best interest of the child. We further hold that where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment. Evidence that the home of the custodial parent is the site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that such environment has adversely affected the child's welfare. A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons. ***Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996) (citations omitted) (emphasis added).**

### **Standard of Review**

The standard of review of a chancellor's decision on a request for modification of custody is limited. A chancellor's decision will only be reversed if it is either manifestly wrong or clearly erroneous, or if the chancellor has applied an erroneous legal standard. ***Thornell v. Thornell*, 860 So. 2d 1241, 1243 (Miss. Ct. App. 2003).**

# CHILD CUSTODY

## Factors Considered in a Modification of Custody Proceeding



## Issues Relevant to Custody

### Child's Preference for Custodial Parent

#### § 93-11-65     **Additional remedies available:**

Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, the chancellor may consider the preference of a child of twelve (12) years of age or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child. The chancellor shall place on the record the reason or reasons for which the award of custody was made and explain in detail why the wishes of any child were or were not honored. . . .

### Separation of Siblings

In regard to the chancellor's separation of the children, there is no general rule in this state that the best interests of siblings are served by keeping them together. However, while the placement of children with their siblings is not a concern that overrides the best interest of the child, our case law makes it clear that keeping siblings together is assumed to be in the best interest of a child, absent a showing that the circumstances in a particular case are to the contrary. *Smullins v. Smullins*, 77 So. 3d 119, 131 (Miss. Ct. App. 2011) (citations omitted).

### Relocation of the Custodial Parent

This Court has repeatedly held that the mere moving of the custodial parent does not constitute a material change in circumstances for child custody modification purposes. This Court has never found a non-custodial parent's relocation creates a material change in circumstances sufficient for modification of child custody. Logic dictates that if the move of the custodial parent is not considered a material change in circumstances, then the move of the non-custodial parent is likewise not a material change in circumstances. To hold otherwise would permit a non-custodial parent to unilaterally create a material change in circumstances and then seek modification of custody. *Giannaris v. Giannaris*, 960 So. 2d 462, 468-69 (Miss. 2007) (citations omitted).

**Awarding Custody to a Step-Parent or a “Parent in Fact”**

Husband and wife were married, and a child was born to the marriage five months later. The couple separated, and the husband sued for divorce years later, after he had assumed the primary child-rearing responsibilities at the wife's request. Husband sought custody of the child because of the wife's drug use. On the day the trial for divorce was scheduled to start, the wife told the chancellor in chambers there was a strong possibility the husband was not the child's biological father. Subsequent blood testing excluded the husband from being the child's biological father. The chancellor, however, found the husband to be the child's “father-in-fact” through judicial adoption and through judicial estoppel, awarded him physical custody of the child, and required the wife to pay child support to the husband. . . . We find that the chancellor did not abuse his discretion in determining that [husband] is [child's] father, in finding that [husband] was the more fit parent to retain primary custody of [child] under *Albright*, or in rendering the child support award. Therefore, we affirm. . . . ***J.P.M. v. T.D.M.*, 932 So. 2d 760, 769-70 (Miss. 2006) (citations omitted).**

The chancellor held . . . that the paternity proceedings foreclosed any rights of custody or visitation Robert may have had with regard to the minor child. We disagree. Merely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship held by Robert and the minor child. Indeed, in *Logan v. Logan*, 730 So. 2d 1124 (Miss. 1998), we held that the custody of a minor child should be awarded to its stepfather upon the divorce between the stepfather and the child's biological mother. We reiterated our recognition of the doctrine of in loco parentis, which clearly applies to Robert. In *Logan*, we further held:

Where a stepfather, as an incident to a new marriage, has agreed to support the children of a previous marriage, or where he does so over a period of time and the mother and the children in good faith rely to their detriment on that support, the best interests of the children require entry of a child support decree against the stepfather. Thus, it follows that if a stepparent can be required to pay child support for a stepchild based on his support of the stepchild over a period of time, where it is in the best interests of the child, he should be allowed to have custody of the stepchild based on the affection for and support of that child over a period of time. With the burden should go the benefit.

Under *Logan*, because Robert supported and cared for the minor child as if she were his own natural child, under state law, he may be required to pay child support for the minor child. It therefore follows that he may be awarded custody and/or visitation rights with the minor child. ***Griffith v. Pell*, 881 So. 2d 184, 186 (Miss. 2004).**

In this appeal from the Jackson County Chancery Court, we find that the chancellor erred in determining that he did not have the power to make a custody award to a stepparent and thus making no custody decision whatsoever after expressly finding the natural parent unfit. Instead, where it is in the best interests of the child, temporary custody/guardianship should have been given to the stepfather, until such time as the biological father could be located and given proper notice. . . . The chancellor, however, decided not to determine custody of Terry. He specifically recognized the relationship between Gary and his stepson, noting that Gary had provided him with food, clothing, shelter and medical care since he was an infant, and acted as a loving and caring parent to Terry. Indeed, the record indicates that Terry regards Gary as his father and calls him “Daddy.” Further, Shirley testified also that neither she nor Terry had any contact with the child's biological father for more than five years. Nonetheless, the chancellor held that because the biological father was not made a party to the suit and was not before the court to testify in reference to Terry's care and custody, no finding could be made as to whether the presumption of the fitness of the natural parent could be overcome. . . . This Court has not addressed the issue of whether a chancellor may grant custody of a stepchild to a stepparent when one natural parent was not a party to the proceeding. However, we have recognized that while a chancellor may award custody to a third party when the parents are unfit, “it is the strong policy of the law of this State that a child shall remain in the custody of one of the parents unless there has been a clear showing that both are unfit.” . . . Additionally, we specifically have recognized the doctrine of *in loco parentis*. We have defined a person acting *in loco parentis* as one who has assumed the status and obligations of a parent without a formal adoption. Thus . . . we stated that “[a]ny person who takes a child of another into his home and treats it as a member of his family, providing parental supervision, support and education, as if it were his own child is said to stand *in loco parentis*.” “[I]f it develops that the mother and father of a child are unsuitable to have custody, it is the duty and responsibility of the court to find a suitable home and suitable adults to stand *in loco parentis*.” Similarly, we have recognized the role of courts in general as *parens patriae* in child custody cases. Where a stepfather, as an incident to a new marriage, has agreed to support the children of a previous marriage, or where he does so over a period of time and the mother and the children in good faith rely to their detriment on that support, the best interests of the children require entry of a child support decree against the stepfather. Thus, it follows that if a stepparent can be required to pay child support for a stepchild based on his support of the stepchild over a period of time, where it is in the best interests of the child, he should be allowed to have custody of the stepchild based on the affection for and support of that child over a period of time. With the burden should go the benefit. Even without clear statutory authorization for the inclusion of stepchildren as “children of the marriage” under Section 93-5-23, it is clear from the decisions of this Court that a stepparent should be considered among the third parties entitled

to custody of a child by overcoming the presumption of the fitness of the natural parents. This comports with our well-established concern for the best interests of the child in custody matters. . . . Rather than doing nothing after having found the mother unfit, the chancellor had several avenues open to him. As a first step, he should have ordered the Department of Human Services to locate Cook, so that he might be provided with proper notice and inquiry made into his fitness as a parent. Further, until such time as Cook could be located and proceedings initiated to determine his fitness and/or whether he had abandoned the child, Gary could have been awarded temporary custody and/or appointed guardian. Once Cook was properly noticed, then proceedings to determine permanent custody could begin. To be awarded custody, Gary must again make a clear showing that the natural parent has abandoned the child; the conduct of the parent is so immoral as to be detrimental to the child; or that the parent is unfit mentally or otherwise to have custody. Once such a showing is made, the chancellor must consider, as with other custody determinations [the *Albright* factors]. Contrary to his findings, the chancellor had the authority to determine the custody of Terry Cook. At the very least, the child could have been placed in the temporary custody of his stepfather, Gary Logan, until such time as his natural father could be located and a determination of his parental fitness made. Moreover, where it is in the best interests of the child and a determination has been made that the child's biological parents are unfit, a step parent may be found to be the proper person to assume custody of that child. ***Logan v. Logan*, 730 So. 2d 1124, 1124-27 (Miss. 1998) (citations omitted).**

## **VISITATION**

### **Non-Custodial Parent**

The chancellor has broad discretion when determining appropriate visitation and the limitations thereon. When the chancellor determines visitation, he must keep the best interest of the child as his paramount concern while always being attentive to the rights of the non-custodial parent, recognizing the need to maintain a healthy, loving relationship between the non-custodial parent and his child. *Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994) (citations omitted).

This Court has consistently ruled that a non-custodial parent should be awarded visitation privileges in order to foster a positive and harmonious relationship between parent and child. *Wood v. Wood*, 579 So. 2d 1271, 1273 (Miss. 1991).

This Court will not reverse a chancellor's findings of fact so long as they are supported by substantial evidence in the record. However, this Court "will reverse when he is manifestly in error in his finding of fact or has abused his discretion." *Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994) (citations omitted).

### **Reasonable Visitation**

The specification of times for visitation rights is committed to the broad discretion of the chancellor, but that does not excuse the failure of the chancellor to specify what those times are. The final judgment of divorce provides "reasonable visitation as specifically dictated in the record and agreed by the parties." However, the record does not indicate any specific visitation schedule or agreement between the parties concerning visitation between [the father] and his children. We, therefore, remand on this issue and order that the chancellor enter a specific visitation schedule. *Lauro v. Lauro*, 924 So. 2d 584, 591 (Miss. 2006) (citations omitted).

The appellee filed an instrument designated "Petition for Reasonable Visitation Rights." . . . We view this instrument not as a petition for modification of the original decree, but for the court to define the term "reasonable visitation rights." In a situation where the parents cannot agree on visitation rights (and they seldom do, as in the record before this Court), such rights must be defined and fixed. Otherwise, divorced or estranged parents of a child, would exceed lawful bounds, and probably, chaos would result. We have reviewed the definitions and limitations placed on visitation rights by the chancellor, and are of the opinion that they are fair and reasonable as to both parents and the [child]. *Brown v. Gillespie*, 465 So. 2d 1046, 1049 (Miss. 1985).

### **Overnight Visitation**

Overnight visitation with the non-custodial parent is the rule, not the exception; indeed, a non-custodial parent is presumptively entitled during reasonable times to overnight visitation with the children. ***Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994).**

Overnight visitation with the non-custodial parent is the rule, and not the exception; indeed, a non-custodial parent is presumptively entitled during reasonable times to overnight visitation with the children. The approach we mandate is based upon the premise of our law in this area: that children of divorced parents should be encouraged to have a close, affectionate and, under the circumstances, as normal as possible a parent-child relationship. ***Wood v. Wood*, 579 So. 2d 1271, 1273 (Miss. 1991).**

### **Restrictions on Visitation**

In *Cox v. Moulds*, 490 So. 2d 866 (Miss. 1986), the issue before the court involved the authority of the Chancery Court to place restrictions upon a non-custodial parent's exercise of visitation rights. The chancellor restricted visitation based solely on the fact that the daughter aged 13 would not have her own room on the nights she visited her father. In reversing the chancellor, this court found no substantial evidence supporting the proposition that such overnight visitation would present any appreciable danger of hazard cognizable in our law. The court stated in a footnote that this is not to suggest that there will never be such circumstances justifying the restriction of visitation rights. The footnote in *Cox* suggests, and we [now] hold that the chancery court has the power to restrict visitation in circumstances which present an appreciable danger of hazard cognizable in our law. ***Newsom v. Newsom*, 557 So. 2d 511, 517 (Miss. 1990).**

In *Dunn v. Dunn*, 609 So. 2d 1277, 1286 (Miss. 1992), this Court stated that there must be evidence presented that a particular restriction on visitation is necessary to avoid harm to the child before a chancellor may properly impose the restriction. Otherwise, the chancellor's imposition of a restriction on a non-custodial parent's visitation is manifest error and an abuse of discretion. ***Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994).**

### **Modification of Visitation**

To modify a visitation order, it must be shown that the prior decree for reasonable visitation is not working and that a modification is in the best interest of the child. ***Butler v. Butler*, 218 So. 3d 759, 763 (Miss. Ct. App. 2017).**



**Non-Custodial Parent Who Has Committed Domestic or Family Violence**

**§ 93-5-24      Custody order; access to information; custody by parent with history of  
perpetrating family violence:**

(9)(a) (i) In every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence. The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party. The court shall make written findings to document how and why the presumption was or was not triggered.

(ii) This presumption may only be rebutted by a preponderance of the evidence.

(iii) In determining whether the presumption set forth in subsection (9) has been overcome, the court shall consider all of the following factors:

1. Whether the perpetrator of family violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child because of the other parent's absence, mental illness, substance abuse or such other circumstances which affect the best interest of the child or children;
2. Whether the perpetrator has successfully completed a batterer's treatment program;
3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate;
4. Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate;
5. If the perpetrator is on probation or parole, whether he or she is restrained by a protective order granted after a hearing, and whether he or she has complied with its terms and conditions; and

6. Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(iv) The court shall make written findings to document how and why the presumption was or was not rebutted.

***See § 97-5-42 Protection of victims of felony parental child sexual abuse; local registry; penalties; visitation.***

## **Grandparents' Visitation Rights**

Natural grandparents have no common-law “right” to visitation with their grandchildren. Such right, if any, must come from a legislative enactment. In the early 1980's, the Mississippi Legislature enacted the grandparents' visitation rights statutes, found at Mississippi Code Annotated Section 93-16-1 to 7. These statutes delineate how a grandparent may seek the opportunity to secure legal visitation with a grandchild. The best interests of the child are the paramount consideration when determining visitation. *Hillman v. Vance*, 910 So. 2d 43, 47 (Miss. Ct. App. 2005) (citations omitted).

### **§ 93-16-1 Jurisdiction:**

Any court of this state which is competent to decide child custody matters shall have jurisdiction to grant visitation rights with a minor child or children to the grandparents of such minor child or children as provided in this chapter.

### **§ 93-16-3 Eligibility to petition; venue; fees:**

(1) Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with the child.

We clarify that, under Section 93–16–3(1), the chancellor's consideration of the child's or children's best interest is not limited to the determination of the amount of visitation, but must be considered in determining whether the grandparents should receive visitation in the first place. *Smith v. Martin*, 222 So. 3d 255, 264 (Miss. 2017).

The *Martin* Court erred by instructing chancellors to consider the best interest of the child(ren) only in the context of the amount of visitation, after finding an entitlement to grandparent visitation under Section 93–16–3(1). *See Martin*, 693 So. 2d at 916 (“The chancellor in this case found that under [Section 93–16–3(1)] the petitioners are in fact the grandparents of [the child] and that their son is deceased. Thus, all the proof necessary under § 93–16–3(1) was present and, therefore, the grandparents should be awarded visitation.”) The *Martin* Court ignored the requirement of Section 93–16–5 that the best interest of the child(ren) be considered in determining the grandparents' entitlement to grandparent

visitation rights. The *Martin* Court stated the following:

In determining the amount of visitation that grandparents should be granted in this situation, some guidelines by this Court may be helpful. As always, the best interest of the child must be the polestar consideration.

But, under Section 93–16–5, the best interest of the child(ren) must be considered, even if Section 93–16–3(1) is found to apply, since Section 93–16–3(1) states that “either parent of the child's parent may petition the court . . . and seek visitation rights with the child.” Section 93–16–3(1) only permits the grandparents to seek visitation; it does not entitle them to receive it. ***Smith v. Martin*, 222 So. 3d 255, 263-64 (Miss. 2017) (citations omitted).**

(2) Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds:

(a) That the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and

(b) That visitation rights of the grandparent with the child would be in the best interests of the child.

(3) For purposes of subsection (3) of this section, the term "viable relationship" means a relationship in which the grandparents or either of them have voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six (6) months before filing any petition for visitation rights with the child, the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year, or the child has been cared for by the grandparents or either of them over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home.

(4) Any petition for visitation rights under subsection (2) of this section shall be filed in the county where an order of custody as to the child has previously been entered. If no custody order has been entered, then the grandparents' petition shall be filed in the county where the child resides or may be found. The court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees to the parent or parents in advance and prior to any hearing, except in cases in which the court finds that no financial hardship will be imposed upon the parents. The court may also direct the grandparents to pay reasonable attorney's fees to the

parent or parents of the child and court costs regardless of the outcome of the petition.

***See* M.R.C.P. 81.**

Mississippi's grandparent-visitation statute is narrow, allowing grandparents (not any person) to seek visitation only under certain circumstances. . . . Thus, we find the grandparent-visitation statutes and *Martin* do not violate the Constitution. ***Smith v. Wilson*, 90 So. 3d 51, 58 (Miss. 2012).**

**§ 93-16-5      Parties; standard; enforcement; modification:**

All persons required to be made parties in child custody proceedings or proceedings for the termination of parental rights shall be made parties to any proceeding in which a grandparent of a minor child or children seeks to obtain visitation rights with such minor child or children; and the court may, in its discretion, if it finds that such visitation rights would be in the best interest of the child, grant to a grandparent reasonable visitation rights with the child. Whenever visitation rights are granted to a grandparent, the court may issue such orders as shall be necessary to enforce such rights and may modify or terminate such visitation rights for cause at any time.

But, under Section 93–16–5, the best interest of the child(ren) must be considered, even if Section 93–16–3(1) is found to apply, since Section 93–16–3(1) states that “either parent of the child's parent may petition the court . . . and seek visitation rights with the child.” Section 93–16–3(1) only permits the grandparents to seek visitation; it does not entitle them to receive it. ***Smith v. Martin*, 222 So. 3d 255, 263-64 (Miss. 2017).**

Natural grandparents have no common-law “right” of visitation with their grandchildren. Such a right must come from a legislative enactment. Although the Mississippi Legislature created this right by enacting § 93–16–3, it is clear that natural grandparents do not have a right to visit their grandchildren that is as comprehensive to the rights of a parent. ***Settle v. Galloway*, 682 So. 2d 1032, 1035 (Miss. 1996).**

**§ 93-16-7      Application:**

This chapter shall not apply to the granting of visitation rights to the natural grandparents of any child who has been adopted by order or decree of any court unless:

- (a) one (1) of the legal parents of such child is also a natural parent of such child; or
- (b) one (1) of the legal parents of such child was related to the child by blood or marriage prior to the adoption.

This chapter shall apply to persons who become grandparents of a child by virtue of adoption.

**Factors to Consider in Determining Grandparents' Visitation**

This Court has set forth ten factors to be considered when determining visitation by grandparents:

1. The amount of disruption that extensive visitation will have on the child's life. This includes disruption of school activities, summer activities, as well as any disruption that might take place between the natural parent and the child as a result of the child being away from home for extensive lengths of time.
2. The suitability of the grandparents' home with respect to the amount of supervision received by the child.
3. The age of the child.
4. The age, and physical and mental health of the grandparents.
5. The emotional ties between the grandparents and the grandchild.
6. The moral fitness of the grandparents.
7. The distance of the grandparents' home from the child's home.
8. Any undermining of the parent's general discipline of the child.
9. Employment of the grandparents and the responsibilities associated with that employment.
10. The willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by the grandparents.

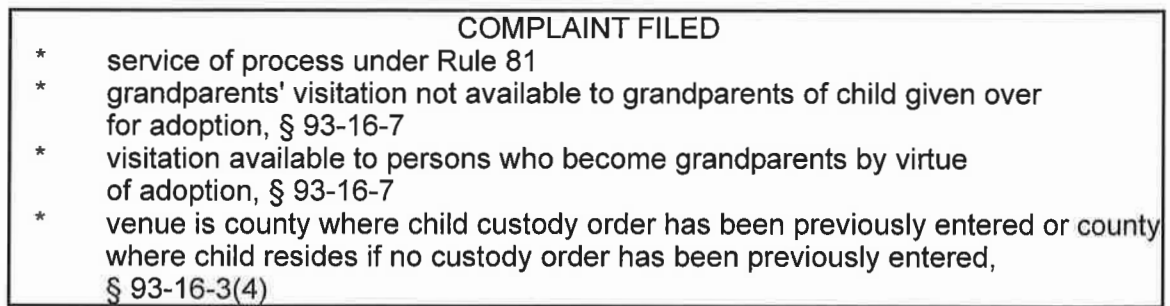
These ten factors have become known in our cases as "the *Martin* factors." *Townes v. Manyfield*, 883 So. 2d 93, 95-96 (Miss. 2004) (citations omitted).

### **Findings of Fact**

But our review of the record leads us to conclude that the chancellor carefully analyzed Sections 93–16–3(1) and (2) and scrupulously weighed each *Martin* factor, thereby performing the correct analytical process and properly applying the right procedural, evidentiary, and statutory principles. This process led her to a fair and just resolution of a difficult and emotional case. . . . Here, we can identify no manifest error which would warrant reversal, and the record before us is clear that the paramount consideration supporting the chancellor's decision was the best interest of the children. ***Smith v. Martin*, 222 So. 3d 255, 264 (Miss. 2017).**

[T]he record is devoid of any mention of the *Martin* factors which this Court has set forth to be considered, when determining the amount of visitation that grandparents should be granted. This Court [has] held that "making findings of fact under the *Martin* factors is an integral part of a determination of what is in the best interest of a child." Therefore, the *Martin* factors are to be applied and discussed in every case in which grandparent visitation is an issue. Furthermore, when a chancellor finds that there are circumstances that "overwhelmingly dictate" that a grandparent should be awarded equivalent visitation to that of a parent, those findings must be fully discussed on the record. The chancellor erred by failing to apply the *Martin* factors and failing to make a finding on the record supporting the visitation awarded. ***Townes v. Manyfield*, 883 So. 2d 93, 97 (Miss. 2004) (citations omitted).**

## GRANDPARENTS' VISITATION



WHO MAY PETITION?

GRANDPARENTS WHO HAVE A CHANGE IN STATUS

- \* child of grandparent lost custody of grandchild to grandchild's other parent
- \* child of grandparent had parental rights terminated
- \* child of grandparent is deceased

§ 93-16-3(1)

GRANDPARENTS WHO HAVE A "VIALE RELATIONSHIP"

- \* if grandparent had established a viable relationship with grandchild and grandchild's parent/custodian unreasonably denied grandparent visitation with the grandchild
- \* visitation rights must serve child's best interests

§ 93-16-3(2)

MARTIN FACTORS CONSIDERED BY THE COURT

- amount of disruption visitation will have on grandchild's life
- suitability of grandparents' home with respect to grandchild's supervision
- age of grandchild
- age, physical & mental health of grandparents
- emotional ties between grandparents and grandchild
- moral fitness of grandparents
- distance between grandchild's home & grandparents' home
- any undermining of parent's general discipline of grandchild
- employment of grandparents & responsibilities
- willingness of grandparents to accept that rearing the child is the parents' responsibility & that grandparents are not to interfere with that responsibility

See *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997).

"Viale Relationship"

- \* grandparents supported grandchild in whole or in part for not less than 6 months prior to petition or
- \* grandparents had frequent visitation, including overnight visitation, for 1 year prior to filing petition or
- \* grandparents cared for grandchild while parent was in jail or on military duty



# **Appendix to Chapter 14**

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**Uniform Child Custody Jurisdiction  
& Enforcement Act (“UCCJ&EA”)  
§ 93-27-101 *et seq.***

The Uniform Child Custody Jurisdiction and Enforcement Act became effective on July 1, 2004, and repealed the prior Uniform Child Custody Jurisdiction Act which was codified at § 93-23-1 *et seq.*

**Selected Statutes**

**§ 93-27-201 Initial child custody jurisdiction:**

- (1) Except as otherwise provided in Section 93-27-204, a court of this state has jurisdiction to make an initial child custody determination only if:
- (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
  - (b) A court of another state does not have jurisdiction under paragraph (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 93-27-207 or 93-27-208; and:
    - (i) The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
    - (ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
  - (c) All courts having jurisdiction under paragraph (a) or (b) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 93-27-207 or 93-27-208; or
  - (d) No court of any other state would have jurisdiction under the criteria specified in paragraph (a), (b), or (c) of this section.
- (2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.
- (3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

**§ 93-27-202 Exclusive, continuing jurisdiction:**

- (1) Except as otherwise provided in Section 93-27-204, a court of this state which has made a child custody determination consistent with Sections 93-27-201 or 93-27-203 has exclusive, continuing jurisdiction over the determination until:
- (a) A court of this state determines that neither the child, nor the child and

one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201.

### **§ 93-27-203 Jurisdiction to modify determination:**

Except as otherwise provided in Section 93-27-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 93-27-201(1) (a) or (b); and:

(a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 93-27-202 or that a court of this state would be a more convenient forum under Section 93-27-207; or

(b) A court of this state or a court of the other state determines that neither the child, the child's parents, nor any person acting as a parent presently does not reside in the other state.

### **§ 93-27-204 Temporary emergency jurisdiction:**

(1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, any order issued by a court of this state under this section must specify in the order a

period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 93-27-201 through 93-27-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.(4) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Sections 93-27-201 through 93-27-203, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

**§ 93-27-205 Notice; opportunity to be heard; joinder:**

(1) Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards of Section 93-27-108 must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(2) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

**§ 93-27-206 Simultaneous proceedings:**

(1) Except as otherwise provided in Section 93-27-204, a court of this state may not exercise its jurisdiction under this chapter if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 93-27-207.

(2) Except as otherwise provided in Section 93-27-204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 93-27-209. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of

the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

- (a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;
- (b) Enjoin the parties from continuing with the proceeding for enforcement; or
- (c) Proceed with the modification under conditions it considers appropriate.

**§ 93-27-207 Inconvenient forum:**

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers

just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

**§ 93-27-208 Jurisdiction declined by reason of conduct:**

(1) Except as otherwise provided in Section 93-27-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under Sections 93-27-201 through 93-27-203 determines that this state is a more appropriate forum under Section 93-27-207; or

(c) No court of any other state would have jurisdiction under the criteria specified in Sections 93-27-201 through 93-27-203.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 93-27-201 through 93-27-203.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under subsection (1), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including court costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

**§ 93-27-209 Information to be submitted to court:**

(1) Subject to any law providing for the confidentiality of procedures, addresses, and other identifying information, in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five (5) years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;

(b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in subsection (1)(a) through (c) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.\

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(5) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public, unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

#### **§ 93-27-210 Appearance of parties and child:**

(1) In a child custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(2) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given under Section 93-27-108 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(3) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(4) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.



**CHAPTER 15**  
**CHILD SUPPORT**

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## **APPENDIX**

### **Uniform Interstate Family Support Act**

## **CHAPTER 15**

### **CHILD SUPPORT**

#### **In Divorce Proceedings**

##### **§ 93-5-23 Children; spousal maintenance or alimony:**

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, . . . make all orders touching the care, custody and maintenance of the children of the marriage, and . . . However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each.

#### **Not in Divorce Proceedings**

##### **§ 93-11-65 Additional remedies available:**

(1)(a) In addition to the right to proceed under Section 93-5-23 . . . the chancery court of the proper county shall have jurisdiction to entertain suits for the custody, care, support and maintenance of minor children and to hear and determine all such matters. . . .

#### **Statutory Guidelines on How Much Child Support Should be Awarded**

##### **§ 43-19-101 Calculating support:**

(1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:

Number of Children Due Support	Percentage of Adjusted Gross Income That Should Be Awarded For Support
1	14%
2	20%
3	22%
4	24%
5 or more	26%

(2) The guidelines provided for in subsection (1) of this section apply unless the judicial or administrative body awarding or modifying the child support award makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103. . . .

### *How to Calculate Adjusted Gross Income*

#### **§ 43-19-101 Calculating support:**

(3) The amount of "adjusted gross income" as that term is used in subsection (1) of this section shall be calculated as follows:

(a) Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following:

- wages and salary income;
- income from self-employment;
- income from commissions;
- income from investments, including dividends, interest income and income on any trust account or property;
- absent parent's portion of any joint income of both parents;
- workers' compensation,
- disability,
- unemployment,
- annuity and retirement benefits, including an IRA;
- any other payments made by any person, private entity, federal or state government or any unit of local government;
- alimony;
- any income earned from an interest in or from inherited property;
- any other form of earned income;

and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse;

(b) Subtract the following legally mandated deductions:

- (i) Federal, state and local taxes.  
Contributions to the payment of taxes over and beyond the actual liability for the taxable year shall not be considered a mandatory deduction;
- (ii) Social security contributions;
- (iii) Retirement and disability contributions except any voluntary retirement and disability contributions;

(c) If the absent parent is subject to an existing court order for another child or children, subtract the amount of that court-ordered support;

(d) If the absent parent is also the parent of another child or other children residing with him, then the court may subtract an amount that it deems appropriate to account for the needs of said child or children;

(e) Compute the total annual amount of adjusted gross income based on paragraphs (a) through (d), then divide this amount by twelve (12) to obtain the monthly amount of adjusted gross income.

Upon conclusion of the calculation of paragraphs (a) through (e), multiply the monthly amount of adjusted gross income by the appropriate percentage designated in subsection (1) to arrive at the amount of the monthly child support award.

**AGI is more than \$100,000 or less than \$10,000**

(4) In cases in which the adjusted gross income as defined in this section is more than One Hundred Thousand Dollars (\$100,000.00) or less than Ten Thousand Dollars (\$10,000.00), the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable.

**Exceptions to the Statutory Guidelines**

**§ 43-19-103 Exceptions to guidelines:**

The rebuttable presumption as to the justness or appropriateness of an award or modification of a child support award in this state, based upon the guidelines established by Section 43-19-101, may be overcome by a judicial or administrative body awarding or modifying the child support award by making a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined according to the following criteria:

- (a) Extraordinary medical, psychological, educational or dental expenses.
- (b) Independent income of the child.
- (c) The payment of both child support and spousal support to the obligee.
- (d) Seasonal variations in one or both parents' incomes or expenses.
- (e) The age of the child, taking into account the greater needs of older children.
- (f) Special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines.
- (g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the noncustodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's

homemaking services.

(h) Total available assets of the obligee, obligor and the child.

(i) Payment by the obligee of child care expenses in order that the obligee may seek or retain employment, or because of the disability of the obligee.

(j) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

### **Other Factors to Consider in Determining Child Support**

This Court recognizes several factors for a chancellor to consider in child support cases:

(1) the health of the husband and his earning capacity;

(2) the health of the wife and her earning capacity;

(3) the entire sources of income of both parties;

(4) the reasonable needs of the wife;

(5) the reasonable needs of the child;

(6) the necessary living expenses of the husband;

(7) the estimated amount of income taxes the respective parties must pay on their incomes;

(8) the fact that the wife has the free use of the home, furnishings and automobile, and

(9) such other facts and circumstances bearing on the subject that might be shown by the evidence.

***Bredemeier v. Jackson*, 689 So. 2d 770, 778 (Miss. 1997) (citation omitted).**

It is wrong for the parents to hide income or to evade a complete assessment of income when child support is being considered. Where the chancellor is not convinced of honesty and openness of the parent, this may be a determining factor for proper consideration of the amount to award. ***Suber v. Suber*, 936 So. 2d 945, 948 (Miss. Ct. App. 2006) (citations omitted).**

### **Standard of Review**

Under the standard of review utilized to review a chancery court's findings of fact, particularly in the areas of divorce, alimony and child support, this Court will not overturn the court on appeal unless its findings were manifestly wrong. ***Shoffner v. Shoffner*, 909 So. 2d 1245, 1249 (Miss. Ct. App. 2005) (citations omitted).**

**Order for Withholding**

**§ 93-11-103 Entry of order for withholding; content; copies; duration; withholding from lump-sum payment made by employer to employee who owes child support arrearage:**

(1) Upon entry of any order for support by a court of this state where the custodial parent is a recipient of services under Title IV-D of the federal Social Security Act, issued on or after October 1, 1996, the court entering such order shall enter a separate order for withholding which shall take effect immediately without any requirement that the obligor be delinquent in payment. All such orders for support issued prior to October 1, 1996, shall, by operation of law, be amended to conform with the provisions contained herein. All such orders for support issued shall:

(a) Contain a provision for monthly income withholding procedures to take effect in the event the obligor becomes delinquent in paying the order for support without further amendment to the order or further action by the court; and

(b) Require that the payor withhold any additional amount for delinquency specified in any order if accompanied by an affidavit of accounting, a notarized record of overdue payments, official payment record or an attested judgment for delinquency or contempt. Any person who willfully and knowingly files a false affidavit, record or judgment shall be subject to a fine of not more than One Thousand Dollars (\$1,000.00). The Department of Human Services shall be the designated agency to receive payments made by income withholding in child support orders enforced by the department. All withholding orders shall be on a form as prescribed by the department.

(2) Upon entry of any order for support by a court of this state where the custodial parent is not a recipient of services under Title IV-D of the federal Social Security Act, issued or modified or found to be in arrears on or after January 1, 1994, the court entering such order shall enter a separate order for withholding which shall take effect immediately. Such orders shall not be subject to immediate income withholding under this subsection: (a) if one (1) of the parties (i.e., noncustodial or custodial parent) demonstrates, and the court finds, that there is good cause not to require immediate income withholding, or (b) if both parties agree in writing to an alternative arrangement. The Department of Human Services shall be the designated agency to receive payments made by income withholding in all child support orders. Withholding orders shall be on a form as prescribed by the department.

(3) If a child support order is issued or modified in the state but is not subject to immediate income withholding, it automatically becomes so if the court finds that a support payment is thirty (30) days past due. If the support order was issued or modified in another state but is not subject to immediate income withholding, it becomes subject to immediate income withholding on the date on which child support payments are at least thirty (30) days in arrears, or (a) the date as of which the noncustodial parent requests that withholding begin, (b) the date as of which the custodial parent requests that withholding begin, or (c) an earlier date chosen by the court, whichever is earlier.

(4) The clerk of the court shall submit copies of such orders to the obligor's payor, any additional or subsequent payor, and to the Mississippi Department of Human Services Case Registry. The clerk of the court, the obligee's attorney, or the department may serve such immediate order for withholding by first-class mail or personal delivery on the obligor's payor, superintendent, manager, agent or subsequent payor, as the case may be. There shall be no need for further notice, hearing, order, process or procedure before service of said order on the payor or any additional or subsequent payor. The obligor may contest, if grounds exist, service of the order of withholding on additional or subsequent payors, by filing an action with the issuing court. Such filing shall not stay the obligor's duty to support pending judicial determination of the obligor's claim. Nothing herein shall be construed to restrict the authority of the courts of this state from entering any order it deems appropriate to protect the rights of any parties involved.

(5) The order for withholding shall:

(a) Direct any payor to withhold an amount equal to the order for current support;

(b) Direct any payor to withhold an additional amount, not less than fifteen percent (15%) of the order for support, until payment in full of any delinquency; and

(c) Direct the payor not to withhold in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.



(6) All orders for withholding may permit the Department of Human Services to withhold through said withholding order additional amounts to recover costs incurred through its efforts to secure the support order, including, but not limited to, all filing fees, court costs, service of process fees, mailing costs, birth certificate certification fee, genetic testing fees, the department's attorney's fees; and, in cases where the state or any of its entities or divisions have provided medical services to the child or the child's mother, all medical costs of prenatal care, birthing, postnatal care and any other medical expenses incurred by the child or by the mother as a consequence of her pregnancy or delivery.

(7) At the time the order for withholding is entered, the clerk of the court shall provide copies of the order for withholding and the order for support to the obligor, which shall be accompanied by a statement of the rights, remedies and duties of the obligor under Sections 93-11-101 through 93-11-119. The clerk of the court shall make copies available to the obligee and to the department or its local attorney.

(8) The order for withholding shall remain in effect for as long as the order for support upon which it is based.

(9) The failure of an order for withholding to state an arrearage is not conclusive of the issue of whether an arrearage is owing.

(10) Any order for withholding entered pursuant to this section shall not be considered a garnishment.

(11) All existing orders for support shall become subject to additional withholding if arrearages occur, subject to court hearing and order. The Department of Human Services or the obligee or his agent or attorney must send to each delinquent obligor notice that:

(a) The withholding on the delinquency has commenced;

(b) The information along with the required affidavit of accounting, notarized record of overdue payment or attested judgment of delinquency or contempt has been sent to the employer; and

(c) The obligor may file an action with the issuing court on the grounds of mistake of fact. Such filing must be made within thirty (30) days of receipt of the notice and shall not stay the obligor's duty to support pending judicial determination of the obligor's claim.

(12) An employer who complies with an income withholding notice that is regular on its face and which is accompanied by the required accounting affidavit, notarized record of overdue payments or attested judgment of delinquency or contempt shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.

(13) Any employer who has been served with an order for withholding under this section, which includes a provision for payment of arrears, shall notify the Department of Human Services before making any lump-sum payment of more than Five Hundred Dollars (\$500.00) to the obligor.

An employer to whom this section applies shall notify the Department of Human Services of its intention to make a lump-sum payment at least forty-five (45) days before the planned date of the lump-sum payment, or as soon as the decision is made to make the payment, should that be less than forty-five (45) days. The employer shall not release the lump sum to the obligor until thirty (30) days after the intended date of the payment or until authorization is received from the Department of Human Services, whichever is earlier.

Upon receipt of notice to pay a lump sum from an employer, the Department of Human Services shall provide the employer with a Notice of Lien in accordance with Section 93-11-71 specifying the amount of the lump sum to be withheld for payment of child support arrearage. Unless the lump sum is considered severance pay, any amount of the lump sum up to the entire arrearage may be withheld. If the lump sum is for severance pay, the amount withheld for child support arrearages may not exceed an amount equal to the amount the employer would have withheld if the severance pay had been paid as the employee's usual earnings.

### **Duration of Child Support**

#### **§ 93-11-65 Additional remedies available:**

- (8)
  - (a) The duty of support of a child terminates upon the emancipation of the child. Unless otherwise provided for in the underlying child support judgment, emancipation shall occur when the child:
    - (i) Attains the age of twenty-one (21) years, or
    - (ii) Marries, or
    - (iii) Joins the military and serves on a full-time basis, or
    - (iv) Is convicted of a felony and is sentenced to incarceration of two (2) or more years for committing such felony; or
  - (b) Unless otherwise provided for in the underlying child support judgment, the court may determine that emancipation has occurred and no other support obligation exists when the child:
    - (i) Discontinues full-time enrollment in school having attained the age of eighteen (18) years, unless the child is disabled, or
    - (ii) Voluntarily moves from the home of the custodial parent or guardian, establishes independent living arrangements, obtains full-time employment and discontinues educational endeavors prior to attaining the age of twenty-one (21) years, or
    - (iii) Cohabits with another person without the approval of the parent obligated to pay support; and
  - (c) The duty of support of a child who is incarcerated but not emancipated shall be suspended for the period of the child's incarceration.
- (9) A determination of emancipation does not terminate any obligation of the noncustodial parent to satisfy arrearage existing as of the date of emancipation; the total amount of periodic support due prior to the emancipation plus any periodic amounts ordered paid toward the arrearage shall continue to be owed until satisfaction of the arrearage in full, in addition to the right of the person for whom the obligation is owed to execute for collection as may be provided by law.

### **Post-Emancipation Support**

In the broader context, our courts have no authority under Sections 93-5-23 and/or 93-11-65 to require parents to provide for the care and maintenance of their child after the child becomes emancipated, by reaching the age of twenty-one (21), or otherwise, whichever occurs first. Of course, nothing we have said should be interpreted as foreclosing the enforceability of agreements by the parties providing for the post-emancipation care and maintenance of their children, whether those agreements are separate contracts, or have been incorporated into the divorce decree. *Nichols v. Tedder*, 547 So. 2d 766, 770 (Miss. 1989).

### Escalation Clauses

Nothing in this decision should be interpreted as a retreat from our recognition that escalation clauses should be included in property settlement agreements. Strong public policy calls for provision for increased financial needs of children without additional litigation, incurring attorney's fees, court congestion and delay, and emotional trauma. We reaffirm *Tedford* and urge attorneys to include escalation clauses tied to the parents' earnings or to the annual inflation rate or to some factual combination of the two. *Tedford* dictates that an escalation clause should be tied to:

- (1) the inflation rate,
- (2) the non-custodial parent's increase or decrease in income,
- (3) the child's expenses, and
- (4) the custodial parent's separate income.

These factors channel the escalation clause to relate to the non-custodial parent's ability to pay and the needs of the child. An automatic adjustment clause without regard to all of the above factors runs the risk of overemphasizing one side of the support equation. On the other hand, an increase in the non-custodial parent's income does not necessarily entitle the child to more support; nor does an income decrease necessarily signal inability to pay, as when the obligated parent has assets. *Wing v. Wing*, 549 So. 2d 944, 947 (Miss. 1989) (citations omitted).

Within the contemplation of our law elucidated in the cases cited above – *Bracey*, *McKee*, and *Keller* – there has been a material change of circumstances. The result we affirm here, however, may have been attainable by much more satisfactory means. Had [the husband and wife] included in their separation agreement an escalation clause to provide for increases in children's expenses and parents' earning capacities, the agonies of the instant litigation likely could have been avoided. We cannot undo what has been done. We can and ought, however, speak to the future. In the child support provisions of their separation agreements, the parties generally ought to be required to include escalation clauses tied to the parents' earnings or to the annual inflation rate or to some factored combination of the two. . . . The chancellor thus has the power and the responsibility, in the face of the reasonably foreseeable, to require some sort of reasonable escalation clause tailored to the situation of the parties. Absent unusual circumstances that might render it inequitable, such a clause ought be in every child support agreement. This practice would have the twin virtues of more adequate and timely support for children and less frequent modification litigation. *Tedford v. Dempsey*, 437 So. 2d 410, 419-20 (Miss. 1983) (citations omitted).

### **Enforcement of Escalation Clause**

Jay argues that, according to the supreme court's decision in *Tedford v. Dempsey*, 437 So. 2d 410, 419 (Miss. 1983), an escalation clause should be based on the children's expenses, the parents' earning capacities, and the annual inflation rate for that clause to be enforceable. While such a suggestion was made in the *Tedford* decision, this Court has since held that there is a different standard when the parties enter into an agreement. "The parties may in fact agree of their own volition to do more than the law requires of them. Where such a valid agreement is made, it may be enforced just as any other contract." *Stigler v. Stigler*, 48 So. 3d 547, 551 (Miss. Ct. App. 2009).

### **Surety or Bond Posted to Guarantee Payment of Child Support**

#### **§ 93-5-23 Children; spousal maintenance or alimony:**

[T]he court . . . shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed.

#### **§ 93-11-65 Additional remedies available:**

[T]he chancery court of the proper county . . . shall, if need be, require bond, sureties or other guarantee to secure any order for periodic payments for the maintenance or support of a child.

### **Other Financial Support**

#### **College Expenses**

The Mississippi Supreme Court has, in the past, found that a parent may be required to pay both college tuition and additional expenses incurred by his or her minor child while attending college. Additionally, "when a father's financial ability is ample to provide a college education and the child shows an [aptitude] for such, the court may in its discretion, after hearing, require the father to provide such education." However, a father's or mother's duty to provide a college education to a minor child "is dependent upon the proof and circumstances of each case." *Webster v. Webster*, 17 So. 3d 602, 607 (Miss. Ct. App. 2009) (citations omitted).

Though college expenses are not technically "child support," a parent may be ordered by the court to pay them. A parent may also be ordered to pay some portion of the resulting expenses of college, in addition just to tuition. *Lawrence v. Lawrence*, 574 So. 2d 1376, 1382 (Miss. 1991) (citations omitted).

### **Extra-Curricular Activities**

This Court agrees with the principle asserted in Varner and in other Mississippi cases - that as children grow older, meeting their needs becomes more expensive. As children age, they eat more, their basic clothing needs increase, and they become involved in extra-curricular activities. All of these factors lead to an increase in the amount of money necessary to raise and support a child. While the increase in a child's age alone is an indicator that an increase in support may be warranted, it is not, standing alone, evidence of a material change in circumstances. To find a material change in circumstances based upon increased expenses, the amount of those expenses must not have been foreseeable at the time of the original order, and the parent seeking an increase in child support must state specifically the basis and amounts of those increased expenses. *McNair v. Clark*, 961 So. 2d 73, 80 (Miss. Ct. App. 2007).

### **Medical Support**

#### **§ 43-19-101 Calculating support:**

(6) All orders involving support of minor children, as a matter of law, shall include reasonable medical support. Notice to the noncustodial parent's employer that medical support has been ordered shall be on a form as prescribed by the Department of Human Services. In any case in which the support of any child is involved, the court shall make the following findings either on the record or in the judgment:

- (a) The availability to all parties of health insurance coverage for the child(ren);
- (b) The cost of health insurance coverage to all parties.

The court shall then make appropriate provisions in the judgment for the provision of health insurance coverage for the child(ren) in the manner that is in the best interests of the child(ren). If the court requires the custodial parent to obtain the coverage then its cost shall be taken into account in establishing the child support award. If the court determines that health insurance coverage is not available to any party or that it is not available to either party at a cost that is reasonable as compared to the income of the parties, then the court shall make specific findings as to such either on the record or in the judgment. In that event, the court shall make appropriate provisions in the judgment for the payment of medical expenses of the child(ren) in the absence of health insurance coverage.

### **Health-Related Expenses**

Whether the orthodontic treatment a child receives and the expenses incurred in connection therewith are "reasonable and necessary" ordinarily presents questions of ultimate fact which must be determined before the cost is assessed to a divorced parent other than the one ordering the care. ***Clements v. Young*, 481 So. 2d 263, 267 (Miss. 1985).**

The issue before this Court is whether or not psychological expenses incurred in the treatment of the minor child are to be included as medical expenses for which the father is obligated to pay under the Hinds County Chancery Court Decree. We find that the treatment was in a hospital setting and was conducted by or under the supervision of an accredited hospital institution and is a normal extension of necessary medical expenses as envisioned by the Hinds County Chancery Court in its 1977 Decree to protect the health and welfare of the minor child. ***Martin v. Martin*, 538 So. 2d 765, 766 (Miss. 1989).**

### **Insurance**

Insurance coverage for the benefit of children in divorce cases is an issue of child support. A parent's obligation to pay child support lasts only until that child reaches the age of majority, which age in Mississippi is twenty-one for child support purposes. It follows that a parent who has been ordered to maintain life insurance for the benefit of a minor child may be required to do so only until that child reaches the age of majority. In the absence of other compelling reasons, such as the mental or physical incapacitation of the child, we hold that life insurance benefits for a minor child may be ordered only until the child reaches the age of majority. ***Arthur v. Arthur*, 691 So. 2d 997, 1001 (Miss. 1997).**

***See Miss. Code Ann. §§ 93-5-23; 93-11-65.***

### **Automobile**

It is not error for the trial court to require a parent to furnish an automobile as part of an award for the care and maintenance of children. ***Crow v. Crow*, 622 So. 2d 1226, 1232 (Miss. 1993).**

### **Waiver of Tax Exemptions for Dependent Children**

In *Nichols v. Tedder*, 547 So. 2d 766 (Miss. 1989), this Court held that a Chancellor could order the custodial parent to waive tax exemptions for dependent children in favor of the non-custodial spouse. The Court engaged in a thorough analysis of the differing tax consequences, but did not set forth specific factors that a Chancellor should consider in determining which spouse should be entitled to the tax exemptions. Income of the spouses is not the only factor that should be considered in determining who should be awarded the tax exemptions, especially considering the non-economic but nevertheless valuable contributions contributed by the custodial parent. Other states have set forth specific guidelines for such a determination:

- (1) the value of the exemption at the marginal tax rate of each parent;
- (2) the income of each parent;
- (3) the age of the child(ren) and how long the exemption will be available;
- (4) the percentage of the cost of supporting the child(ren) borne by each parent; and
- (5) the financial burden assumed by each parent under the property settlement in the case.

Although many cases do not involve incomes or estates significant enough to justify this type of analysis, a Chancellor would be well-served to consider these factors where appropriate. *Louk v. Louk*, 761 So. 2d 878, 883-84 (Miss. 2000)(citations omitted).

### **Collection of Past Due Child Support Obligations**

This Court has stated that once child support payments become past due they become vested and cannot be modified. The Chancellor's reduction of the past child support payments for the months of August, September and October was manifest error. *Thurman v. Thurman*, 559 So. 2d 1014, 1016 (Miss. 1990).

#### **§ 93-11-71      Payments 30 days overdue; judgment; disestablishment of paternity; work program:**

(1) Whenever a court orders any person to make periodic payments of a sum certain for the maintenance or support of a child, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, a judgment by operation of law shall arise against the obligor in an amount equal to all payments that are then due and owing.

- (a) A judgment arising under this section shall have the same effect and be fully enforceable as any other judgment entered in this state. A judicial or administrative action to enforce the judgment may be begun at any time; and



(b) Such judgments arising in other states by operation of law shall be given full faith and credit in this state.

(2) Any judgment arising under the provisions of this section shall operate as a lien upon all the property of the judgment debtor, both real and personal, which lien shall be perfected as to third parties without actual notice thereof only upon enrollment on the judgment roll. The department or attorney representing the party to whom support is owed shall furnish an abstract of the judgment for periodic payments for the maintenance and support of a child, along with sworn documentation of the delinquent child support, to the circuit clerk of the county where the judgment is rendered, and it shall be the duty of the circuit clerk to enroll the judgment on the judgment roll. Liens arising under the provisions of this section may be executed upon and enforced in the same manner and to the same extent as any other judgment.

(3) Notwithstanding the provisions in subsection (2) of this section, any judgment arising under the provisions of this section shall subject the following assets to interception or seizure without regard to the entry of the judgment on the judgment roll of the situs district or jurisdiction and such assets shall apply to all child support owed including all arrears:

- (a) Periodic or lump-sum payments from a federal, state or local agency, including unemployment compensation, workers' compensation and other benefits;
- (b) Winnings from lotteries and gaming winnings that are received in periodic payments made over a period in excess of thirty (30) days;
- (c) Assets held in financial institutions;
- (d) Settlements and awards resulting from civil actions;
- (e) Public and private retirement funds, only to the extent that the obligor is qualified to receive and receives a lump-sum or periodic distribution from the funds; and
- (f) Lump-sum payments as defined in Section 93-11-101.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, upon disestablishment of paternity granted pursuant to Section 93-9-10 and a finding of clear and convincing evidence including negative DNA testing that the obligor is not the biological father of the child or children for whom support has been ordered, the court shall disestablish paternity and may forgive any child support arrears of the obligor for the child or children determined by the court not to be the biological child or children of the obligor, if the court makes a written finding that, based on the totality of the circumstances, the forgiveness of the arrears is equitable under the circumstances.

(5) In any case in which a child receives assistance from block grants for Temporary Assistance for Needy Families (TANF), and the obligor owes past-due child support, the obligor, if not incapacitated, may be required by the court to participate in any work programs offered by any state agency.

(6) A parent who receives social security disability insurance payments who is liable for a child support arrearage and whose disability insurance benefits provide for the payment of past due disability insurance benefits for the support of the minor child or children for whom the parent owes a child support arrearage shall receive credit toward the arrearage for the payment or payments for the benefit of the minor child or children if the arrearage accrued after the date of disability onset as determined by the Social Security Administration.

### **Contempt of Court**

#### **§ 93-5-23      Children; spousal maintenance or alimony:**

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

## **Modification of Child Support**

### **§ 93-5-23 Children; spousal maintenance or alimony:**

The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.

### **Factors to Consider in Deciding Whether to Modify Child Support**

In order to obtain a modification of child support, the party seeking the change must prove there is a “substantial and material change in the circumstances of one of the interested parties arising subsequent to” the original decree. . . . Generally, the material change in circumstances must not have been reasonably foreseeable at the time of the divorce. “However, the supreme court has never required that the natural growth of a child and the inevitable increased expenses that arise must be anticipated in the initial child support award for a toddler.” *Wallace v. Wallace*, 965 So. 2d 737, 742 (Miss. Ct. App. 2007) (citations omitted).

The party seeking modification must show a material change in circumstances of the father, mother or children arising subsequent to the original decree. The factors to be considered are:

- (1) increased needs of children due to advanced age and maturity,
- (2) increase in expenses,
- (3) inflation,
- (4) relative financial condition and earning capacity of the parties,
- (5) health and special medical needs of the child, both physical and psychological,
- (6) health and special medical needs of the parents, both physical and psychological,
- (7) necessary living expenses of the father,
- (8) estimated amount of income tax each party must pay,
- (9) free use of residence, furnishings and automobile, and
- (10) other facts and circumstances bearing on the support as shown by the evidence.

*Pipkin v. Dolan*, 788 So. 2d 834, 837 (Miss. Ct. App. 2001).

Specifically, this Court and the Mississippi Supreme Court have held an increase in the payor's income is a proper and common reason for an increase in child support. Modification based on an increase in an older child's needs coupled with an increase in the payor's income is proper as well. However, the custodial parent must provide evidence of increased costs and that the original award, due to increased financial obligations, no longer meets the child's current needs. Additionally, the Mississippi Supreme Court has held that a child's decision to

attend college may be considered a material change in circumstances justifying child support modification. ***Wallace v. Wallace*, 965 So. 2d 737, 742 (Miss. Ct. App. 2007) (citations omitted).**

### **Standard of Review**

In child support modification proceedings the Chancellor is accorded substantial discretion and is charged to consider all relevant facts and equities to the end that a decree serving the best interest of the child may be fashioned. This Court's standard of review on appeal is the familiar abuse of discretion standard. ***Moulds v. Bradley*, 791 So. 2d 220, 226 (Miss. 2001).**

Domestic relations matters are among the most difficult cases dealt with by our chancellors; therefore, the standard of review employed by this Court in these cases is very limited and abundantly clear. Chancellors are vested with broad discretion, and this Court will not disturb the chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or the court applied an erroneous legal standard. ***Pullis v. Linzey*, 753 So. 2d 480, 483 (Miss. Ct. App. 1999).**

### **Termination of Parental Rights & Termination of Child Support**

Thus, while there is very little statutory or case law on this matter in Mississippi, we find that it is an inherent aspect of voluntary termination of parental rights that, just as the entire parent-child relationship terminates, so too does the responsibility to pay child support, so long as the best interests of the child are preserved. Accordingly, we hold that the chancery court was not in error in holding that [father]'s obligation to pay child support ceased when his parental rights were terminated. ***Beasnett v. Arledge*, 934 So. 2d 345, 348-49 (Miss. Ct. App. 2006).**

# **Appendix to Chapter 15**

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**Uniform Interstate Family Support Act (“UIFSA”)  
§ 93-25-101 *et seq.***

**Selected Statutes**

**§ 93-25-201 Bases for jurisdiction over nonresident:**

- (a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:
- (1) The individual is personally served with process within this state;
  - (2) The individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
  - (3) The individual resided with the child in this state;
  - (4) The individual resided in this state and provided prenatal expenses or support for the child;
  - (5) The child resides in this state as a result of the acts or directives of the individual;
  - (6) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
  - (7) The individual asserted parentage of a child as provided by law in this state; or
  - (8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.
- (b) The bases of personal jurisdiction set forth in subsection (a) or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child-support order of another state unless the requirements of Section 93-25-611 are met, or, in the case of a foreign support order, unless the requirements of Section 93-25-615 are met.

**§ 93-25-202 Duration of personal jurisdiction:**

Personal jurisdiction acquired by a tribunal of this state in a proceeding under this chapter or other law of this state relating to a support order continues as long as a tribunal of this state has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by Sections 93-25-205, 93-25-206 and 93-25-211.

**§ 93-25-203 Initiating and responding tribunal of state:**

Under this chapter, a tribunal of this state may serve as an initiating tribunal to forward proceedings to a tribunal of another state and as a responding tribunal for proceedings initiated in another state or a foreign country.

**§ 93-25-204 Simultaneous proceedings:**

(a) A tribunal of this state may exercise jurisdiction to establish a support order if the complaint or comparable pleading is filed after a complaint or comparable pleading is filed in another state or a foreign country only if:

(1) The complaint or comparable pleading in this state is filed before the expiration of the time allowed in the other state or the foreign country for filing a responsive pleading challenging the exercise of jurisdiction by the other state or the foreign country;

(2) The contesting party timely challenges the exercise of jurisdiction in the other state or the foreign country; and

(3) If relevant, this state is the home state of the child.

(b) A tribunal of this state may not exercise jurisdiction to establish a support order if the complaint or comparable pleading is filed before a complaint or comparable pleading is filed in another state or a foreign country if:

(1) The complaint or comparable pleading in the other state or foreign country is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;

(2) The contesting party timely challenges the exercise of jurisdiction in this state; and

(3) If relevant, the other state or foreign country is the home state of the child.

**§ 93-25-206 Continuing jurisdiction to enforce child-support order:**

(a) A tribunal of this state that has issued a child-support order consistent with the law of this state may serve as an initiating tribunal to request a tribunal of another state to enforce:

(1) The order, if the order is the controlling order and has not been modified by a tribunal of another state which assumed jurisdiction pursuant to the Uniform Interstate Family Support Act; or

(2) A money judgment for support arrearages and interest on the order accrued before a determination that an order of a tribunal of another state is the controlling order.

(b) A tribunal of this state having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order.

**§ 93-25-207 Determination of controlling child-support orders:**

(a) If a proceeding is brought under this chapter, and only one (1) tribunal has issued a child-support order, the order of that tribunal controls and must be recognized.

(b) If a proceeding is brought under this chapter, and two (2) or more child-support orders have been issued by tribunals of this state, another state, or foreign country with regard to the same obligor and the same child, a tribunal of this state having personal jurisdiction over both the obligor and individual obligee



shall apply the following rules and by order shall determine which order controls and must be recognized:

(1) If only one (1) of the tribunals would have continuing, exclusive jurisdiction under this chapter, the order of that tribunal controls.

(2) If more than one (1) of the tribunals would have continuing, exclusive jurisdiction under this chapter:

(A) An order issued by a tribunal in the current home state of the child controls; or

(B) If an order has not been issued in the current home state of the child, the order most recently issued controls.

(3) If none of the tribunals would have continuing, exclusive jurisdiction under this chapter, the tribunal of this state shall issue a child-support order, which controls.

(c) If two (2) or more child-support orders have been issued for the same obligor and the same child, upon request of a party who is an individual or that is a support enforcement agency, a tribunal of this state having personal jurisdiction over both the obligor and the obligee who is an individual shall determine which order controls under subsection (b). The request may be filed with a registration for enforcement or registration for modification pursuant to Article 6, or may be filed as a separate proceeding.

(d) A request to determine which is the controlling order must be accompanied by a copy of every child-support order in effect and the applicable record of payments. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(e) The tribunal that issued the controlling order under subsection (a), (b) or (c) has continuing jurisdiction to the extent provided in Section 93-25-205 or 93-25-206.

(f) A tribunal of this state that determines by order which is the controlling order under subsection (b)(1) or (2) or subsection (c), or that issues a new controlling order under subsection (b)(3), shall state in that order:

(1) The basis upon which the tribunal made its determination;

(2) The amount of prospective support, if any; and

(3) The total amount of consolidated arrearages and accrued interest, if any, under all of the orders after all payments made are credited as provided by Section 93-25-209.

(g) Within thirty (30) days after issuance of an order determining which is the controlling order, the party obtaining the order shall file a certified copy of it in each tribunal that issued or registered an earlier order of child support. A party or support enforcement agency obtaining the order that fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

(h) An order that has been determined to be the controlling order, or a judgment for consolidated arrearages of support and interest, if any, made pursuant to this section must be recognized in proceedings under this chapter.

**§ 93-25-211 Continuing, exclusive jurisdiction to modify child-support order:**

(a) A tribunal of this state issuing a spousal-support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal-support order throughout the existence of the support obligation.

(b) A tribunal of this state may not modify a spousal-support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country.

(c) A tribunal of this state that has continuing, exclusive jurisdiction over a spousal-support order may serve as:

(1) An initiating tribunal to request a tribunal of another state to enforce the spousal-support order issued in this state; or

(2) A responding tribunal to enforce or modify its own spousal-support order.

**§ 93-25-305 Duties and powers of responding tribunal:**

(a) When a responding tribunal of this state receives a complaint or comparable pleading from an initiating tribunal or directly pursuant to Section 93-25-301(b), it shall cause the complaint or pleading to be filed and shall notify the complainant where and when it was filed.

(b) A responding tribunal of this state, to the extent not prohibited by other law, may do one or more of the following:

(1) Establish or enforce a support order, modify a child-support order, determine the controlling child-support order, or determine parentage of a child;

(2) Order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(3) Order income withholding;

(4) Determine the amount of any arrearage and specify a method of payment;

(5) Enforce orders by civil or criminal contempt, or both;

(6) Set aside property for satisfaction of the support order;

(7) Place liens and order execution on the obligor's property;

(8) Order an obligor to keep the tribunal informed of the obligor's current residential address, electronic-mail address, telephone number, employer, address of employment and telephone number at the place of employment;

(9) Issue a bench warrant or capias for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant or capias in any local and state computer systems for criminal warrants;

(10) Order the obligor to seek appropriate employment by specified methods;

(11) Award reasonable attorney's fees and other fees and costs; and

(12) Grant any other available remedy.

(c) A responding tribunal of this state shall include in a support order issued under this chapter, or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of this state may not condition the payment of a support order issued under this chapter upon compliance by a party with provisions for

visitation.

(e) If a responding tribunal of this state issues an order under this chapter, the tribunal shall send a copy of the order to the complainant and the defendant and to the initiating tribunal, if any.

(f) If requested to enforce a support order, arrearage, or judgment or modify a support order stated in a foreign currency, a responding tribunal of this state shall convert the amount stated in the foreign currency to the equivalent amount in dollars under the applicable official or market exchange rate as publicly reported.

**§ 93-25-313 Costs and fees:**

(a) The complainant may not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal of this state may assess against an obligor filing fees, reasonable attorney's fees, other costs and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs or expenses against the obligee or the support enforcement agency of either the initiating or responding state or foreign country, except as provided by other law. Attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding under Article 6, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

**§ 93-25-316 Special rules of evidence and procedure:**

(a) The physical presence of a nonresident party who is an individual in a tribunal of this state is not required for the establishment, enforcement or modification of a support order or the rendition of a judgment determining parentage of a child.

(b) An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this state.

(c) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it, and is admissible to show whether payments were made.

(d) Copies of bills for testing for parentage of a child, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten (10) days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

(e) Documentary evidence transmitted from outside this state to a tribunal of this state by telephone, telecopier or other electronic means that do not provide an

original record may not be excluded from evidence on an objection based on the means of transmission.

(f) In a proceeding under this chapter, a tribunal of this state shall permit a party or witness residing outside this state to be deposed or to testify under penalty of perjury by telephone, audiovisual means or other electronic means at a designated tribunal or other location. A tribunal of this state shall cooperate with other tribunals in designating an appropriate location for the deposition or testimony.

(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(h) A privilege against disclosure of communications between spouses does not apply in a proceeding under this chapter.

(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this chapter.

(j) A voluntary acknowledgement of paternity, certified as a true copy, is admissible to establish parentage of the child.

**CHAPTER 16**  
**PROBATE OF TESTATE ESTATE**

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## **CHAPTER 16**

### **PROBATE OF TESTATE ESTATE**

#### **Jurisdiction**

##### **§ 9-5-83      Administration of estate:**

The court in which a will may have been admitted to probate, letters of administration granted, . . . shall have jurisdiction to hear and determine all questions in relation to the execution of the trust of the executor, administrator, guardian, or other officer appointed for the administration and management of the estate, and all demands against it by heirs at law, distributees, devisees, legatees, wards, creditors, or others; and shall have jurisdiction of all cases in which bonds or other obligations shall have been executed in any proceeding in relation to the estate, or other proceedings, had in said chancery court, to hear and determine upon proper proceedings and evidence, the liability of the obligors in such bond or obligation, whether as principal or surety, and by decree and process to enforce such liability.

#### **Venue**

##### **§ 91-7-1      Venue of probate:**

Wills shall be proved in and letters testamentary thereon granted by the chancery court of

the county in which the testator had a fixed place of residence.

If he had no fixed place of residence and land be devised in the will, it shall be proved in and letters granted by the chancery court of

the county where the land, or some part thereof, is situated.

If the testator had no fixed place of residence and personal property only be disposed of by the will, it may be proved in and letters granted by the chancery court of

the county where the testator died, or

of the county in which some part of the property may be.

## **Probate in Common Form**

### **Caveat to Probate in Common Form**

#### **§ 91-7-21      Objections to probate:**

Any one desiring to contest a will presented for probate may do so before probate by entering in the clerk's office in which it shall be presented his objection to the probate thereof, and causing all parties interested and who do not join him in such objection to be made parties defendant. Thereupon the issue devisavit vel non shall be made up and tried, and proceedings had as in other like cases. When an objection to the probate of a will has been made in writing, filed with the clerk, probate shall not be had of such will without notice to the objector.

### **Petition is Filed**

On March 5, 1959, [petitioner] filed in the Chancery Court a petition praying for the probate in common form of a purported last will and testament of [the testate], the said [petitioner] being named as executor in said purported will. On March 7, 1959, a decree was entered by the chancellor admitting the will to probate in common form. *Hogan v. Sillers*, 151 So. 2d 411, 411 (Miss. 1963).

Every petition to probate a Will must have a copy of the Will attached thereto.  
*U.C.C.R. 6.15.*

### **Will as Proof of Title**

#### **§ 91-5-35      Will as proof of title:**

(1) When a person dies testate owning at the time of death real property in the state of Mississippi and his will purports to devise such realty, then said will may be admitted to probate, as a muniment of title only, by petition signed and sworn to by all beneficiaries named in the will, and the spouse of such deceased person if such spouse is not named as a beneficiary in the will, without the necessity of administration or the appointment of an executor or administrator with the will annexed, provided it be shown by said petition that:



- (a) The value of the decedent's personal estate in the state of Mississippi at the time of his or her death, exclusive of any interest in real property, did not exceed the sum of \$10,000.00, exclusive of exempt property; and
- (b) All known debts of the decedent and his estate have been paid, including estate and income taxes, if any.

(2) If any beneficiary to any will admitted to probate pursuant to this section shall be under a disability, then the petition may be signed for him by one of his parents or his legal guardian.

(3) The probate of a will under this section shall in no way affect the rights of any interested party to petition for a formal administration of the estate or to contest the will as provided by section 91-7-23, or the right of anyone desiring to contest a will presented for probate as provided by section 91-7-21, or as otherwise provided by law.

(4) This section shall apply to wills admitted to probate from and after July 1, 1984, notwithstanding that the testator or testatrix may have died on or before July 1, 1984.

### **Proof of Will**

#### **§ 91-7-7      Proving due execution:**

The due execution of the will, whether heretofore or hereafter executed, must be proved by at least one (1) of the subscribing witnesses, if alive and competent to testify. If none of the subscribing witnesses can be produced to prove the execution of the will, it may be established by proving the handwriting of a testator and of the subscribing witnesses to the will, or of some of them. The execution of the will may be proved by affidavits of subscribing witnesses. The affidavits may be annexed to the will or may be a part of the will, and shall state the address of each subscribing witness. Such affidavits may be signed at the time that the will is executed.

### Executor's Oath & Bond

#### **§ 91-7-41      Fiduciary with will, oath; bond:**

Every executor with the will annexed, at or prior to the time of obtaining letters testamentary or of administration, shall take and subscribe the following oath, viz.:

I do swear that the writing exhibited by me is the true last will and testament of \_\_\_\_\_, as far as I know and believe, and that I, if and when appointed as executor, will well and truly execute the same according to its tenor, and discharge the duties required by law.

He will also give bond in such penalty as will be equal to the full value of the estate, and with such sureties as may be approved of by the court or by the clerk, payable to the state, with the following conditions, viz.:

The condition of this bond is, that if the above bound \_\_\_\_\_, as executor of the last will and testament of \_\_\_\_\_, shall well and truly execute the will as far as the same may be consistent with law, and faithfully discharge all the duties required of him by law, then this obligation shall be void.

### Exemption from Bond

#### **§ 91-7-45      Exemption from bond:**

If the testator, by will, direct that his executor shall not be required to give bond, then none shall be required unless the court or the clerk, at the time of granting the letters or afterwards, shall have reason to require bond, in which event it shall be the duty of the court or clerk to require bond with sufficient sureties. If any creditor of such testator petition the court or the clerk in vacation, under oath, stating his claim and that he believes he is in danger of losing his demand, or some of it, by the bad management of said estate or by the personal insolvency of the executor, such executor, having had five days' notice of the petition, shall be required to give a bond with sureties, to be approved by the court or clerk in vacation, payable to said creditor in a sufficient sum to cover his legal demand, and conditioned to save him from all loss by reason of any act or omission of such executor. Instead of such bond, the executor may give bond as if he had not been relieved from it by the will. If the bond required in either case be not given, it shall be the duty of the court or clerk to remove the executor and grant letters of administration, with the will annexed, to some other person.

### Letters Testamentary Issued to Executor

#### **§ 91-7-35      Issuing letters to executor:**

The executor named in any last will and testament, whether made in this state or out of it and admitted to probate here on an authenticated copy or on the original, shall be entitled to letters testamentary thereon if not legally disqualified. A person shall not be capable of being executor who, at the time when letters testamentary ought to be granted, is under the age of eighteen years, of unsound mind, or convicted of a felony.

***See U.C.C.R. 6.01 Attorney Must be Retained.***

### If No Executor is Listed in the Will

#### **§ 91-7-39      Administration with will annexed:**

If there be no executor named in any last will and testament, or if the executors named all renounce the executorship or, being required to qualify, shall all refuse or fail to do so or shall refuse or wilfully neglect, for the space of forty days after the death of the testator, to exhibit the will and testament for probate or shall all be disqualified, then administration with the will annexed shall be granted to the person who would be entitled to administer according to the rule prescribed for granting administration. Before granting such administration, each executor named in the will and testament who has not renounced the executorship shall be summoned to show cause why administration should not be granted. If any executor named be absent from the state at the time of the probate of the will and administration should be granted during his absence, such executor shall be allowed forty days after his return to make application for letters testamentary and, on his qualifying, the letters of administration shall be revoked; and the administrator shall deliver all the estate which has come to his hands to the executor and settle the account of his administration.

### Revocation of Letters Testamentary

#### **§ 91-7-89      Nonresident fiduciaries, revocation of letters:**

If letters testamentary or of administration be granted to any person not a resident of the state, or if any executor after his appointment remove out of the state, and if such executor refuse or neglect to settle his accounts annually or neglect the due administration thereof in any other respect, the court, after publication made and proof thereof as in other cases, or personal notice, may revoke the letters of such executor and proceed to grant administration de bonis non as if such executor had died or resigned.

## Notice to Creditors

### **§ 91-7-145 Identifying claims against estate:**

(1) The executor shall make reasonably diligent efforts to identify persons having claims against the estate. Such executor shall mail a notice to persons so identified, at their last known address, informing them that a failure to have their claim probated and registered by the clerk of the court granting letters within ninety (90) days after the first publication of the notice to creditors will bar such claim as provided in section 91-7-151.

(2) The executor shall file with the clerk of the court an affidavit stating that such executor has made reasonably diligent efforts to identify persons having claims against the estate and has given notice by mail as required in subsection (1) of this section to all persons so identified. Upon filing such affidavit, it shall be the duty of the executor to publish in some newspaper in the county a notice requiring all persons having claims against the estate to have the same probated and registered by the clerk of the court granting letters, which notice shall state the time when the letters were granted and that a failure to probate and register within ninety (90) days after the first publication of such notice will bar the claim. The notice shall be published for three (3) consecutive weeks, and proof of publication shall be filed with the clerk. If a paper be not published in the county, notice by posting at the courthouse door and three (3) other places of public resort in the county shall suffice, and the affidavit of such posting filed shall be evidence thereof in any controversy in which the fact of such posting shall be brought into question.

(3) The filing of proof of publication as provided in this section shall not be necessary to set the statute of limitation to running, but proof of publication shall be filed with the clerk of the court in which the cause is pending at any time before a decree of final discharge shall be rendered; and the time for filing proof of publication shall not be limited to the ninety-day period in which creditors may probate claims.

From a reading of this statute it is clear that an [executor] has four responsibilities:

- (1) she must make reasonably diligent efforts to ascertain creditors having claims against the estate and mail them notice of the 90 day period within which to file a claim;
- (2) she must file an affidavit stating that she has complied with the first subsection;
- (3) she must publish in some newspaper in the county a notice to creditors explaining that they have 90 days within which to file claims against the estate; and
- (4) she must file proof of publication with the clerk of court.

***In re Estate of Petrick, 635 So. 2d 1389, 1392 (Miss. 1994).***

Under the statute, if [executor], through reasonably diligent efforts could have identified [creditor], as a "person" having a claim against the estate, she had the duty to mail notice prior to filing her affidavit, publishing notice in the paper, and filing proof of publication. In other words, if the creditor could have been ascertained through reasonably diligent efforts, mere publication in the newspaper in the county, absent notice by mail, does not comply with the mandates of the statute. The statute does not specifically allow for notice by publication as a substitute for actual notice by mail; rather, notice by publication is a requirement in addition to providing creditors notice by mail. It stands to reason that the notice by publication requirement is to further ensure that those creditors who were served by mail are reminded of the time limit to file claims, as well as to give constructive notice to creditors who could not be ascertained through reasonably diligent efforts. *In re Estate of Petrick*, 635 So. 2d 1389, 1392-93 (Miss. 1994).

#### Exception for Small Estates

##### **§ 91-7-147     Notices in small estates:**

Where the value of an estate shall not be more than \$500.00, the court shall dispense with newspaper notices; and notices in lieu thereof shall be posted for thirty (30) days at the courthouse door and two (2) other public places in the county. Failure of persons having claims against the estate to have their claims probated and registered by the clerk of the court granting letters within ninety (90) days after the date on which notice is posted will bar such claims as provided in section 91-7-151.

#### Inventory of Estate

##### **§ 91-7-93     Inventory:**

The executor . . . shall, within ninety (90) days of the grant of his letters unless further time be allowed by the court or clerk, file an inventory, verified by oath, of the money and property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each listed item, its market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item. There shall be no requirement for filing an inventory if the requirement of filing an inventory is waived in the testator's will. . . . Even though the requirement of filing an inventory is waived in the testator's will . . . the court or the chancellor may later order the executor or administrator to file an inventory upon the petition of a beneficiary or other interested party if the court or the chancellor determines that the filing of inventory is necessary or advisable.

## Claims Against the Estate

### **§ 91-7-149 Procedure for probating claims:**

Any person desiring to probate his claim shall present to the clerk the written evidence thereof, if any, or if the claim be a judgment or decree, a duly certified copy thereof, or if there be no written evidence thereof, an itemized account or a statement of the claim in writing, signed by the creditor, and make affidavit, to be attached thereto, to the following effect, viz.:

That the claim is just, correct, and owing from the deceased; that it is not usurious; that neither the affiant nor any other person has received payment in whole or in part thereof, except such as is credited thereon, if any; and that security has not been received therefor except as stated, if any.

Thereupon, if the clerk shall approve, he shall indorse upon the claim the words following:

Probated and allowed for \$ \_\_\_\_\_ and registered this \_\_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_, and shall sign his name officially thereto.

Probate registration and allowance shall be sufficient presentation of the claim to the executor; provided, that should the clerk probate and allow and register the claim, but fail or neglect to indorse thereon the words,

Probated and allowed for \$ \_\_\_\_\_ and registered the \_\_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_, and officially sign his name thereto,

the court may, upon proper showing, allow the clerk to indorse on the claim, nunc pro tunc, the words,

Probated and allowed for \$ \_\_\_\_\_ and registered, this the \_\_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_, and sign his name officially thereto.

If the claim be based upon a demand of which there is no written evidence or upon an itemized account, the statement of said claim or the itemized account shall be retained and kept by the clerk among the official papers pertaining to the estate; and if the claim be based upon a promissory note or other instrument purporting to have been executed by the decedent, the creditor shall file with his claim either the original thereof or a duplicate of such original in the discretion of the creditor. If the original writing is presented to the clerk, it may be withdrawn by the creditor, and the clerk shall make a duplicate thereof. No specific writing or certificate shall be required to be made by the clerk on either the original writing or the duplicate retained by the clerk.

In no instance shall an original writing be required to be presented to the clerk unless

- (a) a question is raised by the personal representative of the estate, or by any party in interest, as to the authenticity of the original or
- (b) in the circumstances it would be unfair to admit into evidence the duplicate in lieu of the original.

In either of the above situations, the court or chancellor, upon good cause being shown, may require the creditor to produce the original before the court or clerk for the inspection of the personal representative or other party in interest, who may examine the original and who may make photographic copies thereof under the supervision of the clerk.

Notwithstanding the foregoing, any record, voucher, claim, check, draft, receipt, writing, account, statement, note or other evidence which may be furnished, filed, probated, presented or produced, or required to be produced, by a federally regulated bank, thrift or trust company shall be deemed to be an original admitted, furnished, filed, probated, presented, or produced for all purposes and with the same effect as the original, if such financial institution produces a copy of such evidence from a format of storage commonly used by financial institutions, whether electronic, imaged, magnetic, microphotographic or otherwise.

### **Contest of Claims**

#### **§ 91-7-165     Contesting claims:**

The executor may contest a claim presented against the estate. The court or clerk may refer the same to auditors, who shall hear and reduce to writing the evidence on both sides, if any be offered, and report their findings with the evidence to the court. Thereupon the court may allow or disallow the claim, but such proceeding shall not be had without notice to the claimant.

The rule is well settled by the decisions of this Court that, when an [executor] contests the payment of a claim against the estate of a decedent, the claim must be established by clear and reasonably positive evidence.  
*Ladnier v. Cross*, 128 So. 2d 540, 543 (Miss. 1961).

### **Payment of Claims Against the Estate**

#### **§ 91-7-155     Duty to pay debts:**

It shall be the duty of an executor to speedily pay the debts due by the estate out of the assets, if the estate be solvent; but he shall not pay any claim against the deceased unless the same has been probated, allowed, and registered.

#### **§ 91-7-191     Insufficiency of personal property:**

Whenever it shall be necessary for an executor or administrator to sell property to pay the debts and expenses of the estate, he may file a petition in the chancery court for the sale of the land of the deceased, or so much of it as may be

necessary, and exhibit to the court a true account of the personal estate and debts due from the deceased, and the expenses and a description of the land to be sold. Any sale of land shall be subject to the abatement provisions of [section 91-7-91].

It is clear from this statute and the decisions of this Court that in the absence of a contrary provision in a will, resort must first be had to the personal property in the payment of debts and expenses of the estate including federal estate taxes, before resort may be had to real property. It is also clear that resort must be first had to personal property not specifically devised by the will. *In re Estate of Torian*, 321 So. 2d 287, 292 (Miss. 1975) (prior version of statute).

**§ 91-7-187     Selling realty before personalty:**

When the estate of any deceased person consists of real and personal property and it shall be necessary to sell a portion thereof, the chancery court, on petition of the executor, administrator, legatees or distributees, being satisfied that it would be to the interest of the distributees or legatees, may decree a sale of the real estate in preference to the personal estate.

When the decedent dies intestate, it must be conceded that, except in special cases, provided for by section 1900, where the interest of all parties make it advisable, the entire personal estate must be exhausted before, even by recourse to the courts, any portion of the lands can be sold and the proceeds devoted to that purpose. The reason for this distinction between personalty and land is obvious, and is still recognized in our jurisprudence. The personalty upon the death of the owner passes to the administrator; the title to the land vests at once in his heir. If this be the rule and the order in which property must be applied to the liquidation of the debts of an intestate, we see nothing in the statute to warrant the conclusion that the legislature intended to adopt a different order in the case of a man dying testate. If the testator devise and bequeath by general terms his entire estate, unless the will contains evidence of a manifest intent on his part to commingle land and personalty, the personal estate must, as in case of intestacy, be first exhausted, before any portion of the lands can be used. *Gordon v. James*, 39 So. 18, 24 (Miss. 1905).

**§ 91-7-197     Petitions affecting realty, persons summoned:**

When a petition shall be filed to sell or lease land to pay debts or otherwise affecting the real estate of a deceased person, all parties interested shall be cited by summons or publication, which shall specify the time and place of hearing the petition. If the petition be filed by a creditor or by a purchaser to correct a mistake in the description of the land, the executor or administrator shall be cited.



### **Execution of the Will**

#### **§ 91-7-47      Functions of fiduciary with will annexed:**

(1) Every executor with the will annexed, who has qualified, shall have the right to the possession of all the personal estate of the deceased, unless otherwise directed in the will; and he shall take all proper steps to acquire possession of any part thereof that may be withheld from him, and shall manage the same for the best interest of those concerned, consistently with the will, and according to law. He shall have the proper appraisements made, return true and complete inventories except as otherwise provided by law, shall collect all debts due the estate as speedily as may be, pay all debts that may be due from it which are properly probated and registered, so far as the means in his hands will allow, shall settle his accounts as often as the law may require, pay all the legacies and bequests as far as the estate may be sufficient, and shall well and truly execute the will if the law permit. He shall also have a right to the possession of the real estate so far as may be necessary to execute the will, and may have proper remedy therefor. . . .

#### **§ 91-7-49      Following of will:**

Whenever any last will and testament shall empower and direct the executor as to the sale of property, the payment of debts and legacies, and the management of the estate, the directions of the will shall be followed by the executor, and the provisions herein contained shall not so operate as to require the executor to pursue a different course from that prescribed in the will, if it be lawful. If land be directed by the will to be sold, the sale shall be made and the proper conveyance executed by the executors, or such of them as shall undertake the execution of the will, or by the person appointed by the will to execute the trust. If the executor fail to qualify or die before he execute the will, and if the person appointed fail to execute the trust, the sale shall be made by the administrator with the will annexed. The executor shall, in all cases, make publication for creditors to probate their claims, as required in the administration of the estates of intestates and with like effect, any provision of the will to the contrary notwithstanding.

### **Final Accounting**

#### **§ 91-7-291      Final settlement of accounts:**

When the estate has been administered by payment of the debts and the collection of the assets, it shall be the duty of the executor or administrator, unless the court or chancellor, on cause shown, shall otherwise order, to make and file a final

settlement of the administration by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of the annual accounts, either as debits or credits, all other charges and disbursements, amounts received and not contained in any previous annual account, and a statement of the kind and condition of all assets in his hands. There shall be no requirement for filing a final account if the requirement of filing accountings is waived in the testator's will. The court or the chancellor may also waive the requirement for filing a final account in an intestate estate upon petition to the court by the administrator. Even though the requirement of filing accountings or the final account is waived in the testator's will or waived by the court or the chancellor upon petition to the court by the administrator in an intestate estate, the court or the chancellor may later order the executor or administrator to file a final account upon the timely petition of a beneficiary or other interested party if the court or the chancellor determines that the filing of a final account is necessary or advisable and the petition is timely filed.

**§ 91-7-293      Statement of heirs, devisees, legatees:**

The executor shall file with his final account a written statement, under oath, of the names of the heirs or devisees and legatees of the estate, so far as known, specifying particularly which, if any, are under the age of twenty-one years, of unsound mind, or convict of felony; the places of residence of each and their post-office address if they be nonresidents or, if the post-office address be unknown, the statement must aver that diligent inquiry has been made to learn the same without avail and giving the names and places of residence of the guardians of all who have guardians, so far as known.

**§ 91-7-295      Final account, allowance and approval:**

The final account so presented, with the statement as to parties, shall remain on file, subject to the inspection of any person interested. Summons shall be issued or publication be made for all parties interested, as in other suits in the chancery court, to appear at a term of the court, or before the chancellor in vacation, not less than thirty (30) days from the service of the summons or the completion of the publication, and show cause, if any they can, why the final account of the executor, administrator, or guardian should not be allowed and approved.

**§ 91-7-297      Final account, examination and decree:**

If process be returned executed, or publication has been made, the court shall examine the final account so presented and filed, hear the evidence in support of it, and the objections and evidence against it. If the court shall be satisfied that the account is correct, it shall make a final decree of approval and allowance, and

shall, at the same time, order the executor or administrator to make distribution of the property in his hands. In proceedings for a final settlement, the court may allow any party interested to surcharge and falsify any annual or partial settlement of the executor or administrator.

### **Executor's Fees**

#### **§ 91-7-299     Fiduciary's allowance and compensation:**

On the final settlement the court shall make allowance to the executor for the property or the estate which has been lost, or has perished or decreased in value, without his fault; and profit shall not be allowed him in consequence of increase. The court shall allow to an executor as compensation for his trouble, either in partial or final settlements, such sum as the court deems proper considering the value and worth of the estate and considering the extent or degree of difficulty of the duties discharged by the executor; in addition to which the court may allow him his necessary expenses, including a reasonable attorney's fee, to be assessed out of the estate, in an amount to be determined by the court.

### **Attorney's Fees**

#### **§ 91-7-281     Attorney's fees:**

In annual and final settlements, the executor, administrator, or guardian shall be entitled to credit for such reasonable sums as he may have paid for the services of an attorney in the management or in behalf of the estate, if the court be of the opinion that the services were proper and rendered in good faith. Where the executor, administrator, or guardian acts also as attorney, the court may allow such executor, administrator, or guardian credit for his reasonable compensation as attorney in lieu of his compensation as executor, administrator, or guardian.

### **Uniform Chancery Court Rule 6.12:**

Every petition by a fiduciary or attorney for the allowance of attorney's fees for services rendered shall set forth the same facts as required in Rule 6.11, touching his compensation, and if so, the nature and effect thereof. If the petition be for the allowance of fees for recovering damages for wrongful death or injury, or other claim due the estate, the petition shall show the total amount recovered, the nature and extent of the service rendered and expense incurred by the attorney, and the amount if any, offered in compromise before the attorney was employed in the matter. In such cases, the amount allowed as attorney's fees will be fixed by the Chancellor at such sum as will be reasonable compensation for the service rendered and expense incurred without being bound by any contract made with any unauthorized persons. If the parties make an agreement for a contingent fee the contract or agreement of the fiduciary with the attorney must be approved by the Chancellor. Fees on structured settlements shall be based on the "present cash value" of the claim.

In determining what constitutes a reasonable fee, this Court has said a chancellor should consider:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

***Moreland v. Riley*, 716 So. 2d 1057, 1062 (Miss. 1998).**

## Limitations of Actions

### Against the Validity of the Will

#### **§ 91-7-23      Time to contest probated will:**

Any person interested may, at any time within two years, by petition or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced be the will of the testator or not. If some person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. In case of concealed fraud, the limitation shall commence to run at, and not before, the time when such fraud shall be, or with reasonable diligence might have been, first known or discovered.

### Against the Executor

#### **§ 15-1-25      Action against executor or administrator:**

An action or scire facias may not be brought against any executor upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor.

#### **§ 91-7-239      Ninety-day exemption from lawsuits:**

A suit or action shall not be brought against an executor until after the expiration of ninety (90) days from the date of letters testamentary or of administration.

However, a suit cannot be filed against an executor until after 90 days following the issuance of the letters of administration. Since the letters [testamentary] were issued on December 21, 1981, the four year statute of limitations began to run 90 days later. . . .  
***Townsend v. Estate of Gilbert*, 616 So. 2d 333, 336 (Miss. 1993).**

**To Compel Distribution of the Estate**

**§ 91-7-303      Petition to compel distribution:**

Any person entitled to a distributive share of an intestate's estate, or to a legacy under a last will and testament, may, at any time after the expiration of six months from the grant of letters testamentary or of administration, petition the court therefor, setting forth his claim; and the executor and all persons interested as distributees or legatees shall be cited to appear. Upon return of summons executed or publication made, the court may order the executor to make the distribution or to pay the legacies according to the rights of the parties, as may be adjudged; but the executor shall not be compelled, before final settlement, to make distribution or to pay any legacy until bond, with sufficient sureties, be given by the distributee or legatee, conditioned to refund his proportionate part of any debts or demands that may afterwards appear against the estate, and the costs of recovering the same.

**Will Probated in Common Form - Prima Facie Evidence of the Validity of the Will**

**§ 91-7-27      Probate as prima facie evidence:**

On the trial of an issue made up to determine the validity of a will which has been duly admitted to probate, such probate shall be prima facie evidence of the validity of the will.

Since the will was admitted to probate in common form, the only duties were to notify the parties named in the will (as they take under the will) and give 90 day notice to creditors, both of which were done. Anyone else is not a party to a common form probate, unless they petition for will contest within the statutorily prescribed time limit. *Will of Winding, v. Estate of Winding*, 783 So. 2d 707, 711 (Miss. 2001).

**Probate In Solemn Form**

**§ 91-7-19      Parties; jury trial:**

Any proponent of a will for probate may, in the first instance, make all interested persons parties to his application to probate the will, and in such case all who are made parties shall be concluded by the probate of the will.

At the request of either party to such proceeding, an issue shall be made up and tried by a jury as to whether or not the writing propounded be the will of the alleged testator.

Under Mississippi law, there are two different types of probate proceedings: common form and solemn form. In order to probate a will in solemn form, all interested parties must be properly served with a Rule 81 summons. M.R.C.P. 81(a)(8) and (d)(1). Because Cuevas served Kelly with a Rule 4 summons, the Court of Appeals properly found the solemn form proceeding void for lack of notice. ***In re Estate of Kelly*, 951 So. 2d 543, 547 (Miss. 2007).**

***See Miss. R. Civ. Pro. 81.***

**Will Contest (devisavit vel non)**

**Necessary Parties**

**§ 91-7-25      Necessary parties:**

In any proceeding to contest the validity of a will, all persons interested in such contest shall be made parties.

The words, “interested parties,” in the statute, are deemed to mean parties who have a pecuniary interest in the subject of the contest, and that the heirs at law who would take the property of the deceased in the absence of a valid will are interested parties, and also that they are necessary parties under the very terms of the statute itself. It was further held, in that case, that the court cannot properly entertain a contest of the will without having before it all the parties interested in such contest. *Provenza v. Provenza*, 29 So. 2d 669, 670 (Miss. 1947)(citations omitted).

**Trial by Jury**

**§ 91-7-19      Parties; jury trial:**

At the request of either party to such proceeding, an issue shall be made up and tried by a jury as to whether or not the writing propounded be the will of the alleged testator.

We have interpreted the right to a jury trial under section 91-7-19 to mean that unless a party requests a jury trial under this section, the chancellor is not required to impanel a jury. *In re Will of Varvaris*, 477 So. 2d 273, 278 (Miss. 1985).



## **Burden of Proof**

### **§ 91-7-29      Conduct of trial:**

On the trial of such issue, the proponent of the will shall have the affirmative of the issue and be entitled to all the rights of one occupying such position. The witnesses shall be examined orally before the jury, except where in the circuit court depositions would be admissible; and the testimony taken on the probate of the will shall be admissible if the witnesses who delivered it be dead, out of the state, or have since become incompetent.

It is well settled law in Mississippi that in a will contest the proponents of the will have the burden of persuasion on all issues requisite to the validity of a will, e.g., due execution and testamentary capacity. Showing that the will was properly probated makes out the proponent's prima facie case. At this point, the burden of production shifts to the contestants. The contestants must present evidence to support their contention that the will is not valid. If the contestants present no evidence, the proponent's prima facie case stands, and the will will be found to be valid. Furthermore, the contestants may raise other issues, such as undue influence, but like the other grounds for invalidity, if the contestants do not present evidence to support the contention, the will may not be found invalid. *In re Estate of Taylor*, 755 So. 2d 1284, 1287 (Miss. Ct. App. 2000)(citations omitted).

## **Prima Facie Evidence**

### **§ 91-7-27      Probate as prima facie evidence:**

On the trial of an issue made up to determine the validity of a will which has been duly admitted to probate, such probate shall be prima facie evidence of the validity of the will.

The proponent of a contested will bears the burden of proving its validity in all respects. A prima facie case of validity is made when the will and its record of probate are admitted into evidence. The contestants then bear the burden of going forward with evidence to challenge the will's validity. *In re Estate of Pigg*, 877 So. 2d 406, 409 (Miss. Ct. App. 2003).

From *Clardy v. National Bank of Commerce*, 555 So. 2d 64, 66 (Miss. 1989):

To begin with, the positive statutory law of this state declares "On the issue of [devisavit vel non], the proponent of the will shall have the affirmative of the issue and be entitled to all the rights of one occupying such position." We have accepted this rule of practice and evidence and fleshed out its meaning.

Proponents of a will have the burden of proving the will throughout. They meet this burden by showing the will was duly executed and admitted to probate. When the will is admitted to probate, proponents put on prima facie evidence that the testator had testamentary capacity.

The burden of going forward then shifts to contestant, who must overcome the presumption raised by proponents that testator had testamentary capacity.

Put in today's terminology, the proponent of the will at all times bears the burden of persuading the trier of fact on all issues requisite to the validity of the will, e.g., due execution and testamentary capacity.

At the outset the proponent bears the burden of producing evidence of due execution and testamentary capacity. This burden is conventionally met by offering the will itself, the affidavits of subscribing witnesses and the judgment admitting the will to probate. These offerings make out what is referred to as the proponent's prima facie case, meaning only that in such a state of the record the proponent is entitled to survive the contestant's motion for a directed verdict, in the event the case is heard before a jury, and that a jury verdict upholding the will may survive a motion for judgment notwithstanding the verdict.

In the event no further proof is offered in a non-jury trial, the proponent will have carried its burden of persuasion sufficient to survive a motion to dismiss.

Of course, if there is to be a contest of the will, the proponent does not have to rest after proving the common form probate but may and generally should offer other witnesses and evidence at that time and as a part of his case-in-chief.

Once the proponent has shouldered his burden of production such that he has made out a prima facie case, the burden of production shifts to the contestants. What is critical for present purposes is that the burden of persuading the trier of fact on the issues of due execution and testamentary capacity rests on proponent throughout and never shifts to the contestants.

That burden of persuasion is subject to the familiar preponderance of the evidence standard.

**§ 91-5-1      Execution of will and testament:**

Every person eighteen (18) years of age or older, being of sound and disposing mind, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, hereditaments, or annuities, or rents charged upon or issuing out of them, or goods and chattels, and personal estate of any description whatever, provided such last will and testament, or codicil, be signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction. Moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two (2) or more credible witnesses in the presence of the testator or testatrix.

In other words, this Court must decide whether the execution of the will complied with Mississippi Code Section 91–5–1, when the two attesting witnesses were unaware that the document they signed was a will. This Court employs a de novo standard of review to a chancellor's legal findings in a will contest. Section 91–5–1 governs the execution of a last will and testament. . . . Section 91–5–1 does not explicitly address any knowledge requirement on behalf of the attesting witnesses. However, we find that our caselaw addressing attestation and publication does address it and is determinative of the case sub judice. Mississippi Code Section 91–5–1 provides that a will must be “attested” by at least two witnesses. . . . The Court held that ‘attestation’ includes not only the mental act of observation, but also includes the manual one of subscription. In other words, not only must the witness observe the testator, he must also affix his signature to the document. . . . It was the duty of the attesting witnesses, under the statute, to observe and see that the will was executed by the testator, and that he had capacity to make a will. . . . [Prior Mississippi cases have that] the purpose of signing by the attesting witnesses in the presence of the testator is that the testator will know that the witnesses are attesting the testator's will and not another document; [and] that the witnesses will know the same. . . . In accord with our previous cases of *Maxwell*, *Jefferson*, and *Kennebrew*, we find that an attesting witness must have some knowledge that the document being signed is, in fact, the testator's last will and testament. Therefore, Scott and Bell were not “attesting” witnesses under Section 91–5–1 but merely subscribing witnesses. *Estate of Griffith v. Griffith*, 30 So. 3d 1190, 1193-94 (Miss. 2010) (citations omitted).

### **Jury Verdict**

We conclude that the role of a jury in a will contest is the same as that of a jury in a civil trial in a court of law and is not “merely advisory.” ***Fowler v. Fisher*, 353 So. 2d 497, 501 (Miss. 1977).**

The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." The chancellor is the fact-finder and is charged with the obligation of resolving disputes between the parties and likewise is the sole arbiter of the credibility of the witnesses. ***Estate of Volmer v. Volmer*, 832 So. 2d 615, 621-22 (Miss. Ct. App. 2002) (will contest where issue was not tried by a jury).**

### **Standard of Review**

This Court will not disturb a chancellor's findings of fact in a will contest unless the findings are clearly erroneous, manifestly wrong, or the chancellor applied an incorrect legal standard. However, we apply a de novo standard of review to questions of law. ***Estate of Finley v. Finley*, 37 So. 3d 687, 689 (Miss. Ct. App. 2010) (citations omitted).**

# PROBATE IN COMMON FORM

## Admission of Will to Probate

Original will presented & filed, if available  
Petition must have copy of will attached  
Will must be proved by at least 1 subscribing witness (usually through affidavit attached to self-proving will or by proof of will executed later)  
U.C.C.R. 6.15; § 91-7-7

## Caveat

Will may not be probated in common form if written objection is filed first  
§ 91-7-21

## Executor Appointed & Letters Testamentary Granted

Court appoints executor named in will, if appropriate  
Executor must be over 18 years of age, of sound mind, & not a felon  
If no person qualifies or agrees to act as executor, court may appoint an executor  
§§ 91-7-35, 91-7-39

## Oath & Bond

At the time letters testamentary are granted, executor must take & subscribe the oath  
At this time, executor must also post bond equal to the full value of the estate, unless bond is waived by the terms of the will. Even so, the court has authority to require bond  
§ 91-7-41

## Notice to Creditors

Executor has responsibility of providing notice to creditors in the prescribed form & order:

- Executor to make reasonably diligent efforts to ascertain creditors having a claim against the estate & to mail them actual notice of the 90 day time period in which to file a claim
- Executor to file affidavit of known creditors & attest to having served actual notice on them
- Executor to publish notice in newspaper which informs creditors that they have 90 days in which to file a claim against the estate: publication to run 3 times, once per week for 3 consecutive weeks  
(Publication may be waived by court in very small estates having a value of not more than \$500)
- Executor to file proof of newspaper publication with the court

§ 91-7-145

## Inventory & Appraisal

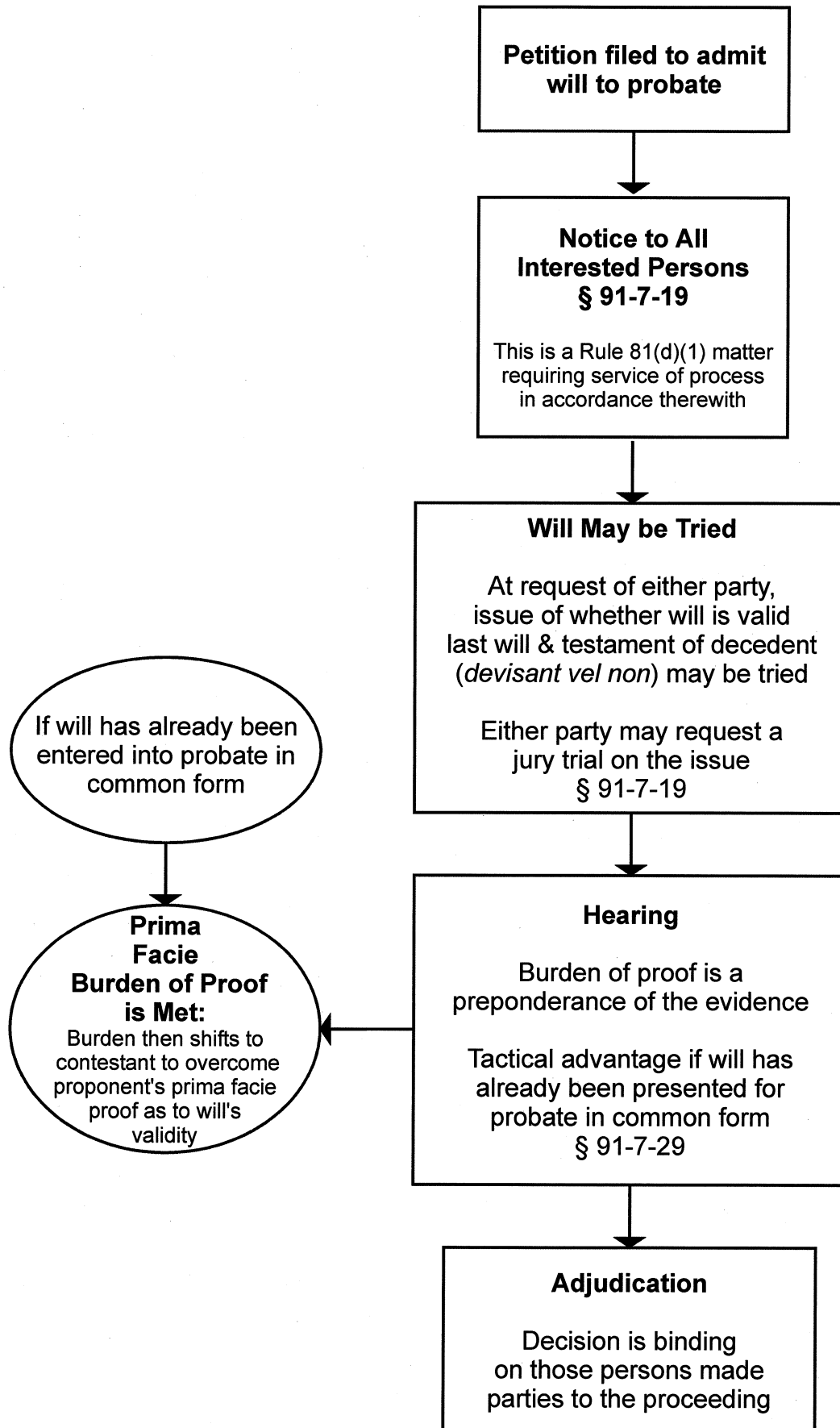
This process is commonly waived by the will. If not, executor is to complete inventory & appraisal within 90 days from the grant of letters testamentary.  
§ 91-7-145

## Execution of the Will

## Petition to Close Estate & Discharge Executor Filed

Final account filed with petition unless excused by the court  
All parties in interest summoned to hearing on final account & petition  
Any party may enter appearance by consent & waiver  
If approved, court enters order for final distribution of any property remaining in executor's care,  
§§ 91-7-295, 91-7-297

## PROBATE IN SOLEMN FORM



## **CHAPTER 17**

### **ADMINISTRATION OF AN INTESTATE ESTATE**

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## **CHAPTER 17**

### **ADMINISTRATION OF AN INTESTATE ESTATE**

#### **Jurisdiction**

##### **§ 9-5-83      Administration of estate:**

The court in which a will may have been admitted to probate, letters of administration granted, . . . shall have jurisdiction to hear and determine all questions in relation to the execution of the trust of the executor, administrator, guardian, or other officer appointed for the administration and management of the estate, and all demands against it by heirs at law, distributees, devisees, legatees, wards, creditors, or others; and shall have jurisdiction of all cases in which bonds or other obligations shall have been executed in any proceeding in relation to the estate, or other proceedings, had in said chancery court, to hear and determine upon proper proceedings and evidence, the liability of the obligors in such bond or obligation, whether as principal or surety, and by decree and process to enforce such liability.

#### **Venue**

##### **§ 91-7-63      Letters of administration, issuance:**

(1) Letters of administration shall be granted by the chancery court  
of the county in which the intestate had, at the time of his death, a fixed  
place of residence;  
but if the intestate did not have a fixed place of residence, then by the chancery  
court  
of the county where the intestate died, or  
that in which his personal property or some part of it may be.

**Letters of Administration Are Granted to Administrator**

**§ 91-7-63      Letters of administration, issuance:**

The court shall grant letters of administration to the relative who may apply, preferring

first the husband or wife and

then such others as may be next entitled to distribution if not disqualified,

selecting amongst those who may stand in equal right the person or

persons best calculated to manage the estate; or

the court may select

a stranger,

a trust company organized under the laws of this state, or

a national bank doing business in this state, if the kindred be incompetent.

If such person does not apply for administration within thirty (30) days from the death of an intestate, the court may grant administration to a creditor or to any other suitable person.

***See U.C.C.R. 6.01 Attorney Must be Retained.***

**§ 91-7-65      Disqualifications:**

Letters of administration shall not be granted to a person under the age of eighteen (18) years, of unsound mind, or convicted of any felony.

**Appointment of County Administrator**

**§ 91-7-73      County administrator, appointment and term:**

It shall be the duty of the chancellor to appoint for each county of his district an officer to be styled "county administrator," to hold his office four years, and whose appointment shall be entered on the minutes of the court.

**§ 91-7-75      County administrator, bond and oath:**

Before a county administrator shall perform any of the duties or functions of the office, and before any letters shall be granted to him, he shall execute and file in the office of the clerk of the chancery court a bond with two (2) or more sufficient sureties, to be approved by the chancellor in termtime or vacation, in a penalty of \$5,000.00 payable to the state, conditioned that he will discharge all the duties of the office of county

administrator, which bond may be sued on at the instance of any person interested. He shall also take an oath at or prior to the granting of letters of administration, to be filed in the clerk's office, to administer according to law every estate which may be committed to his charge, and that he will account for and pay over all monies in his hands by virtue of his office when thereto required by order of the court.

**§ 91-7-79 County administrator as fiduciary:**

When it shall appear that any person has died, in this state or out of it, and has left real or personal property in this state, and some person has not applied for letters testamentary or of administration, the administration of the estate, after the expiration of sixty days from the death of such person, shall be committed to the county administrator, to whom letters of administration, administrator de bonis non, administration with the will annexed, or as the case may require, shall be granted. He shall administer the estate, as in other cases, under the direction of the court, with the same rights and liabilities as executors and other administrators. The county administrator shall not be bound to incur or be liable for costs, except such as the estate in his hands, in excess of his commissions shall be sufficient to pay. On the final settlement of the estate, he shall be allowed by the court, as his commissions, a sum not to exceed ten per cent on the whole estate administered. The county administrator may also be appointed temporary administrator pending an appeal from the grant of letters testamentary or of administration, and administrator to institute suit in proper cases. He shall be liable in all cases on his official bond for his acts, and another bond need not be executed by him in any case unless, his official bond being insufficient, the court shall require an additional bond, or where he may be required to give bond to account for the proceeds of a sale of land.

***See § 91-7-83 Sheriff as administrator.***

**Revocation of Letters of Administration**

**§ 91-7-89 Nonresident fiduciaries, revocation of letters:**

If letters of administration be granted to any person not a resident of the state, or if any administrator after his appointment remove out of the state, and if such administrator refuse or neglect to settle his accounts annually or neglect the due administration thereof in any other respect, the court, after publication made and proof thereof as in other cases, or personal notice, may revoke the letters of such administrator and proceed to grant administration de bonis non as if such administrator had died or resigned.

**Administrator's Oath & Bond**

**§ 91-7-67 Administrator's oath and bond:**

The person to whom administration is granted, at or prior to the granting thereof, shall take and prescribe the following oath:

I do swear that \_\_\_\_\_, deceased, died without any will, as far as I know or believe, and that I, if and when appointed, will well and truly administer all the goods, chattels, and credits of the deceased, and pay his debts as far as his goods, chattels, and credits will extend and the law requires me, and that I will make a true and perfect inventory of the said goods, chattels, and credits, and a just account, when thereto required. So help me God.

He shall give bond in a penalty equal to the value of all the personal estate, with such sureties as may be approved by the court or clerk, payable to the state, with condition in form or to the effect following, to wit:

The condition of this bond is, that if the above bound \_\_\_\_\_, as administrator of the goods, chattels, rights, and credits of \_\_\_\_\_, deceased, shall faithfully discharge all the duties required of him by law, then this obligation shall be void.

The chancellor, in termtime or in vacation, may waive or reduce the bond if the administrator is the decedent's sole heir or if all the heirs are competent and present their sworn petition to waive or reduce such bond.

## **Heirs at Law**

### **§ 91-1-27 Recognition as heir at law:**

In all cases in which persons have died, or may hereafter die, wholly or partially intestate, having property, real or personal, any heir at law of such deceased person, or any one interested in any of the property as to which he shall have died intestate, may petition the chancery court of the county in which said deceased had his mansion house or principal place or residence, or in which any part of his real estate may be situated, in case he was a nonresident, setting forth the fact that said person died wholly or partially intestate, possessed of real or personal property in the State of Mississippi, the names of the heirs at law or next of kin, and praying that the person named in said petition be recognized and decreed to be the heir at law of said deceased.

### **§ 91-1-29 Determining heirs at law:**

All the heirs at law and next of kin of said deceased who are not made parties plaintiff to the action shall be cited to appear and answer the same. And in addition thereto a summons by publication shall be made addressed to "The heirs at law of \_\_\_\_\_, Deceased," and shall be published as other publications to absent or unknown defendants, and the cause shall be proceeded with as other causes in chancery, and upon satisfactory evidence as to death of said person and as to the fact that the parties to said suit are his sole heirs at law, the court shall enter a judgment that the persons so described be recognized as the heirs at law of such a decedent, and as such be placed in possession of his estate. And said judgment shall be evidence in all the courts of law and equity in this state that the persons therein named are the sole heirs at law of the person therein described as their ancestor.

## Notice to Creditors

### **§ 91-7-145 Identifying claims against estate:**

(1) The administrator shall make reasonably diligent efforts to identify persons having claims against the estate. Such administrator shall mail a notice to persons so identified, at their last known address, informing them that a failure to have their claim probated and registered by the clerk of the court granting letters within ninety (90) days after the first publication of the notice to creditors will bar such claim as provided in § 91-7-151.

(2) The administrator shall file with the clerk of the court an affidavit stating that such administrator has made reasonably diligent efforts to identify persons having claims against the estate and has given notice by mail as required in subsection (1) of this section to all persons so identified. Upon filing such affidavit, it shall be the duty of the administrator to publish in some newspaper in the county a notice requiring all persons having claims against the estate to have the same probated and registered by the clerk of the court granting letters, which notice shall state the time when the letters were granted and that a failure to probate and register within ninety (90) days after the first publication of such notice will bar the claim. The notice shall be published for three (3) consecutive weeks, and proof of publication shall be filed with the clerk. If a paper be not published in the county, notice by posting at the courthouse door and three (3) other places of public resort in the county shall suffice, and the affidavit of such posting filed shall be evidence thereof in any controversy in which the fact of such posting shall be brought into question.

(3) The filing of proof of publication as provided in this section shall not be necessary to set the statute of limitation to running, but proof of publication shall be filed with the clerk of the court in which the cause is pending at any time before a decree of final discharge shall be rendered; and the time for filing proof of publication shall not be limited to the ninety-day period in which creditors may probate claims.

From a reading of this statute it is clear that an [administrator] has four responsibilities:

- (1) she must make reasonably diligent efforts to ascertain creditors having claims against the estate and mail them notice of the 90 day period within which to file a claim;
- (2) she must file an affidavit stating that she has complied with the first subsection;
- (3) she must publish in some newspaper in the county a notice to creditors explaining that they have 90 days within which to file claims against the estate; and
- (4) she must file proof of publication with the clerk of court.

***In re Estate of Petrick, 635 So. 2d 1389, 1392 (Miss. 1994).***

Under the statute, if [administrator], through reasonably diligent efforts could have identified [creditor], as a "person" having a claim against the estate, she had the duty to mail notice prior to filing her affidavit, publishing notice in the paper, and filing proof of publication. In other words, if the creditor could have been ascertained through reasonably diligent efforts, mere publication in the newspaper in the county, absent notice by mail, does not comply with the mandates of the statute. The statute does not specifically allow for notice by publication as a substitute for actual notice by mail; rather, notice by publication is a requirement in addition to providing creditors notice by mail. It stands to reason that the notice by publication requirement is to further ensure that those creditors who were served by mail are reminded of the time limit to file claims, as well as to give constructive notice to creditors who could not be ascertained through reasonably diligent efforts. *In re Estate of Petrick*, 635 So. 2d 1389, 1392- 93 (Miss. 1994).

#### **Exception for Small Estates**

##### **§ 91-7-147     Notices in small estates:**

Where the value of an estate shall not be more than \$500.00, the court shall dispense with newspaper notices; and notices in lieu thereof shall be posted for thirty (30) days at the courthouse door and two (2) other public places in the county. Failure of persons having claims against the estate to have their claims probated and registered by the clerk of the court granting letters within ninety (90) days after the date on which notice is posted will bar such claims as provided in § 91-7-151.

#### **Intestate's Estate**

##### **§ 91-7-91     Assets subject to claims:**

The real property, goods, chattels, personal property, choses in action and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real, personal or otherwise, and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be assets and shall stand chargeable with all the just debts, funeral expenses of the deceased, and the expenses of settling the estate, without any preference or priority as between real and personal property, and shall abate in the manner set out in [section 91-7-90]. However, that in cases where no administration has been or shall be commenced on the estate of the decedent within three (3) years after his death, no creditor of the decedent shall be entitled to a lien or any claim whatsoever on any real property of the decedent, or the proceeds therefrom, against purchasers or

encumbrancers for value of the heirs of the decedent unless such creditor shall, within three (3) years and ninety (90) days from the date of the death of the decedent, file on the lis pendens docket in the office of the clerk of the chancery court of the county in which the land is located notice of his claim, containing the name of the decedent, a brief statement of the nature, amount and maturity date of his claim and a description of the real property sought to be charged with the claim. The provisions of this section requiring the filing of notice shall not apply to any secured creditor having a recorded lien on the property.

### **Inventory of Estate**

#### **§ 91-7-93      Inventory:**

The executor or administrator shall, within ninety (90) days of the grant of his letters unless further time be allowed by the court or clerk, file an inventory, verified by oath, of the money and property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each listed item, its market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

There shall be no requirement for filing an inventory if the requirement of filing an inventory is waived in the testator's will. The court or the chancellor may also waive the requirement for filing an inventory in an intestate estate upon petition to the court by the administrator. Even though the requirement of filing an inventory is waived in the testator's will or waived by the court or the chancellor upon petition to the court by the administrator in an intestate estate, the court or the chancellor may later order the executor or administrator to file an inventory upon the petition of a beneficiary or other interested party if the court or the chancellor determines that the filing of inventory is necessary or advisable.

***See § 91-7-95 Supplemental inventory.***



## Claims Against the Estate

### § 91-7-149 Procedure for probating claims:

Any person desiring to probate his claim shall present to the clerk the written evidence thereof, if any, or if the claim be a judgment or decree, a duly certified copy thereof, or if there be no written evidence thereof, an itemized account or a statement of the claim in writing, signed by the creditor, and make affidavit, to be attached thereto, to the following effect, viz.:

That the claim is just, correct, and owing from the deceased; that it is not usurious; that neither the affiant nor any other person has received payment in whole or in part thereof, except such as is credited thereon, if any; and that security has not been received therefor except as stated, if any.

Thereupon, if the clerk shall approve, he shall indorse upon the claim the words following:

Probated and allowed for \$ \_\_\_\_\_ and registered this \_\_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_, and shall sign his name officially thereto.

Probate registration and allowance shall be sufficient presentation of the claim to the administrator; provided, that should the clerk probate and allow and register the claim, but fail or neglect to indorse thereon the words,

Probated and allowed for \$ \_\_\_\_\_ and registered the \_\_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_, and officially sign his name thereto,

the court may, upon proper showing, allow the clerk to indorse on the claim, nunc pro tunc, the words,

Probated and allowed for \$ \_\_\_\_\_ and registered, this the \_\_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_, and sign his name officially thereto.

If the claim be based upon a demand of which there is no written evidence or upon an itemized account, the statement of said claim or the itemized account shall be retained and kept by the clerk among the official papers pertaining to the estate; and if the claim be based upon a promissory note or other instrument purporting to have been executed by the decedent, the creditor shall file with his claim either the original thereof or a duplicate of such original in the discretion of the creditor. If the original writing is presented to the clerk, it may be withdrawn by the creditor, and the clerk shall make a duplicate thereof. No specific writing or certificate shall be required to be made by the clerk on either the original writing or the duplicate retained by the clerk.

In no instance shall an original writing be required to be presented to the clerk unless

- (a) a question is raised by the personal representative of the estate, or by any party in interest, as to the authenticity of the original or
- (b) in the circumstances it would be unfair to admit into evidence the duplicate in lieu of the original.

In either of the above situations, the court or chancellor, upon good cause being shown, may require the creditor to produce the original before the court or clerk for the inspection of the personal representative or other party in interest, who may examine the original and who may make photographic copies thereof under the supervision of the clerk.

Notwithstanding the foregoing, any record, voucher, claim, check, draft, receipt, writing, account, statement, note or other evidence which may be furnished, filed, probated, presented or produced, or required to be produced, by a federally regulated bank, thrift or trust company shall be deemed to be an original admitted, furnished, filed, probated, presented, or produced for all purposes and with the same effect as the original, if such financial institution produces a copy of such evidence from a format of storage commonly used by financial institutions, whether electronic, imaged, magnetic, microphotographic or otherwise.

### **Contest of Claims**

#### **§ 91-7-165     Contesting claims:**

The executor or administrator, legatee, heir, or any creditor may contest a claim presented against the estate. The court or clerk may refer the same to auditors, who shall hear and reduce to writing the evidence on both sides, if any be offered, and report their findings with the evidence to the court. Thereupon the court may allow or disallow the claim, but such proceeding shall not be had without notice to the claimant.

The rule is well settled by the decisions of this Court that, when an [administrator] contests the payment of a claim against the estate of a decedent, the claim must be established by clear and reasonably positive evidence. *Ladnier v. Cross*, 128 So. 2d 540, 543 (Miss. 1961).

### **Payment of Claims Against the Estate**

#### **§ 91-7-155     Duty to pay debts:**

It shall be the duty of an executor or administrator to speedily pay the debts due by the estate out of the assets, if the estate be solvent; but he shall not pay any claim against the deceased unless the same has been probated, allowed, and registered.

#### **§ 91-7-191     Insufficiency of personal property:**

Whenever it shall be necessary for an executor or administrator to sell property to pay the debts and expenses of the estate, he may file a petition in the chancery court for the sale of the land of the deceased, or so much of it as may be necessary, and exhibit to the court a true account of the personal estate and debts

due from the deceased, and the expenses and a description of the land to be sold. Any sale of land shall be subject to the abatement provisions of [section 91-7-90].

It is clear from this statute and the decisions of this Court that in the absence of a contrary provision in a will, resort must first be had to the personal property in the payment of debts and expenses of the estate including federal estate taxes, before resort may be had to real property. It is also clear that resort must be first had to personal property not specifically devised by the will. *In re Estate of Torian*, 321 So. 2d 287, 292 (Miss. 1975) (prior version of statute).

**§ 91-7-187     Selling realty before personalty:**

When the estate of any deceased person consists of real and personal property and it shall be necessary to sell a portion thereof, the chancery court, on petition of the executor, administrator, legatees or distributees, being satisfied that it would be to the interest of the distributees or legatees, may decree a sale of the real estate in preference to the personal estate.

When the decedent dies intestate, it must be conceded that, except in special cases, provided for by section 1900, where the interest of all parties make it advisable, the entire personal estate must be exhausted before, even by recourse to the courts, any portion of the lands can be sold and the proceeds devoted to that purpose. The reason for this distinction between personalty and land is obvious, and is still recognized in our jurisprudence. The personalty upon the death of the owner passes to the administrator; the title to the land vests at once in his heir. If this be the rule and the order in which property must be applied to the liquidation of the debts of an intestate, we see nothing in the statute to warrant the conclusion that the legislature intended to adopt a different order in the case of a man dying testate. If the testator devise and bequeath by general terms his entire estate, unless the will contains evidence of a manifest intent on his part to commingle land and personalty, the personal estate must, as in case of intestacy, be first exhausted, before any portion of the lands can be used. *Gordon v. James*, 39 So. 18, 24 (Miss. 1905).

**§ 91-7-197     Petitions affecting realty, persons summoned:**

When a petition shall be filed to sell or lease land to pay debts or otherwise affecting the real estate of a deceased person, all parties interested shall be cited by summons or publication, which shall specify the time and place of hearing the petition. If the petition be filed by a creditor or by a purchaser to correct a mistake in the description of the land, the executor or administrator shall be cited.

## **Final Accounting**

### **§ 91-7-291 Final settlement of accounts:**

When the estate has been administered by payment of the debts and the collection of the assets, it shall be the duty of the executor or administrator, unless the court or chancellor, on cause shown, shall otherwise order, to make and file a final settlement of the administration by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of the annual accounts, either as debits or credits, all other charges and disbursements, amounts received and not contained in any previous annual account, and a statement of the kind and condition of all assets in his hands. There shall be no requirement for filing a final account if the requirement of filing accountings is waived in the testator's will. The court or the chancellor may also waive the requirement for filing a final account in an intestate estate upon petition to the court by the administrator. Even though the requirement of filing accountings or the final account is waived in the testator's will or waived by the court or the chancellor upon petition to the court by the administrator in an intestate estate, the court or the chancellor may later order the executor or administrator to file a final account upon the timely petition of a beneficiary or other interested party if the court or the chancellor determines that the filing of a final account is necessary or advisable and the petition is timely filed.

### **§ 91-7-293 Statement of heirs, devisees, legatees:**

The administrator shall file with his final account a written statement, under oath, of the names of the heirs or devisees and legatees of the estate, so far as known, specifying particularly which, if any, are under the age of twenty-one years, of unsound mind, or convict of felony; the places of residence of each and their post-office address if they be nonresidents or, if the post-office address be unknown, the statement must aver that diligent inquiry has been made to learn the same without avail and giving the names and places of residence of the guardians of all who have guardians, so far as known.

### **§ 91-7-295 Final account, allowance and approval:**

The final account so presented, with the statement as to parties, shall remain on file, subject to the inspection of any person interested. Summons shall be issued or publication be made for all parties interested, as in other suits in the chancery court, to appear at a term of the court, or before the chancellor in vacation, not less than thirty (30) days from the service of the summons or the completion of the publication, and show cause, if any they can, why the final account of the executor, administrator, or guardian should not be allowed and approved.

**§ 91-7-297      Final account, examination and decree:**

If process be returned executed, or publication has been made, the court shall examine the final account so presented and filed, hear the evidence in support of it, and the objections and evidence against it. If the court shall be satisfied that the account is correct, it shall make a final decree of approval and allowance, and shall, at the same time, order the executor or administrator to make distribution of the property in his hands. In proceedings for a final settlement, the court may allow any party interested to surcharge and falsify any annual or partial settlement of the executor or administrator.

**Administrator's Fees**

**§ 91-7-299      Fiduciary's allowance and compensation:**

On the final settlement the court shall make allowance to the administrator for the property or the estate which has been lost, or has perished or decreased in value, without his fault; and profit shall not be allowed him in consequence of increase. The court shall allow to an administrator, as compensation for his trouble, either in partial or final settlements, such sum as the court deems proper considering the value and worth of the estate and considering the extent or degree of difficulty of the duties discharged by the administrator; in addition to which the court may allow him his necessary expenses, including a reasonable attorney's fee, to be assessed out of the estate, in an amount to be determined by the court.

**Attorney's Fees**

**§ 91-7-281      Attorney's fees:**

In annual and final settlements, the executor, administrator, or guardian shall be entitled to credit for such reasonable sums as he may have paid for the services of an attorney in the management or in behalf of the estate, if the court be of the opinion that the services were proper and rendered in good faith. Where the executor, administrator, or guardian acts also as attorney, the court may allow such executor, administrator, or guardian credit for his reasonable compensation as attorney in lieu of his compensation as executor, administrator, or guardian.

### **Uniform Chancery Court Rule 6.12:**

Every petition by a fiduciary or attorney for the allowance of attorney's fees for services rendered shall set forth the same facts as required in Rule 6.11, touching his compensation, and if so, the nature and effect thereof. If the petition be for the allowance of fees for recovering damages for wrongful death or injury, or other claim due the estate, the petition shall show the total amount recovered, the nature and extent of the service rendered and expense incurred by the attorney, and the amount if any, offered in compromise before the attorney was employed in the matter. In such cases, the amount allowed as attorney's fees will be fixed by the Chancellor at such sum as will be reasonable compensation for the service rendered and expense incurred without being bound by any contract made with any unauthorized persons. If the parties make an agreement for a contingent fee the contract or agreement of the fiduciary with the attorney must be approved by the Chancellor. Fees on structured settlements shall be based on the "present cash value" of the claim.

In determining what constitutes a reasonable fee, this Court has said a chancellor should consider:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

***Moreland v. Riley*, 716 So. 2d 1057, 1062 (Miss. 1998).**

## Limitations of Actions

### Against the Administrator

#### **§ 15-1-25      Action against executor or administrator:**

An action or scire facias may not be brought against any administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such administrator.

#### **§ 91-7-239      Ninety-day exemption from lawsuits:**

A suit or action shall not be brought against an administrator until after the expiration of ninety (90) days from the date of letters testamentary or of administration.

However, a suit cannot be filed against an [administrator] until after 90 days following the issuance of the letters of administration. *Townsend v. Estate of Gilbert*, 616 So. 2d 333, 336 (Miss. 1993).

### To Compel Distribution of the Estate

#### **§ 91-7-303      Petition to compel distribution:**

Any person entitled to a distributive share of an intestate's estate, or to a legacy under a last will and testament, may, at any time after the expiration of six months from the grant of letters testamentary or of administration, petition the court therefor, setting forth his claim; and the administrator and all persons interested as distributees or legatees shall be cited to appear. Upon return of summons executed or publication made, the court may order the administrator to make the distribution or to pay the legacies according to the rights of the parties, as may be adjudged; but the administrator shall not be compelled, before final settlement, to make distribution or to pay any legacy until bond, with sufficient sureties, be given by the distributee or legatee, conditioned to refund his proportionate part of any debts or demands that may afterwards appear against the estate, and the costs of recovering the same.

### Standard of Review

This Court will not disturb a chancellor's findings of fact in a will contest unless the findings are clearly erroneous, manifestly wrong, or the chancellor applied an incorrect legal standard. *Estate of Finley v. Finley*, 37 So. 3d 687, 689 (Miss. Ct. App. 2010) (citations omitted).

## **ADMINISTRATION OF INTESTATE ESTATE**

### **Application of party to become administrator of estate is granted by the court in order of preference**

- Surviving spouse
- Next of kin, not otherwise disqualified
- Other third party, bank, or trust company
- If no application is made within 30 days of decedent's death, administration may be granted to creditor or other suitable person
- If no application is made and decedent left property in Mississippi, county administrator or sheriff may be appointed



### **Oath & Bond**

- At the time letters of administration are granted, administrator must take & subscribe the oath in § 91-7-41
- At this time, the administrator must also post bond equal to the full value of the personal estate unless all heirs are competent & consent to waive/reduce bond, or unless administrator is sole heir, pursuant to § 91-7-67



### **Notice to creditors: Administrator has responsibility of providing notice to creditors in the prescribed form & order pursuant to § 91-7-145**

- Administrator is to make reasonably diligent efforts to ascertain creditors having a claim against the estate to mail them actual notice of the 90-day time period in which to file a claim
- Administrator is to file affidavit of known creditors & attest to having served actual notice on them
- Administrator is to publish notice in newspaper which informs creditors that they have 90 days in which to file a claim against the estate; publication to run 3 times, once per week for 3 consecutive weeks
- Administrator is to file proof of newspaper publication with court
- Publication may be waived by court in very small estates



### **Inventory & Appraisal**

- If not excused by the court, the administrator must complete inventory & appraisal within 90 days from the granting of letters of administration pursuant to § 91-7-145



### **Interim hearings as necessary**

- To authorize expenditures or to resolve any conflicts between the parties



### **Petition to close estate & discharge administrator is filed**

- Final accounting filed with petition unless excused by court
- All parties in interest summoned to hearing on final accounting & petition pursuant to § 91-7-295
- Any party may enter appearance by consent & waiver
- If approved, court enters order for final distribution of any property remaining in administrator's care pursuant to § 91-7-297
- Upon court's approval, administrator is allowed reasonable fee for services & for reimbursement of attorney's fees pursuant to § 91-7-299



## **CHAPTER 18**

### **ADOPTION**

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## **CHAPTER 18**

### **ADOPTION**

#### **Adoption Authorized by Statute**

#### **§ 93-17-3      Jurisdiction; venue; petition; certificate of mental and physical condition of child; change of name; home study:**

(1) Except as otherwise provided in this section, a court of this state has jurisdiction over a proceeding for the adoption or readoption of a minor commenced under this chapter if:

(a) Immediately before commencement of the proceeding, the minor lived in this state with a parent, a guardian, a prospective adoptive parent or another person acting as parent, for at least six (6) consecutive months, excluding periods of temporary absence, or, in the case of a minor under six (6) months of age, lived in this state from soon after birth with any of those individuals and there is available in this state substantial evidence concerning the minor's present or future care;

(b) Immediately before commencement of the proceeding, the prospective adoptive parent lived in this state for at least six (6) consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the minor's present or future care;

(c) The agency that placed the minor for adoption is licensed in this state and it is in the best interest of the minor that a court of this state assume jurisdiction because:

(i) The minor and the minor's parents, or the minor and the prospective adoptive parent, have a significant connection with this state; and

(ii) There is available in this state substantial evidence concerning the minor's present or future care;

(d) The minor and the prospective adoptive parent or parents are physically present in this state and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has been subjected to or threatened with mistreatment or abuse or is otherwise neglected, and the prospective adoptive parent or parents, if not residing in Mississippi, have completed and provided the court with a satisfactory Interstate Compact for Placement of Children (ICPC) home study and accompanying forms;

(e) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a) through (d), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to hear a petition for adoption of the

minor, and it is in the best interest of the minor that a court of this state assume jurisdiction; or

(f) The child has been adopted in a foreign country, the agency that placed the minor for adoption is licensed in this state, and it is in the best interest of the child to be readopted in a court of this state having jurisdiction.

(2) A court of this state may not exercise jurisdiction over a proceeding for adoption of a minor if, at the time the petition for adoption is filed, a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act or this section unless the proceeding is stayed by the court of the other state.

(3) If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state may not exercise jurisdiction over a proceeding for adoption of the minor unless:

(a) The court of this state finds that the court of the state which issued the decree or order:

(i) Does not have continuing jurisdiction to modify the decree or order under jurisdictional prerequisites substantially in accordance with the Uniform Child Custody Jurisdiction Act or has declined to assume jurisdiction to modify the decree or order; or

(ii) Does not have jurisdiction over a proceeding for adoption substantially in conformity with subsection (1)(a) through (d) or has declined to assume jurisdiction over a proceeding for adoption; and

(b) The court of this state has jurisdiction over the proceeding.

(4) Any person may be adopted in accordance with the provisions of this chapter in term time or in vacation by an unmarried adult, by a married person whose spouse joins in the petition, by a married person whose spouse does not join in the petition because such spouse does not cohabit or reside with the petitioning spouse, and in any circumstances determined by the court that the adoption is in the best interest of the child. Only the consenting adult will be a legal parent of the child. The adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child has been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's or nurse practitioner's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, if any, owned by the child. In addition, the petition shall be accompanied by affidavits of the petitioner

or petitioners stating the amount of the service fees charged by any adoption agencies or adoption facilitators used by the petitioner or petitioners and any other expenses paid by the petitioner or petitioners in the adoption process as of the time of filing the petition. If the doctor's or nurse practitioner's certificate indicates any abnormal mental or physical condition or defect, the condition or defect shall not, in the discretion of the chancellor, bar the adoption of the child if the adopting parent or parents file an affidavit stating full and complete knowledge of the condition or defect and stating a desire to adopt the child, notwithstanding the condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" in this section shall be construed to refer to the person to be adopted, though an adult.

Section 93-17-3(4) sets out requirements for an adoption, detailing the jurisdiction and venue for adoption proceedings and detailing the petition's requirements - such as the joinder of both spouses when married and a doctor's or nurse practitioner's certificate of the health of the child. The section also governs home studies for adoptions, changing the child's name, and additional considerations for jurisdiction. Section 93-7-3 is unambiguous. The requirements are clear, and we see no reason why they should not be followed in the instant case. Simply put, Gray's spouse must join him in his petition to adopt D.D.H. The plain language of Section 93-17-3(4) does not provide that the joinder of Gray's spouse means that she will receive any custodial or parental rights or that she is adopting the child. It requires only that she join in Gray's request. In an adoption proceeding, the best interests of the child are paramount, and the Court reviews adoptions to ensure the chancellor considered the best interests of the child. The requirement to include the spouse on the adoption petition, even if the spouse is not the adopting party, enables the best interests of the child to be served. If the spouse is joined, the chancellor would then have the opportunity to consider and, if needed, question the spouse who regularly would be in the adopted child's life as a step-parent. Further, requiring the spouse to join provides the spouse notice of the adoption petition - as the final decree could possibly affect the spouse's rights and the inheritance rights of the spouse's children. Therefore, Section 93-17-3(4)'s requirement to include Gray's spouse in the adoption proceeding ensures that the best interests of D.D.H. are considered and should be followed in this case. *In re Adoption of D.D.H.*, 268 So. 3d 449, 452-453 (Miss. 2018).

(5) Adoption by couples of the same gender is prohibited.

The Executive Director of DHS is hereby preliminarily enjoined from enforcing Mississippi Code section 93-17-3(5). *Campaign for Southern Equal. v. Mississippi Dep't of Human Servs.*, 175 F. Supp. 3d 691,

**709-11 (S.D. Miss. 2016) (citations omitted).**

(6) No person may be placed in the home of or adopted by the prospective adopting parties before a court-ordered or voluntary home study is satisfactorily completed by a licensed adoption agency, a licensed, experienced social worker approved by the chancery court, a court-appointed guardian ad litem that has knowledge or training in conducting home studies if so directed by the court, or by the Department of Human Services on the prospective adoptive parties if required by Section 93-17-11.

(7) No person may be adopted by a person or persons who reside outside the State of Mississippi unless the provisions of the Interstate Compact for Placement of Children (Section 43-18-1 et seq.) have been complied with. In such cases Forms 100A, 100B (if applicable) and evidence of Interstate Compact for Placement of Children approval shall be added to the permanent adoption record file within one (1) month of the placement, and a minimum of two (2) post-placement reports conducted by a licensed child-placing agency shall be provided to the Mississippi Department of Child Protection Services Interstate Compact for Placement of Children office.

(8) No person may be adopted unless the provisions of the Indian Child Welfare Act (ICWA) have been complied with, if applicable. When applicable, proof of compliance shall be included in the court adoption file prior to finalization of the adoption. If not applicable, a written statement or paragraph in the petition for adoption shall be included in the adoption petition stating that the provisions of ICWA do not apply before finalization.

***See 25 U.S.C.A. § 1901 et seq. (Indian Child Welfare Act).***

(9) The readoption of a child who has automatically acquired United States citizenship following an adoption in a foreign country and who possesses a Certificate of Citizenship in accordance with the Child Citizenship Act, CAA, Public Law 106-395, may be given full force and effect in a readoption proceeding conducted by a court of competent jurisdiction in this state by compliance with the Mississippi Registration of Foreign Adoptions Act, Article 9 of this chapter.

<b>Adoption Quick Reference</b>		
<b><u>Who May Be Adopted</u></b>	Any person	§ 93-17-3(4)
<b><u>Who May Adopt</u></b>	An unmarried individual or A married individual whose spouse joins in the petition or A married person whose spouse does not join in the petition because such spouse does not cohabit or reside with the petitioning spouse	§ 93-17-3(4)
<b><u>Attachments to the Petition</u></b>	Doctor or nurse practitioner's certificate  Sworn statement of all property owned by the child  Affidavit stating amount of service fees charged by adoption agency	§ 93-17-3(4)

**Parties to the Adoption**

**§ 93-17-5      Parties; consent:**

(1) There shall be made parties to the proceeding by process or by the filing therein of a consent to the adoption proposed in the petition, which consent shall be duly sworn to or acknowledged and executed only by the following persons, but not before seventy-two (72) hours after the birth of the child:

(a) The parents, or parent, if only one (1) parent, though either be under the age of twenty-one (21) years;

(b) If both parents are dead, then any two (2) adult kin of the child within the third degree computed according to the civil law; if one of such kin is in possession of the child, he or she shall join in the petition or be made a party to the suit; or

(c) The guardian ad litem of an abandoned child, upon petition showing that the names of the parents of the child are unknown after diligent search and inquiry by the petitioners. In addition to the above, there shall be made parties to any proceeding to adopt a child, either by process or by the filing of a consent to the adoption proposed in the petition, the following:

(i) Those persons having physical custody of the child, except persons who are acting as foster parents as a result of placement with them by the Department of Human Services of the State of Mississippi.

(ii) Any person to whom custody of the child may have been awarded by a court of competent jurisdiction of the State of Mississippi.

(iii) The agent of the county Department of Human Services of the State of Mississippi that has placed a child in foster care, either by agreement or by court order.

(2) The consent may also be executed and filed by the duly authorized officer or representative of a home to whose care the child has been delivered. The child shall join the petition by the child's next friend.

(3) If consent is not filed, process shall be had upon the parties as provided by law for process in person or by publication, if they are nonresidents of the state or are not found therein after diligent search and inquiry, the court or chancellor in



vacation may fix a date in termtime or in vacation to which process may be returnable and shall have power to proceed in termtime or vacation. In any event, if the child is more than fourteen (14) years of age, a consent to the adoption, sworn to or acknowledged by the child, shall also be required or personal service of process shall be had upon the child in the same manner and in the same effect as if the child were an adult.

**§ 93-17-6      Petition for determination of rights; alleged fathers:**

(1) Any person who would be a necessary party to an adoption proceeding under this chapter and any person alleged or claiming to be the father of a child born out of wedlock who is proposed for adoption or who has been determined to be such by any administrative or judicial procedure (the “alleged father”) may file a petition for determination of rights as a preliminary pleading to a petition for adoption in any court which would have jurisdiction and venue of an adoption proceeding. A petition for determination of rights may be filed at any time after the period ending thirty (30) days after the birth of the child. Should competing petitions be filed in two (2) or more courts having jurisdiction and venue, the court in which the first such petition was properly filed shall have jurisdiction over the whole proceeding until its disposition. The prospective adopting parents need not be a party to the petition. Where the child's biological mother has surrendered the child to a home for adoption, the home may represent the biological mother and her interests in this proceeding.

(2) The court shall set this petition for hearing as expeditiously as possible allowing not less than ten (10) days' notice from the service or completion of process on the parties to be served.

(3) The sole matter for determination under a petition for determination of rights is whether the alleged father is the natural father of the child based on Mississippi law governing paternity or other relevant evidence.

(4) If the court determines that the alleged father is not the natural father of the child, he shall have no right to object to an adoption under Section 93-17-7.

(5) If the court determines that the alleged father is the child's natural father and that he objects to the child's adoption, the court shall stay the adoption proceedings to allow the filing of a petition to determine whether the father's parental rights should be terminated pursuant to Section 93-15-119, or other applicable provision of the Mississippi Termination of Parental Rights Law.

(6) If a petition for the termination of parental rights is filed and, after an evidentiary hearing, the court does not terminate the father's parental rights, the court shall set the matter as a contested adoption as provided in Section 93-17-8.

(7) A petition for determination of rights may be used to determine the rights of alleged fathers whose identity is unknown or uncertain. In such cases the court shall determine what, if any, notice can be and is to be given those persons. Determinations of rights under the procedure of this section may also be made under a petition for adoption.

(8) Petitions for determination of rights shall be considered adoption cases and all subsequent proceedings such as a contested adoption under Section 93-17-8 and the adoption proceeding itself shall be portions of the same file.

(9) Service of process in the adoption of a foreign born child shall be governed by Section 93-15-107(3).

**§ 93-17-27      Reference to parents' marital status:**

No reference shall be required to be made to the marital status of the natural parents of the child nor shall any allegation or recital be made therein that the child was born out of wedlock in any petition filed or decree entered upon consent.

## Consent to Adoption

### § 93-17-5      **Parties; consent:**

(1) There shall be made parties to the proceeding by process or by the filing therein of a consent to the adoption proposed in the petition, which consent shall be duly sworn to or acknowledged and executed only by the following persons, but not before seventy-two (72) hours after the birth of the child:

- (a) The parents, or parent, if only one (1) parent, though either be under the age of twenty-one (21) years;
- (b) If both parents are dead, then any two (2) adult kin of the child within the third degree computed according to the civil law; if one of such kin is in possession of the child, he or she shall join in the petition or be made a party to the suit; or
- (c) The guardian ad litem of an abandoned child, upon petition showing that the names of the parents of the child are unknown after diligent search and inquiry by the petitioners. . . .

We have repeatedly held that a consent is valid and irrevocable unless the parent can establish either fraud, duress, or undue influence by clear and convincing evidence. *In re Adoption of P.B.H.*, 787 So. 2d 1268, 1272 (Miss. 2001).

[N]ot every influence is undue, and undue influence cannot be predicated of any act unless free agency is destroyed, and that influence exerted by means of advice, arguments, persuasions, solicitation, suggestion, or entreaty is not undue, unless it be so importunate and persistent, or otherwise so operate, as to subdue and subordinate the will and take away its free agency. . . . Several of the means which may constitute undue influence include over-persuasion, threat of economic detriment or promise of economic benefit, the invoking of extreme family hostility both to the child and mother, and undue moral persuasion. Because undue influence is such a broad concept, cases must be resolved upon their particular facts. General law is that the party asserting undue influence has the heavy burden to show that the consent was obtained by undue influence. Such a burden must be met by clear and convincing evidence, and there is no presumption that a party has exercised undue influence upon another. *Adoption of J.M.M. v. New Beginnings Inc.*, 796 So. 2d 975, 981 (Miss. 2001).

## Objection to Adoption

### § 93-17-7      **Parental objection; when adoption may be allowed:**

(1) No infant shall be adopted to any person if a parent whose parental rights have not been terminated under the Mississippi Termination of Parental Rights Law, after having been summoned, shall appear and object thereto before the making of a decree for adoption. A parent shall not be summoned in the adoption proceedings nor have the right to object thereto if the parental rights of the parent have been terminated by the procedure set forth in the Mississippi Termination of Parental Rights Law (Section 93-15-101 et seq.), and the termination shall be res judicata on the question of parental abandonment or unfitness in the adoption proceedings.

[D]uring the 2016 session, the Legislature passed House Bill 1240, aimed at reforming parental-rights terminations. Significantly, the Legislature removed the separate list of termination factors from Section 93-17-7. In doing so, the Legislature removed the chancery court's authority to grant a contested adoption and terminate parental rights without having to follow the termination-of-parental-rights statutes. Instead, Section 93-17-7 now provides: “No infant shall be adopted to any person if a parent whose parental rights have not been terminated under the Mississippi Termination of Parental Rights Law, after having been summoned, shall appear and object thereto before the making of a decree for adoption.” In other words, there are no longer two statutory avenues to terminate parental rights - one under the MTPRL and another as part of a contested adoption. Now, all terminations of parental rights must proceed under the MTPRL. *Petition of M.A.S. v. Mississippi Dep’t of Human Servs.*, 245 So. 3d 410, 414-15 (Miss. 2018).

[W]hen a petition for adoption is filed in chancery court - as it must be - and the parents of that child contest the adoption, amended Section 93-17-7(1) now requires that the parents' rights be terminated under the MTPRL before the contested adoption can be granted. *Petition of M.A.S. v. Mississippi Dep’t of Human Servs.*, 245 So. 3d 410, 415 (Miss. 2018).

Instead, applying amended Section 93-17-7, the chancellor recognized the child could not be adopted because A.B.G.P. and C.P., whose parental rights had not yet been terminated under the MTPRL, had objected. And under newly created Section 93-15-105(1) of the MTPRL, the youth court had exclusive original jurisdiction to hear M.A.S.'s termination-of-parental-rights petition, because the youth court already had jurisdiction over the child as part of the abuse proceeding initiated by

MDHS years prior. So the chancellor dismissed the adoption petition in order for termination to be pursued in youth court. . . . [T]he chancery court may not grant a contested adoption if a youth court with jurisdiction over the child in an abuse proceeding has not yet terminated the parents' rights. Because the law has changed since *Watts*, the chancellor did not err by applying the current governing statutes to hold that the youth court had exclusive jurisdiction over the termination of A.B.G.P. and C.P.'s parental rights and, unless and until those rights were terminated, the child could not be adopted. ***Petition of M.A.S. v. Mississippi Dep't of Human Servs.*, 245 So. 3d 410, 415-16 (Miss. 2018).**

There is a two-step process in determining whether or not a party should be permitted to adopt a child. The court must first determine that one of the grounds for adoption is present:

- (1) desertion or abandonment or
- (2) moral unfitness.

***In re B.N.N.*, 928 So. 2d 197, 202 (Miss. Ct. App. 2006).**

The best interest of the child is a polestar consideration in the granting of any adoption. ***In re Adoption of J.J.G.*, 736 So. 2d 1037, 1038 (Miss. 1999).**

(2) No person, whether claiming to be the parent of the child or not, has standing to object to the adoption if:

(a) A final judgment for adoption that comports with all applicable state and federal laws has been entered by a court; and

(b) Notice to the parties of the action, whether known or unknown, has been made in compliance with Section 93-17-5.

## **Contested Adoption**

### **§ 93-17-8      Contested adoptions:**

(1) Whenever an adoption becomes a contested matter, whether after a hearing on a petition for determination of rights under Section 93-17-6 or otherwise, the court:

(a) Shall, on motion of any party or on its own motion, issue an order for immediate blood or tissue sampling in accordance with the provisions of Section 93-9-21 et seq., if paternity is at issue. The court shall order an expedited report of such testing and shall hold the hearing resolving this matter at the earliest time possible.

(b) Shall appoint a guardian ad litem to represent the child. Such guardian ad litem shall be an attorney, however his duties are as guardian ad litem and not as attorney for the child. The reasonable costs of the guardian ad litem shall be taxed as costs of court. Neither the child nor anyone purporting to act on his behalf may waive the appointment of a guardian ad litem.

(c) Shall determine first whether or not the objecting parent is entitled to so object under the criteria of Section 93-17-7 and then shall determine the custody of the child in accord with the best interests of the child and the rights of the parties as established by the hearings and judgments.

(d) Shall schedule all hearings concerning the contested adoption as expeditiously as possible for prompt conclusion of the matter.

(2) In determining the custody of the child after a finding that the adoption will not be granted, the fact of the surrender of the child for adoption by a parent shall not be taken as any evidence of that parent's abandonment or desertion of the child or of that parent's unfitness as a parent.

(3) In contested adoptions arising through petitions for determination of rights where the prospective adopting parents were not parties to that proceeding, they need not be made parties to the contested adoption until there has been a ruling that the objecting parent is not entitled to enter a valid objection to the adoption. At that point the prospective adopting parents shall be made parties by joinder which shall show their suitability to be adopting parents as would a petition for adoption. The identity and suitability of the prospective adopting parents shall be made known to the court and the guardian ad litem, but shall not be made known to other parties to the proceeding unless the court determines that the interests of justice or the best interests of the child require it.

(4) No birth parent or alleged parent shall be permitted to contradict statements given in a proceeding for the adoption of their child in any other proceeding concerning that child or his ancestry.

(5) Appointment of a guardian ad litem is not required in any proceeding under this chapter except as provided in subsection (1)(b) above and except for the guardian ad litem needed for an abandoned child. It shall not be necessary for a guardian ad litem to be appointed where the chancery judge presiding in the adoption proceeding deems it unnecessary and no adoption agency is involved in the proceeding. No final decree of adoption heretofore granted shall be set aside or modified because a guardian ad litem was not appointed unless as the result of a direct appeal not now barred.

(6) The provisions of Chapter 15 of this Title 93, Mississippi Code of 1972, are not applicable to proceedings under this chapter except as specifically provided by reference herein.

(7) The court may order a child's birth father, identified as such in the proceedings, to reimburse the Department of Human Services, the foster parents, the adopting parents, the home, any other agency or person who has assumed liability for such child, all or part of the costs of the medical expenses incurred for the mother and the child in connection with the birth of the child, as well as reasonable support for the child after his birth.

#### **§ 93-17-11     Investigation; decrees; review:**

At any time after the filing of the petition for adoption and completion of process thereon, and before the entering of a final decree, the court may, in its discretion, of its own motion or on motion of any party to the proceeding, require an investigation and report to the court to be made by any person, officer or home as the court may designate and direct concerning the child, and shall require in adoptions, other than those in which the petitioner or petitioners are a relative or stepparent of the child, that a home study be performed of the petitioner or petitioners by a licensed adoption agency or by the Department of Human Services, at the petitioner's or petitioners' sole expense and at no cost to the state or county. The investigation and report shall give the material facts upon which the court may determine whether the child is a proper subject for adoption, whether the petitioner or petitioners are suitable parents for the child, whether the adoption is to its best interest, and any other facts or circumstances that may be material to the proposed adoption. The home study shall be considered by the court in determining whether the petitioner or petitioners are suitable parents for the child. The court, when an investigation and report are required by the court or by this section, shall stay the proceedings in the cause for such reasonable time as

may be necessary or required in the opinion of the court for the completion of the investigation and report by the person, officer or home designated and authorized to make the same.

Upon the filing of that consent or the completion of the process and the filing of the investigation and report, if required by the court or by this section, and the presentation of such other evidence as may be desired by the court, if the court determines that it is to the best interests of the child that an interlocutory decree of adoption be entered, the court may thereupon enter an interlocutory decree upon such terms and conditions as may be determined by the court, in its discretion, but including therein that the complete care, custody and control of the child shall be vested in the petitioner or petitioners until further orders of the court and that during such time the child shall be and remain a ward of the court. If the court determines by decree at any time during the pendency of the proceeding that it is not to the best interests of the child that the adoption proceed, the petitioners shall be entitled to at least five (5) days' notice upon their attorneys of record and a hearing with the right of appeal as provided by law from a dismissal of the petition; however, the bond perfecting the appeal shall be filed within ten (10) days from the entry of the decree of dismissal and the bond shall be in such amount as the chancellor may determine and supersedeas may be granted by the chancellor or as otherwise provided by law for appeal from final decrees.

After the entry of the interlocutory decree and before entry of the final decree, the court may require such further and additional investigation and reports as it may deem proper. The rights of the parties filing the consent or served with process shall be subject to the decree but shall not be divested until entry of the final decree.

**§ 93-17-14      Home studies in international adoptions; duration of validity:**

In the case of international adoptions, a home study of the prospective adopting parents shall be valid for a period of twenty-four (24) months from the date of completion.

**§ 93-17-12      Fee for home study:**

In any child custody matter hereafter filed in any chancery or county court in which temporary or permanent custody has already been placed with a parent or guardian and in all adoptions, the court shall impose a fee for any court-ordered home study performed by the Department of Human Services or any other entity.

The fee shall be assessed upon either party or upon both parties in the court's discretion.



The minimum fee imposed shall be not less than Three Hundred Fifty Dollars (\$350.00) for each household on which a home study is performed. The fee shall be paid directly to the Mississippi Department of Human Services prior to the home study being conducted by the department or to the entity if the study is performed by another entity. The judge may order the fee be paid by one or both of the parents or guardian. If the court determines that both parents or the guardian are unable to pay the fee, the judge shall waive the fee and the cost of the home study shall be defrayed by the Department of Human Services.

### **Final Decree of Adoption**

#### **§ 93-17-13     Waiting period; final decree's effect:**

(1) A final decree of adoption shall not be entered before the expiration of six (6) months from the entry of the interlocutory decree except

(a) when a child is a stepchild of a petitioner or is related by blood to the petitioner within the third degree according to the rules of the civil law or in any case in which the chancellor in the exercise of his discretion shall determine from all the proceedings and evidence in said cause that the six-month waiting period is not necessary or required for the benefit of the court, the petitioners or the child to be adopted, and shall so adjudicate in the decree entered in said cause, in either of which cases the final decree may be entered immediately without any delay and without an interlocutory decree,

(b) when the child has resided in the home of any petitioner prior to the granting of the interlocutory decree, in which case the court may, in its discretion, shorten the waiting period by the length of time the child has thus resided, or

(c) when an adoption in a foreign country is registered under Article 9 of this chapter, the Mississippi Registration of Foreign Adoptions Act.

(2) The final decree shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child; and its effect, unless otherwise specifically provided, shall be that

(a) the child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi, and that the adopting parents and

their other children shall inherit from the child, just as if such child had been born to the adopting parents in lawful wedlock;

(b) the child and the adopting parents and adoptive kindred are vested with all of the rights, powers, duties and obligations, respectively, as if such child had been born to the adopting parents in lawful wedlock, including all rights existing by virtue of Section 11-7-13, Mississippi Code of 1972; provided, however, that inheritance by or from the adopted child shall be governed by paragraph (a) above;

(c) that the name of the child shall be changed if desired; and

(d) that the natural parents and natural kindred of the child shall not inherit by or through the child except as to a natural parent who is the spouse of the adopting parent, and all parental rights of the natural parent, or parents, shall be terminated, except as to a natural parent who is the spouse of the adopting parent. Nothing in this chapter shall restrict the right of any person to dispose of property under a last will and testament.

Thus, the public policy in Mississippi remains that adopted children are allowed to inherit from their natural parent(s) in the absence of a court decree to the contrary. This is “to protect minor children from losing their birthright without consent or knowledge.” To allow otherwise “would raise grave questions where a child having expectations should be adopted against its consent or without its power to consent during the tender years of minority and thus be deprived of benefits.” *Mitchell v. Moore*, 237 So. 3d 681, 688 (Miss. 2017) (citations omitted), *reh'g denied* (Mar. 15, 2018).

(3) A final decree of adoption shall not be entered until a court-ordered home study is satisfactorily completed, if required in Section 93-17-11.

The best interest of the child is a polestar consideration in the granting of any adoption. . . . *W.A.S. v. A.L.G.*, 949 So. 2d 31, 35 (Miss. 2007).

***See § 93-17-21 Original and revised birth certificates:***

(1) A certified copy of the final decree shall be furnished to the Bureau of Vital Statistics, together with a certificate signed by the clerk giving the true or original name and the place and date of birth of the child. . . .

**§ 93-17-19      Taxation of costs:**

All costs of the proceeding shall be taxed in the manner that the court may direct, including a reasonable fee as determined, approved, and allowed by the court to be paid for each investigation that may be authorized or required by the chancellor, other than for an investigation and report by a public authority or agency, in which event no such fee shall be allowed.

**§ 93-17-15      Limitations period, challenging final decree:**

No action shall be brought to set aside any final decree of adoption, whether granted upon consent or personal process or on process by publication, except within six (6) months of the entry thereof.

**§ 93-17-17      Grounds to set aside:**

For all purposes of this chapter, the chancery court shall be a court of general jurisdiction and it is declared to be the public policy of the state that no adoption proceedings shall be permitted to be set aside except for jurisdictional defects and for failure to file and prosecute the same under the provisions of this chapter.

This issue presents a question of law, which is reviewed de novo. Additionally, we note generally the setting aside of an adoption decree is disfavored in Mississippi. There is a strong public policy declaration in Mississippi's adoption statutes for the finality of adoption decrees. *In re Adoption of A.S.E.L.*, 111 So. 3d 1243, 1248 (Miss. Ct. App. 2013).

Upon reading these two Mississippi Code sections 93-17-15 and 93-17-17 together, it becomes clear that the statute of limitations for challenging an adoption decree in Mississippi is (6) months after entry of the adoption decree except for jurisdictional defects and failure to file and prosecute the same under the adoption chapter of the Mississippi Code. *In re Adoption of M.D.T.*, 722 So. 2d 702, 704 (Miss. 1998).

### Confidentiality of Adoption Proceedings

#### **§ 93-17-25 Confidentiality:**

All proceedings under this chapter shall be confidential and shall be held in closed court without admittance of any person other than the interested parties, except upon order of the court. All pleadings, reports, files and records pertaining to adopting proceedings shall be confidential and shall not be public records and shall be withheld from inspection or examination by any person, except upon order of the court in which the proceeding was had on good cause shown.

Upon motion of any interested person, the files of adoption proceedings, heretofore had may be placed in the confidential files upon order of the court or chancellor and shall be subject to the provisions of this chapter.

Provided, however, that notwithstanding the confidential nature of said proceedings, said record shall be available for use in any court or administrative proceedings under a subpoena duces tecum addressed to the custodian of said records and portions of such record may be released pursuant to Sections 93-17-201 through 93-17-223.

### Standard of Review

As earlier noted, the standard of review to appeals for adoption was stated in *Grafe v. Olds*, 556 So. 2d 690, 692 (Miss. 1990). This Court will not overturn a Chancellor's findings of fact when supported by substantial evidence unless an erroneous legal standard is applied or is manifestly wrong. *Adoption of J.M.M. v. New Beginnings of Tupelo, Inc.*, 796 So. 2d 975, 980 (Miss. 2001).

**CHAPTER 19**

**TERMINATION OF PARENTAL RIGHTS**

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## **CHAPTER 19**

### **TERMINATION OF PARENTAL RIGHTS**

#### **Termination of Parental Rights Law**

##### **§ 93-15-101 Short title:**

This chapter shall be known and may be cited as the “Mississippi Termination of Parental Rights Law.”

Though often connected to adoptions, terminations of parental rights are distinct proceedings, governed by separate chapters of the Mississippi Code. Mississippi Code Section 93-15-101 *et seq.* - now titled the Mississippi Termination of Parental Rights Law (MTPRL) - governs terminations of parental rights. And Mississippi Code Section 93-17-1 *et seq.* governs adoptions. *Adoption of M.A.S. v. Mississippi Dep’t of Human Servs.*, 245 So. 3d 410, 413 (Miss. 2018).

#### **Definitions**

##### **§ 93-15-103 Definitions:**

For purposes of this chapter, unless a different meaning is plainly expressed by the context, the following definitions apply:

(a) “Abandonment” means any conduct by the parent, whether consisting of a single incident or actions over an extended period of time, that evinces a settled purpose to relinquish all parental claims and responsibilities to the child. Abandonment may be established by showing:

(i) For a child who is under three (3) years of age on the date that the petition for termination of parental rights was filed, that the parent has deliberately made no contact with the child for six (6) months;

(ii) For a child who is three (3) years of age or older on the date that the petition for termination of parental rights was filed, that the parent has deliberately made no contact with the child for at least one (1) year; or

(iii) If the child is under six (6) years of age, that the parent has exposed the child in any highway, street, field, outhouse, or elsewhere with the intent to wholly abandon the child.

(b) “Child” means a person under eighteen (18) years of age.

(c) “Court” means the court having jurisdiction under the Mississippi Termination of Parental Rights Law.

(d) “Desertion” means:

- (i) Any conduct by the parent over an extended period of time that demonstrates a willful neglect or refusal to provide for the support and maintenance of the child; or
- (ii) That the parent has not demonstrated, within a reasonable period of time after the birth of the child, a full commitment to the responsibilities of parenthood.

(e) “Home” means any charitable or religious corporation or organization or the superintendent or head of the charitable or religious corporation or organization organized under the laws of the State of Mississippi, any public authority to which has been granted the power to provide care for or procure the adoption of children by any Mississippi statute, and any association or institution engaged in placing children for adoption on July 1, 1955.

(f) “Interested person” means any person related to the child by consanguinity or affinity, a custodian or legal guardian of the child, a guardian ad litem representing the child's best interests, or an attorney representing the child's preferences under Rule 13 of the Uniform Rules of Youth Court Practice.

(g) “Minor parent” means any parent under twenty-one (21) years of age.

(h) “Parent” means a natural or adoptive parent of the child.

(i) “Permanency outcome” means achieving a permanent or long-term custodial arrangement for the custody and care of the child that ends the supervision of the Department of Child Protection Services.

(j) “Qualified health professional” means a licensed or certified professional who is engaged in the delivery of health services and who meets all applicable federal or state requirements to provide professional services.

(k) “Qualified mental health professional” means a person with at least a master's degree in mental health or a related field and who has either a professional license or a Department of Mental Health credential as a mental health therapist.

(l) “Reunification” means the restoration of the parent's custodial rights in providing for the safety and welfare of the child which ends the supervision of the Department of Child Protection Services.



## Jurisdiction & Venue

### § 93-15-105 Jurisdiction and venue:

(1) The chancery court has original exclusive jurisdiction over all termination of parental rights proceedings except that a county court, when sitting as a youth court with jurisdiction of a child in an abuse or neglect proceeding, has original exclusive jurisdiction to hear a petition for termination of parental rights against a parent of that child.

There is also no longer competing jurisdiction between youth court and chancery court over parental-rights terminations involving abused or neglected children. . . . Under [amended] Section 93-15-105(1), “[t]he chancery court has original exclusive jurisdiction over all termination of parental rights proceedings” with one important exception. In direct contradiction to *Watts*, Section 95-15-105(1) unequivocally provides that a “county court, when sitting as a youth court with jurisdiction of a child in an abuse or neglect proceeding, has original exclusive jurisdiction to hear a petition for termination of parental rights against a parent of that child. . . .” The MTPRL provides that the chancery court also has jurisdiction over the termination proceeding unless the youth court already has jurisdiction over the child in an abuse or neglect proceeding. If the youth court already has jurisdiction over the child in an abuse and neglect proceeding, then the youth court has exclusive original jurisdiction to hear a petition to terminate parental rights. So a person seeking to adopt the abused or neglected child no longer can simply seek the termination of the parents' rights as part of her adoption petition. Instead, the MTPRL makes clear she must first petition for the termination of parental rights in youth court, before she can seek an adoption in chancery court. *Adoption of M.A.S. v. Mississippi Dep’t of Human Servs.*, 245 So. 3d 410, 415 (Miss. 2018) (citations omitted).

The MTPRL provides that the chancery court also has jurisdiction over the termination proceeding unless the youth court already has jurisdiction over the child in an abuse or neglect proceeding. If the youth court already has jurisdiction over the child in an abuse and neglect proceeding, then the youth court has exclusive original jurisdiction to hear a petition to terminate parental rights. So a person seeking to adopt the abused or neglected child no longer can simply seek the termination of the parents' rights as part of her adoption petition. Instead, the MTPRL makes clear she must first petition for the termination of parental rights in youth court, before she can seek an adoption in chancery court. *Adoption of M.A.S. v. Mississippi Dep’t of Human Servs.*, 245 So. 3d 410, 415 (Miss. 2018).

(2)(a) Venue in a county court sitting as a youth court for termination of parental rights proceedings shall be in the county in which the court has jurisdiction of the child in the abuse or neglect proceedings. Venue in chancery court for termination of parental rights proceedings shall be proper either in the county in which the defendant resides, the child resides or in the county where an agency or institution having custody of the child is located.

(b) Transfers of venue shall be governed by the Mississippi Rules of Civil Procedure.

### **Proceedings & Necessary Parties**

#### **§ 93-15-107 Involuntary termination of parental rights; commencement of proceedings; parties; summons:**

(1)(a) Involuntary termination of parental rights proceedings are commenced upon the filing of a petition under this chapter. The petition may be filed by any interested person, or any agency, institution or person holding custody of the child. The simultaneous filing of a petition for adoption is not a prerequisite for filing a petition under this chapter.

(b) The proceeding shall be triable, either in term time or vacation, thirty (30) days after personal service of process to any necessary party or, for a necessary party whose address is unknown after diligent search, thirty (30) days after the date of the first publication of service of process by publication that complies with the Mississippi Rules of Civil Procedure.

(c) Necessary parties to a termination of parental rights action shall include the mother of the child, the legal father of the child, the putative father of the child when known, and any agency, institution or person holding custody of the child. The absence of a necessary party who has been properly served does not preclude the court from conducting the hearing or rendering a final judgment.

[A]n anonymous sperm donor is not a legal parent whose rights must be terminated. *Strickland v. Day*, 239 So. 3d 486, 488 (Miss. 2018).

(d) A guardian ad litem shall be appointed to protect the best interest of the child, except that the court, in its discretion, may waive this requirement when a parent executes a written voluntary release to terminate parental rights. The guardian ad litem fees shall be determined and assessed in the discretion of the court.

In actions for terminating parental rights a guardian ad litem shall be appointed to protect the interest of the child in the termination of parental

rights. This proviso is mandatory. Recently, this Court stated in a termination of parental rights proceeding, the sole reason for the appointment of a guardian ad litem is to ensure that the best interest of a minor child is fully sought out and protected. ***D.J.L. v. Bolivar County Dep't of Human Services ex rel. McDaniel*, 824 So. 2d 617, 622 (Miss. 2002) (citations omitted) (discussing prior version of statute).**

Once it has been determined that clear and convincing evidence exists as a basis for the termination of parental rights (as in this case, the failure of the parents to implement the plan to which they agreed) the issue becomes whether termination is in the best interests of the child. The criteria . . . are: (1) whether parental contact is desirable, and (2) whether it is possible to secure placement of the children without terminating parental rights. ***S.R.B.R. v. Harrison County Dep't of Human Services*, 798 So. 2d 437, 443 (Miss. 2001) (discussing prior version of statute).**

We do hold, however, that a chancellor shall include at least a summary review of the qualifications and recommendations of the guardian ad litem in the court's findings of fact and conclusions of law. Further, we hold that when a chancellor's ruling is contrary to the recommendation of a statutorily required guardian ad litem, the reasons for not adopting the guardian ad litem's recommendation shall be stated by the court in the findings of fact and conclusions of law. ***S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1082 (Miss. 2000) (discussing prior version of statute).**

- (2) Voluntary termination of parental rights by written voluntary release is governed by Section 93-15-111.
- (3) In all cases involving termination of parental rights, a minor parent shall be served with process as an adult.
- (4) The court may waive service of process if an adoptive child was born in a foreign country, put up for adoption in the birth country, and has been legally admitted into this country.

### **Voluntary Termination of Parental Rights**

#### **§ 93-15-109 Surrender of child to Department of Child Protection Services or a home:**

(1) A parent may accomplish the surrender of a child to the Department of Human Services or to a home by:

- (a) Delivering the child to the Department of Human Services or the home;
- (b) Executing an affidavit of a written agreement that names the child and which vests in the Department of Human Services or the home the exclusive custody, care and control of the child; and
- (c) Executing a written voluntary release as set forth in Section 93-15-111(2).

(2) If a child has been surrendered to a home or other agency operating under the laws of another state, and the child is delivered into the custody of a petitioner or home within this state, the execution of consent by the nonresident home or agency shall be sufficient.

(3) Nothing in this section prohibits the delivery and surrender of a child to an emergency medical services provider pursuant to Sections 43-15-201 through 43-15-209.

#### **§ 93-15-111 Written voluntary release; requirements:**

(1) The court may accept the parent's written voluntary release if it meets the following minimum requirements:

- (a) Is signed under oath and dated at least seventy-two (72) hours after the birth of the child;
- (b) States the parent's full name, the relationship of the parent to the child, and the parent's address;
- (c) States the child's full name, date of birth, time of birth if known, and place of birth as indicated on the birth certificate;
- (d) Identifies the governmental agency or home to which the child has been surrendered, if any;
- (e) States the parent's consent to adoption of the child and waiver of service of process for any future adoption proceedings;
- (f) Acknowledges that the termination of the parent's parental rights and that the subsequent adoption of the child may significantly affect, or even eliminate, the parent's right to inherit from the child under the laws of Descent and Distribution (Chapter 1, Title 91, Mississippi Code of 1972);
- (g) Acknowledges that all provisions of the written voluntary release were

entered into knowingly, intelligently, and voluntarily; and  
(h) Acknowledges that the parent is entitled to consult an attorney regarding the parent's parental rights.

(2) The court's order accepting the parent's written voluntary release terminates all of the parent's parental rights to the child, including, but not limited to, the parental right to control or withhold consent to an adoption. If the court does not accept the parent's written voluntary release, then any interested person, or any agency, institution or person holding custody of the child, may commence involuntary termination of parental rights proceedings under Section 93-15-107.

[A] written voluntary release, or consent by the parent, terminates the parental rights and thereafter, no objection to the adoption from the natural parent may be sustained. ***Grafe v. Olds*, 556 So. 2d 690, 694 (Miss. 1990) (discussing prior version of statute).**

### **Voluntary Termination of Parental Rights & Child Support**

The case and statutory law in Mississippi is sparse regarding whether a parent's obligation to pay child support terminates when his parental rights are voluntarily terminated. . . . While not a direct holding by this Court, our support of the . . . language in *McCracking* indicates what seems an obvious conclusion: that it is inherent in the voluntary termination of parental rights that the obligation to pay child support ends. Further, as is clear from Mississippi Code Annotated Section 93-15-103(2), the voluntary termination of parental rights completely and utterly extinguishes the parent-child relationship. When the parent-child relationship terminates, not only are the rights of the parent with regard to the child terminated, but the reverse is also true, so long as such termination is not sought simply to evade the obligation to pay child support. It would be against public policy to allow voluntary termination of parental rights as a mere proxy for avoiding the responsibility to pay child support, but there is no evidence that this is the situation in the case sub judice. . . . Thus, while there is very little statutory or case law on this matter in Mississippi, we find that it is an inherent aspect of voluntary termination of parental rights that, just as the entire parent-child relationship terminates, so too does the responsibility to pay child support, so long as the best interests of the child are preserved. Accordingly, we hold that the chancery court was not in error in holding that Arledge's obligation to pay child support ceased when his parental rights were terminated. ***Beasnett v. Arledge*, 934 So. 2d 345, 348-49 (Miss. Ct. App. 2006) (citations omitted) (discussing prior version of statute).**

### **Involuntary Termination of Parental Rights**

#### **§ 93-15-113 Conduct of hearing for involuntary termination of parental rights; counsel for parent:**

(1) A hearing on the involuntary termination of parental rights shall be conducted without a jury and in accordance with the Mississippi Rules of Evidence. The court may exclude the child from the hearing if the court determines that the exclusion of the child from the hearing is in the child's best interest.

(2)(a) At the beginning of the involuntary termination of parental rights hearing, the court shall determine whether all necessary parties are present and identify all persons participating in the hearing; determine whether the notice requirements have been complied with and, if not, determine whether the affected parties intelligently waived compliance with the notice requirements; explain to the parent the purpose of the hearing, the standard of proof required for terminating parental rights, and the consequences if the parent's parental rights are terminated. The court shall also explain to the parent:

- (i) The right to counsel;
- (ii) The right to remain silent;
- (iii) The right to subpoena witnesses;
- (iv) The right to confront and cross-examine witnesses; and
- (v) The right to appeal, including the right to a transcript of the proceedings.

(b) The court shall then determine whether the parent before the court is represented by counsel. If the parent wishes to retain counsel, the court shall continue the hearing for a reasonable time to allow the parent to obtain and consult with counsel of the parent's own choosing. If an indigent parent does not have counsel, the court shall determine whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution of 1890, or statutory law and, if so, appoint counsel for the parent and then continue the hearing for a reasonable time to allow the parent to consult with the appointed counsel. The setting of fees for court-appointed counsel and the assessment of those fees are in the discretion of the court.

At the outset of our analysis, we must note that the chancellor in this case erred in not making an on-the-record determination under *Lassiter* on whether John was entitled to court-appointed counsel before allowing him to proceed pro se. However, the failure to do so was harmless error, as it is clear from the record that John was given a fair and adequate hearing, and the presence of an attorney would not have made a difference. Turning to

the factors emphasized by the *Lassiter* Court and adopted by this Court in *K.D.G.L.B.P.*, this case did not involve any allegations of abuse or neglect which could have resulted in additional criminal charges against John. On the contrary, the evidence focused on John's inability to maintain a relationship with his children while serving a life sentence. Thus, the assistance of counsel was not necessary to assist John in protecting his right against self-incrimination. In addition, no expert testimony was offered at trial, nor did this case involve "specially troublesome points of law." A GAL was appointed, but her testimony was relatively uncomplicated, and John was given the opportunity to question her about her report. Don and Carolyn McRee were the only other witnesses to testify, and John was allowed to cross-examine them both thoroughly. Finally, as will be explained more fully in Issue II below, the chancellor's decision to terminate John's parental rights was supported by substantial evidence, and the presence of an attorney would not have changed the result of this case. . . . John received adequate notice of the pending adoption proceeding and was present and actively involved at all stages of the proceedings. At trial, John was able to cross-examine the McRees and the GAL and was able to testify on his own behalf. In addition, the chancellor assisted John in his examination of the witnesses and prevented the McRees from presenting irrelevant evidence. The assistance of counsel cannot change the fact that John was convicted of murdering his wife's father in front of his children, was sentenced to life imprisonment, and has not had a relationship with A.B. and C.B. for almost a decade. Thus, while the chancellor erred in failing to make a *Lassiter* ruling on the record, we find such error to be harmless beyond a reasonable doubt in light of the substantial credible evidence supporting the adoption. ***Blakeney v. McRee*, 188 So. 3d 1154, 1160-61 (Miss. 2016) (citations omitted) (discussing prior version of statute).**

The termination of parental rights is a serious and permanent proceeding, one which effectively ends any ties between a parent and a child. . . . The Mississippi Supreme Court case of *K.D.G.L.B.P. v. Hinds County Department of Human Services*, 771 So. 2d 907, 909 (Miss. 2000), also involved the question of whether a natural parent should be appointed an attorney in a termination of parental rights proceeding. In *K.D.G.L.B.P.*, the chancery court thoroughly questioned the natural mother about the lack of an attorney and whether she would represent herself. She indicated that she would represent herself, she never asked for a continuance, and she did not indicate that she was unable to afford an attorney. The supreme court, in analyzing *Lassiter*, stated:

One of the most important factors to be considered in applying the standards for court[-]appointed counsel is whether the presence of

counsel would have made a determinative difference. The *Lassiter* decision thus states that appointment of counsel in termination proceedings, while wise, is not mandatory and therefore should be determined by state courts on a case-by-case basis. . . .

The case before us is distinguishable from *K.D.G.L.B.P.* in that serious due-process concerns exist in this case that were not present in *K.D.G.L.B.P.* [In the instant case,] James claimed indigency in three letters filed with the chancery court and requested appointment of counsel. The record does not contain a response from the chancery court. . . . We simply are unable to conclude, based on the scant record we have, that the presence of counsel would not have made an outcome-determinative difference. . . . Additionally, an attorney's presence could have aided James with presenting the complex issue of the applicability of the section 93-15-103 to the present facts. We reverse the chancery court's decision and remand this case for the chancery court to determine the question of indigency and the necessity of appointment of counsel under *Lassiter*, and for the chancery court to make appropriate arrangements for James to be present and/or participate in the proceedings. *Pritchett v. Pritchett*, 161 So. 3d 1106, 1111-12 (Miss. Ct. App. 2015) (citations omitted) (discussing prior version of statute).

**§ 93-15-115 Involuntary termination when child is in custody or under supervision of Department of Child Protection Services pursuant to youth court proceedings and reasonable efforts for reunification are required; standard of proof:**

When reasonable efforts for reunification are required for a child who is in the custody of, or under the supervision of, the Department of Child Protection Services pursuant to youth court proceedings, the court hearing a petition under this chapter may terminate the parental rights of a parent if, after conducting an evidentiary hearing, the court finds by clear and convincing evidence that:

- (a) The child has been adjudicated abused or neglected;
- (b) The child has been in the custody and care of, or under the supervision of, the Department of Child Protection Services for at least six (6) months, and, in that time period, the Department of Child Protection Services has developed a service plan for the reunification of the parent and the child;
- (c) A permanency hearing, or a permanency review hearing, has been conducted pursuant to the Uniform Rules of Youth Court Practice and the court has found that the Department of Child Protection Services, or a licensed child caring agency under its supervision, has made reasonable efforts over a reasonable period to diligently assist the parent in complying with the service plan but the parent has failed to substantially comply with



the terms and conditions of the plan and that reunification with the abusive or neglectful parent is not in the best interests of the child; and

(d) Termination of the parent's parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome based on one or more of the grounds set out in Section 93-15-119 or 93-15-121.

We likewise find sufficient record support for the county court's finding that clear and convincing evidence satisfied the statutory prerequisites for parental-rights termination. *C.S.H. v. Lowndes Cty. Dep't of Human Servs.*, 246 So. 3d 908, 915–16 (Miss. Ct. App. 2018).

**§ 93-15-117 Involuntary termination when child is in custody or under supervision of the Department of Child Protection Services pursuant to youth court proceedings and reasonable efforts for reunification are not required; standard of proof:**

When reasonable efforts for reunification are not required, a court hearing a petition under this chapter may terminate the parental rights of a parent if, after conducting an evidentiary hearing, the court finds by clear and convincing evidence:

- (a) That the child has been adjudicated abused or neglected;
- (b) That the child has been in the custody and care of, or under the supervision of, the Department of Child Protection Services for at least sixty (60) days and the Department of Child Protection Services is not required to make reasonable efforts for the reunification of the parent and the child pursuant to Section 43-21-603(7)(c) of the Mississippi Youth Court Law;
- (c) That a permanency hearing, or a permanency review hearing, has been conducted pursuant to the Uniform Rules of Youth Court Practice and the court has found that reunification with the abusive or neglectful parent is not in the best interests of the child; and
- (d) That termination of the parent's parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome based on one or more of the following grounds:

- (i) The basis for bypassing the reasonable efforts for reunification of the parent and child under Section 43-21-603(7)(c) is established by clear and convincing evidence; or
- (ii) Any ground listed in Section 93-15-119 or 93-15-121 is

established by clear and convincing evidence.

However, the chancery court did find that the children had been the victims of physical and sexual abuse, which have caused them permanent emotional and psychological damage. The chancery court also determined that all the children had been in the custody of DHS for four years or more, and DHS had made diligent and ongoing efforts to implement a plan to return all three children to their parents. The chancery court found that H.D.H.'s implementation of DHS's plan had been less than satisfactory, and the court further found that both parents had exhibited behavior that made it impossible to return the children to them. The chancery court found that, while there was no deep-seated antipathy by the children toward either parent, there was an adjudication that the children were neglected and abused. *H.D.H. v. Prentiss County Dep't of Human Servs. ex rel. Malone*, 979 So. 2d 6, 12 (Miss. Ct. App. 2008) (discussing prior version of statute).

**§ 93-15-119 Grounds for involuntary termination of parental rights; standard of proof; rebuttal of allegations of desertion; inquiry as to military status:**

(1) A court hearing a petition under this chapter may terminate the parental rights of a parent when, after conducting an evidentiary hearing, the court finds by clear and convincing evidence:

- (a)(i) That the parent has engaged in conduct constituting abandonment or desertion of the child, as defined in Section 93-15-103, or is mentally, morally, or otherwise unfit to raise the child, which shall be established by showing past or present conduct of the parent that demonstrates a substantial risk of compromising or endangering the child's safety and welfare; and
- (ii) That termination of the parent's parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome; or
- (b) That a parent has committed against the other parent a sexual act that is unlawful under Section 97-3-65 or 97-3-95, or under a similar law of another state, territory, possession or Native American tribe where the offense occurred, and that the child was conceived as a result of the unlawful sexual act. A criminal conviction of the unlawful sexual act is not required to terminate the offending parent's parental rights under this paragraph (b).

Abandonment does not necessarily refer to some overall course of conduct as "desertion" would, but rather "abandonment" may result from a single decision by a parent, at a particular point in time, where that parent decides to relinquish parental claims. For instance, when after the three day waiting period a parent signs the paper to renounce all rights in the child and place him or her for adoption, at that moment the parent may be said to have abandoned that child. One does not need to wait and see if the natural parent will make overtures to visit the child that has been placed up for adoption before declaring that "abandonment" has taken place. ***Grafe v. Olds*, 556 So. 2d 690, 693-94 (Miss. 1990) (citation omitted) (discussing prior version of statute).**

We find it unnecessary to address further the assignment of error relating to abandonment and desertion of the child, since we are of the opinion that the chancellor was not manifestly wrong in finding by clear and convincing evidence that the natural parents were morally and mentally unfit to rear and train the child, and that parental rights should be terminated because of such conditions. We hold that in proper cases, where the proof is clear and convincing, there may be constructive abandonment and desertion. ***G.M.R. v. H.E.S.*, 489 So. 2d 498, 500 (Miss. 1986) (discussing prior version of statute).**

(2) An allegation of desertion may be fully rebutted by proof that the parent, in accordance with the parent's means and knowledge of the mother's pregnancy or the child's birth, either:

- (a) Provided financial support, including, but not limited to, the payment of consistent support to the mother during her pregnancy, contributions to the payment of the medical expenses of the pregnancy and birth, and contributions of consistent support of the child after birth; frequently and consistently visited the child after birth; and is now willing and able to assume legal and physical care of the child; or
- (b) Was willing to provide financial support and to make visitations with the child, but reasonable attempts to do so were thwarted by the mother or her agents, and that the parent is now willing and able to assume legal and physical care of the child.

(3) The court shall inquire as to the military status of an absent parent before conducting an evidentiary hearing under this section.

## **Grounds for Termination & Burden of Proof**

### **§ 93-15-121    Grounds for termination:**

Any of the following, if established by clear and convincing evidence, may be grounds for termination of the parent's parental rights if reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome:

- (a) The parent has been medically diagnosed by a qualified mental health professional with a severe mental illness or deficiency that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, makes the parent unable or unwilling to provide an adequate permanent home for the child;
- (b) The parent has been medically diagnosed by a qualified health professional with an extreme physical incapacitation that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, prevents the parent, despite reasonable accommodations, from providing minimally acceptable care for the child;
- (c) The parent is suffering from habitual alcoholism or other drug addiction and has failed to successfully complete alcohol or drug treatment;
- (d) The parent is unwilling to provide reasonably necessary food, clothing, shelter, or medical care for the child; reasonably necessary medical care does not include recommended or optional vaccinations against childhood or any other disease;

Although aware of the great responsibility placed upon any court when determining whether a parent's fundamental right to rear their offspring should be terminated, we think we would be remiss in our duties if we did not terminate the parental rights to safeguard the children's greater right to food, shelter, and opportunity to become useful citizens. After careful scrutiny of the record, we are convinced, based on the overwhelming evidence of the deplorable, subhuman living conditions afforded the children, that the [parents'] parental rights should be terminated. The record is replete with evidence that the [parents] were given considerable opportunity and warning that they must change their lifestyle. Nothing was required of the [parents] by the welfare department

beyond providing their children with the most basic necessities for a healthy life which were well within the [parents'] capabilities if they were so inclined. Therefore, based on the extraordinary record before us in this case we conclude the [parents'] parental rights over the six children involved in this action be terminated. ***Adams v. Powe*, 469 So. 2d 76, 78 (Miss. 1985) (discussing prior version of statute).**

(e) The parent has failed to exercise reasonable visitation or communication with the child;

The evidence amply supports the conclusion that there had been a substantial erosion of the parent child relationship due to prolonged absence and lack of communication. ***Natural Mother v. Paternal Aunt*, 583 So. 2d 614, 619 (Miss. 1991) (discussing prior version of statute).**

(f) The parent's abusive or neglectful conduct has caused, at least in part, an extreme and deep-seated antipathy by the child toward the parent, or some other substantial erosion of the relationship between the parent and the child;

A finding of substantial erosion of the parent/child relationship necessarily involves a consideration of the relationship as it existed when the termination proceedings were initiated. A substantial erosion can be proved by showing a prolonged absence and lack of communication between the parent and the child. In a similar case, this Court affirmed the chancellor's decision to terminate a father's parental rights since the father had admittedly not seen his child in two years and only started paying child support after the termination action was filed. ***Fuller v. Weidner*, 147 So. 3d 380, 382 (Miss. Ct. App. 2014) (citations omitted) (discussing prior version of statute).**

(g) The parent has committed an abusive act for which reasonable efforts to maintain the children in the home would not be required under Section 43-21-603, or a series of physically, mentally, or emotionally abusive incidents, against the child or another child, whether related by consanguinity or affinity or not, making future contacts between the parent and child undesirable; or

The chancellor, however, found [the children] to be victims of child sexual abuse which will permanently injure them emotionally

and psychologically. This finding is supported by the record. . . . There is also ample evidence to support his findings of [the mother's] knowledge of, or participation in the sexual abuse of her children, or both. . . . We therefore conclude the chancellor had evidence to support the clear and convincing standard required to terminate [the mother's] parental rights. ***Carson v. Natchez Children's Home*, 580 So. 2d 1248, 1258 (Miss. 1991) (discussing prior version of statute).**

(h)(i) The parent has been convicted of any of the following offenses against any child:

1. Rape of a child under Section 97-3-65;
2. Sexual battery of a child under Section 97-3-95(c);
3. Touching a child for lustful purposes under Section 97-5-23;
4. Exploitation of a child under Sections 97-5-31 through 97-5-37;
5. Felonious abuse or battery of a child under Section 97-5-39(2);
6. Carnal knowledge of a step or adopted child or a child of a cohabitating partner under Section 97-5-41; or
7. Human trafficking of a child under Section 97-3-54.1; or

The chancery court determined that both parents pleaded guilty and were convicted of felonious child abuse under Mississippi Code Annotated section 97-5-39(2), a ground for termination of parental rights. ***H.D.H. v. Prentiss County Dep't of Human Servs. ex rel. Malone*, 979 So. 2d 6, 12 (Miss. Ct. App. 2008).**

or

(ii) The parent has been convicted of:

1. Murder or voluntary manslaughter of another child of the parent;
2. Aiding, abetting, attempting, conspiring or soliciting to commit murder or voluntary manslaughter of the child or another child of the parent; or
3. A felony assault that results in the serious bodily injury to the child or another child of the parent.

### **Court's Discretion Not to Terminate Parental Rights**

#### **§ 93-15-123 Court discretion not to terminate:**

Notwithstanding any other provision of this chapter, the court may exercise its discretion not to terminate the parent's parental rights in a proceeding under this chapter if the child's safety and welfare will not be compromised or endangered and terminating the parent's parental right is not in the child's best interests based on one or more of the following factors:

- (a) The Department of Child Protection Services has documented compelling and extraordinary reasons why terminating the parent's parental rights would not be in the child's best interests;
- (b) There is a likelihood that continuing reasonable efforts for achieving reunification will be successful;
- (c) Terminating the parent's parental rights would inappropriately relieve the parent of the parent's financial or support obligations to the child; or
- (d) The child is being cared for by the other parent, or a relative, guardian, or custodian, in a residence not occupied by the abusive or neglectful parent and terminating the parent's parental rights would not expedite the process for obtaining a satisfactory permanency outcome.

The law leaves no room for doubt as to what is required in a case involving termination of parental rights. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. Indeed, this is exactly what the Termination of Rights of Unfit Parents Law requires. The trial judge must be satisfied by clear and convincing proof that the mother was within the grounds laid out within the statute requiring termination of her parental rights. Also, under Mississippi law a strong presumption exists that the natural parent should retain his or her parental rights. Terminating those rights requires overcoming that strong presumption with clear and convincing evidence. *In re V.M.S.*, 938 So. 2d 829, 834 (Miss. 2006) (citations omitted) (discussing prior version of statute).

## Other Provisions

### **§ 93-15-125 Compliance with Indian Child Welfare Act:**

In any proceeding under this chapter, where the court knows or has reason to know that an Indian child is involved, the court must comply with the Indian Child Welfare Act (25 USCS Section 1901 et seq.) in regard to notice, appointment of counsel, examination of reports or other documents, remedial services and rehabilitation programs, and other protections the act provides. Additionally, no termination of parental rights may be ordered in the proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the Indian child by the parent is likely to result in serious emotional or physical damage to the Indian child.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), the United States Supreme Court dealt with the Mississippi chancery court adoption of two minor children, the unmarried parents of whom were both enrolled members of the Mississippi Band of Choctaw Indians. The children were born in Harrison County, Mississippi and the parents both executed consent-to-adoption forms. The band sought unsuccessfully before this court to vacate the adoption and appealed ultimately to the U.S. Supreme Court which found that even though the natural parents had both consented to the adoption, that Congressional intent and tribal interests outweighed any individual rights possessed by the parents and that pursuant to the Indian Child Welfare Act of 1978, the rights of the Band, not the welfare of the children, should prevail. The adoption decree, which had been upheld by this Court, was reversed and the issue was ultimately, upon remand, transferred to the tribal court. *Holyfield* grants exclusive jurisdiction of adoption proceedings concerning Indian children to the tribal courts pursuant to the Indian Child Welfare Act. Specifically Section 1911(a) of this act states in full as follows:

An Indian tribe shall have jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

*Holyfield* is consistent with prior U.S. Supreme Court renderings which establish that tribal courts have authority to punish tribal offenders, to determine tribal membership, to regulate domestic relations among



members and to prescribe rules of inheritance for members of the Band.  
***Harrison v. Boyd Mississippi, Inc.*, 700 So. 2d 247, 250 (Miss. 1997)**  
**(citations omitted).**

**§ 93-15-127 Effect on another parent's rights:**

Termination under this chapter of a parent's parental rights does not affect the parental rights of another parent.

**§ 93-15-129 Petitions involving sexual abuse or serious bodily injury treated as preference case:**

In any case where a child has been removed from the custody and care of the parent due to sexual abuse or serious bodily injury to the child, or is not living in the home of the offending parent, the court shall treat the petition for termination of parental rights as a preference case to be determined with all reasonable expedition.

**§ 93-15-131 Post-judgment proceedings:**

(1) If the court does not terminate the parent's parental rights, the custody and care of the child shall continue with the person, agency, or institution that is holding custody of the child at the time the judgment is rendered, or the court may grant custody to the parent whose rights were sought to be terminated if that is in the best interest of the child. If the Department of Child Protection Services has legal custody of the child, the court must conduct a permanency hearing and permanency review hearings as required under the Mississippi Youth Court Law and the Mississippi Uniform Rules of Youth Court Practice.

(2) If the court terminates the parent's parental rights, the court shall place the child in the custody and care of the other parent or some suitable person, agency, or institution until an adoption or some other permanent living arrangement is achieved. No notice of adoption proceedings or any other subsequent proceedings pertaining to the custody and care of the child shall be given to a parent whose rights have been terminated.

### **Right to Appeal**

#### **§ 93-15-133 Review by Supreme Court:**

Appeal from a final judgment on the termination of parental rights under this chapter shall be to the Supreme Court of Mississippi pursuant to the Mississippi Rules of Appellate Procedure.

### **Standard of Review**

The judgment of a county court in a nonjury trial is entitled to the same deference on appeal as a chancery-court decree, as to its findings of fact and conclusions of law. A chancellor's findings of fact concerning the termination of parental rights are viewed under the manifest error/substantial credible evidence standard of review. Therefore, we examine whether credible proof exists to support the chancellor's findings of fact by clear and convincing evidence. ***R.F. v. Lowndes County Dep't of Human Servs.*, 17 So. 3d 1133, 1136 (Miss. Ct. App. 2009) (citations omitted) (discussing prior version of statute).**

The chancellor's findings of fact concerning the termination of parental rights are viewed under the manifest error/substantial credible evidence standard of review. Therefore, we examine whether credible proof exists to support the chancellor's finding of fact by clear and convincing evidence.” That being said, it is not this Court's role to substitute its judgment for the chancellor's. ***W.A.S. v. A.L.G.*, 949 So. 2d 31, 34 (Miss. 2007) (citations omitted) (discussing prior version of statute).**

## **CHAPTER 20**

### **UNIFORM LAW ON PATERNITY**

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## **CHAPTER 20**

### **UNIFORM LAW ON PATERNITY**

#### **Uniform Law on Paternity**

**§ 93-9-1      Short title:**

Sections 93-9-1 to 93-9-49 may be cited as the "Mississippi Uniform Law on Paternity."

**§ 93-9-5      Application:**

Sections 93-9-1 to 93-9-49 apply to all cases of birth out of lawful matrimony as defined in section 93-9-7.

**§ 93-9-3      Construction; uniformity of laws:**

Nothing herein contained shall be construed as abridging the power and jurisdiction of the chancery courts of the State of Mississippi, exercised over the estates of minors, nor as an abridgment of the power and authority of said chancery courts or the chancellor in vacation or chancery clerk in vacation to appoint guardians for minors. The Uniform Law on Paternity shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

**§ 93-9-15      Remedies:**

The county court, the circuit court, or the chancery court has jurisdiction of an action under Sections 93-9-1 through 93-9-49, and all remedies for the enforcement of orders awarding custody or for expenses of pregnancy and confinement for a wife, or for education, necessary support and maintenance, or funeral expenses for legitimate children shall apply. The defendant must defend the cause in whichever court the action is commenced. The court has continuing jurisdiction to modify or revoke an order and to increase or decrease amounts fixed by order for future education and necessary support and maintenance. All remedies under the Uniform Interstate Family Support Act, and amendments thereto, are available for enforcement of duties of support and maintenance under Sections 93-9-1 through 93-9-49. Parties to an action to establish paternity shall not be entitled to a jury trial. The court may also order the father to reimburse Medicaid for expenses of the pregnancy and confinement of the mother.

**§ 93-9-30      Full faith and credit to foreign determinations of paternity:**

In any proceeding in Mississippi, either before a court or administrative tribunal, wherein the question of paternity may arise, and a determination or adjudication of paternity has been made through either a voluntary acknowledgment procedure, an administrative determination or a judicial order in another state or jurisdiction, then upon certification of that determination or adjudication by competent administrative or judicial authority of such state or jurisdiction, the court or administrative tribunal in Mississippi shall give full faith and credit to that foreign determination or adjudication, and it shall be conclusive proof of its substance.

**No Right to a Jury Trial**

**§ 93-9-15      Remedies:**

Parties to an action to establish paternity shall not be entitled to a jury trial.

**§ 93-9-27      Effect of test results; rebuttable presumption; no right to jury trial:**

(3) Parties to an action to establish paternity shall not be entitled to a jury trial.

**Venue of Paternity Actions**

**§ 93-9-17      Venue of actions:**

(1) An action under §§ 93-9-1 through 93-9-49 may be brought  
in the county where the alleged father is present or has property; or  
in the county where the mother resides; or  
in the county where the child resides.

However, if the alleged father resides or is domiciled in this state, upon the motion of the alleged father filed within thirty (30) days after the date the action is served upon him, the action shall be removed to the county where the alleged father resides or is domiciled. If no such motion is filed by the alleged father within thirty (30) days after the action is served upon him, the court shall hear the action in the county in which the action was brought. . . .

**Who May File Petition**

**§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity:**

(1) Paternity may be determined upon the petition of the mother, or father, the child or any public authority chargeable by law with the support of the child. . . .

***See Miss. R. Civ. Pro. 81.***

***See § 93-9-71 Mother's death:***

The death of the mother shall not abate the paternity prosecution, if the child be living; but a suggestion of the fact shall be made, and the name of the child substituted in the proceedings for that of the mother, and a guardian ad litem shall be appointed by the court to prosecute the cause, who shall not be liable for costs; and in such case the testimony of the mother, taken in writing before the justice, may be read in evidence, and shall have the same force and effect as if she were living and had testified to the same in court.

***See § 93-9-37 False complaints:***

The making of a false complaint as to the identity of the father, or the aiding or abetting therein, shall be punishable as for perjury.

***When Paternity Proceedings May be Instituted***

**§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity:**

(1) . . . Proceedings may be instituted at any time until such child attains the age of 21 years unless the child has been emancipated as provided in § 93-5-23 and § 93-11-65.

***Burden of Proof - Alleged Father is Alive***

The burden of proof in a paternity action, where the putative father is alive, is by a preponderance of the evidence. *Chisolm v. Eakes*, 573 So. 2d 764, 766 (Miss. 1990).

***Burden of Proof - Alleged Father is Deceased***

**§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity:**

[S]uch an adjudication after the death of the defendant must be made only upon clear and convincing evidence.

Adjudging paternity is more than a mere civil dispute persons need fairly resolved so they can get on with the rest of their lives. Where (as here) the claim is brought following the death of the intestate, the claimant must establish paternity by clear and convincing evidence. *In re Estate of Ford*, 552 So. 2d 1065, 1067 (Miss. 1989).

### *Alleged Father Fails to Enter an Appearance*

#### **§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity:**

(2) If the alleged father in an action to determine paternity to which the Department of Human Services is a party fails to appear for a scheduled hearing after having been served with process or subsequent notice consistent with the Rules of Civil Procedure, his paternity of the child(ren) shall be established by the court if a written declaration in support of establishing paternity made under penalty of perjury to the best of her knowledge, information and belief by the mother averring the alleged father's paternity of the child has accompanied the complaint to determine paternity. The written declaration shall constitute sufficient grounds for the court's finding of the alleged father's paternity without the necessity of the presence or testimony of the mother at the said hearing. The court shall, upon motion by the Department of Human Services, enter a judgment of paternity. . . .

### *Appointment of a Guardian ad Litem*

[In a paternity action, we] remand for a new hearing as set forth above, and we instruct the chancellor to appoint a guardian ad litem for the minor child, and for a hearing and a determination of what would be in the best interests of the minor child. *Griffith v. Pell*, 881 So. 2d 184, 188 (Miss. 2004).

Our attention does not end here, but consideration of the identity of the parties is important since the mother appears in the capacity of next friend. The real party in interest here is the child, not the mother, and it is presumed that the mother, as a natural guardian of her child, acts in the best interest of the child. . . . The interest of the mother may or may not be co-extensive with the interest of the child. The chancery court as the guardian of persons under disability of minority has authority to appoint a guardian ad litem. M.R.C.P. 17(d) provides that when the appointment of a guardian becomes necessary, the court shall appoint an attorney to serve in that capacity whose compensation shall be determined by the court and taxed as a cost of the actions. These facts strongly direct the appointment of such a guardian in this case is needed. In selection of a guardian ad litem, the Court should appoint a person who is unbiased and independent of the natural mother to insure protection for the child's best interests. The realities of present day domestic relationships suggest that the trauma of divorce may not end, and that a mother may desire to break all ties to a former marriage or the inconveniences of visitation with a former spouse. Therefore, before a just determination is concluded, this Court strongly suggests that the chancery court exercise its authority to appoint a guardian ad litem to insure and protect the best interests of the child. *Baker ex. rel. Williams v. Williams*, 503 So. 2d 249, 252-53 (Miss. 1987) (citations omitted).



### **Paternity Trial**

#### **§ 93-9-43      Prosecutor:**

It shall be the duty of the county attorney, in counties having a county attorney, (in the county in which the complaint is made) to prosecute all cases relating to natural children where the complainant is a state or county public welfare official. He shall receive as compensation for his services, when and if performed, not to exceed the sum of one hundred dollars (\$100.00) for any one month, in addition to compensation provided otherwise, out of the county treasury upon an order of the county, circuit, or chancery judge. In counties not having a county attorney, the complaint shall be prosecuted by the district attorney, or by an attorney representing the state or county public welfare official as the petitioner, who shall receive the same compensation as herein provided for the county attorney.

### **Scope of Paternity Trial**

The Court of Appeals . . . held that paternity actions were limited to issues of biology and support. The Court of Appeals stated:

Current case law provides that paternity suits have limited purposes.

Where scientific evidence points overwhelmingly towards one man as the father of a child, paternity is established, and the only matter left to resolve in the paternity action is that of support.

We agree. Paternity actions are about biology. However, it also important to note that custody issues such as visitation and support issues are routinely decided in paternity actions, as they were in Sue Ann Pell's paternity action against Griffith here, such that conflicts arise which may eventually necessitate consideration of the best interests of the child. Yet, a paternity action is not the most convenient or appropriate forum for determining the best interests of the child where custody actions are arranged to effectively and exhaustively address the issue. The best interests of the minor child at the heart of this action was best addressed in the divorce proceeding or in a separate custody action, not in the paternity action.

***Griffith v. Pell*, 881 So. 2d 184, 187-88 (Miss. 2004).**

Although chancery courts do not have exclusive jurisdiction over child custody matters, the Legislature has not granted the chancery courts' full jurisdiction over custody matters to the county courts. Section 9-9-21 grants county courts concurrent jurisdiction with chancery courts “in all matters of law and equity” only where the thing in controversy has a value that can be determined, and where that value does not exceed \$200,000. The value of child custody is incalculable and therefore is not a subject that was included in the Legislature's grant of chancery jurisdiction to the county courts of this State. ***Bronk v. Hobson*, 152 So. 3d 1130, 1134 (Miss. 2014).**

### **Specific Items of Proof**

#### **§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity:**

(1) . . . The trier of fact shall receive without the need for third-party foundation testimony certified, attested or sworn documentation as evidence of

- (a) childbirth records;
- (b) cost of filing fees;
- (c) court costs;
- (d) services of process fees;
- (e) mailing cost;
- (f) genetic tests and testing fees;
- (g) the department's attorney's fees;
- (h) in cases where the state or any of its entities or divisions have provided medical services to the child or the child's mother, all costs of prenatal care, birthing, postnatal care and any other medical expenses incurred by the child or by the mother as a consequence of the mother's pregnancy or delivery; and
- (i) funeral expenses.

#### **§ 93-9-73      Mother's dying declarations as evidence:**

In all proceedings to determine the parentage of a child when the mother is dead, her declarations in her travail, proved to be her dying declarations, may, on the trial of the case, be received in evidence.

#### **§ 93-9-19      Time of trial; preserving testimony:**

If the issue of paternity is raised in an action commenced during the pregnancy of the mother, the trial shall not, without the consent of the alleged father, be held until after the birth or miscarriage, but during such delay testimony may be perpetuated according to the laws of this state.

### **Genetic Testing**

#### **§ 93-9-21      Genetic tests; order and notice; enforcement of order to submit; notice of witness testifying as to sexual intercourse with mother:**

(2) In any case in which paternity has not been established, the court, on its own motion or on motion of the plaintiff or the defendant, ***shall*** order the mother, the alleged father and the child or children to submit to genetic tests and any other tests which reasonably prove or disprove the probability of paternity. If paternity

has been previously established, the court shall only order genetic testing pursuant to Section 93-9-10. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order for genetic testing as the rights of others and the interest of justice require.

In *Ivy v. Harrington*, 644 So. 2d 1218, 1221 (Miss. 1994), this Court noted that Section 93-9-21 was amended in 1987 to allow a putative father, plaintiff in a paternity action, to move for an order requiring blood tests. The *Ivy* Court went on to say that the word “shall” is a mandatory directive, and thus no discretion is afforded the trial judge, and the motion for paternity must be granted. . . . Statutory construction of the plain language of Miss. Code Ann. Section 93-9-21(2), cited by the trial court as authority for its ruling, constrains us to conclude that the word “shall” is a mandatory directive. As a consequence, in a proceeding to establish paternity, upon motion by either the plaintiff or defendant for an order requiring blood tests, the trial judge must grant the motion. Even if a trial court determined it was not in the child's best interests to require a paternity test, all that is necessary, under the statute as it currently exists, is for either the plaintiff or defendant in a suit regarding paternity to move for a test to be done. No discretion is afforded. Notwithstanding the breadth and depth and importance of the “best interest of the child” doctrine in Mississippi jurisprudence, the legislature was very clear in its unconditional amendment of 93-9-21. Unless and until that body sees fit to change it, we are bound by it. Notwithstanding good arguments to the contrary in this situation, the trial court and this Court must follow the mandate of the legislature. ***Thoms v. Thoms*, 928 So. 2d 852, 854-55 (Miss. 2006).**

In a proceeding to establish paternity, upon motion by either the plaintiff or defendant for an order requiring blood tests, the trial judge must grant the motion; no discretion is afforded the trial judge. ***Ivy v. Harrington*, 644 So. 2d 1218, 1221 (Miss. 1994).**

(4) The court shall ensure that all parties are aware of their right to request genetic tests under this section.

(5)(a) Genetic tests shall be performed by a laboratory selected from the approved list as prepared and maintained by the Department of Human Services. . . .

**Tests Results Shall be Admitted into Evidence**

**§ 93-9-23      Genetic testing, reports and proceedings on tests:**

[T]he certified report shall be admitted as evidence in the proceeding as prima facie proof of its contents.

**Effect of Test Results on Issue of Paternity**

**§ 93-9-27      Effect of test results; rebuttable presumption; no right to jury trial:**

(1) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If an expert concludes that the blood or other tests show the probability of paternity, such evidence shall be admitted.

(2) There shall be a rebuttable presumption of paternity, affecting the burden of proof, if the court finds that the probability of paternity, as calculated by the experts qualified as examiners of genetic tests, is ninety-eight percent (98%) or greater. This presumption may only be rebutted by a preponderance of the evidence. . . .

*Another Man as Possible Father*

**§ 93-9-21 Genetic tests; order and notice; enforcement of order to submit; notice of witness testifying as to sexual intercourse with mother:**

(3) Any party calling a witness or witnesses for the purpose of testifying that they had sexual intercourse with the mother at any possible time of conception of the child whose paternity is in question shall provide all other parties with the name and address of the witness at least twenty (20) days before the trial. If a witness is produced at the hearing for the purpose provided in this subsection but the party calling the witness failed to provide the twenty-day notice, the court may adjourn the proceeding for the purpose of taking a genetic test of the witness before hearing the testimony of the witness if the court finds that the party calling the witness acted in good faith.

The statute envisions two types of witnesses: a party witness and a non-party witness. The statute does not instill the court with the power to compel a non-party witness to take a blood test, though it may be requested by the court. A person's right to privacy is a fundamental right guaranteed under the United States Constitution. Nevertheless, a person's right to privacy can be overcome when the State has a compelling interest. Determining a child's parentage is a compelling state interest, and thus, according to the statute, a court can order a party witness to submit to a blood test. To the contrary, substantiating a non-party witness's testimony is not a compelling state interest. . . . Therefore, if the court requests that a non-party witness take a blood test and the witness refuses, then the court's only option under the statute would be to exclude the testimony of that witness. The statute does not mandate that a non-party witness be excluded for refusing to undergo a blood test. However, the purpose of the statute is to give an adverse party notice twenty days prior to trial. Failure to comply with the statute must have a remedy. Violation of the statute not in good faith dictates exclusion of the witness. If the violation is in good faith, the court shall request blood tests in lieu of excluding the witness. The intent of this statute is to reach the truth, not only for the parties, but for the state while balancing the individual's privacy rights against interests of the state and the child to determine parentage. To give meaning to the statute, the court must have authority to exclude a non-party witness from testifying if he refuses to take a blood test. This remedy strikes a reasonable balance between competing interests. *In re Estate of Chambers*, 711 So. 2d 878, 881-82 (Miss. 1998).

## *Voluntary Acknowledgment of Paternity*

### **§ 93-9-28      Voluntary paternity acknowledgment; procedures:**

(1) The Mississippi State Department of Health in cooperation with the Mississippi Department of Human Services shall develop a form and procedure which may be used to secure a voluntary acknowledgement of paternity from the mother and father of any child born out of wedlock in Mississippi. The form shall clearly state on its face that the execution of the acknowledgement of paternity shall result in the same legal effect as if the father and mother had been married at the time of the birth of the child. The form shall also clearly indicate the right of the alleged father to request genetic testing through the Department of Human Services within the one-year time period specified in subsection (2)(a)(i) of this section and shall state the adverse effects and ramifications of not availing himself of this one-time opportunity to definitively establish the paternity of the child. When such form has been completed according to the established procedure and the signatures of both the mother and father have been notarized, then such voluntary acknowledgement shall constitute a full determination of the legal parentage of the child. The completed voluntary acknowledgement of paternity shall be filed with the Bureau of Vital Statistics of the Mississippi State Department of Health. The name of the father shall be entered on the certificate of birth upon receipt of the completed voluntary acknowledgement.

- (2)      (a) A signed voluntary acknowledgment of paternity is subject to the right of any signatory to rescind the acknowledgment within the earlier of:
- (i) One (1) year; or
  - (ii) The date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.
- (b) After the expiration of the one-year period specified in subsection (2)(a)(i) of this section, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger; the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the pendency of the challenge, except for good cause shown.
- (c) During the one-year time period specified in subsection (2)(a)(i) of this section, the alleged father may request genetic testing through the Department of Human Services in accordance with the provisions of Section 93-9-21.

(d) The one-year time limit, specified in subsection (2)(a)(i) of this section, for the right of the alleged father to rescind the signed voluntary acknowledgement of paternity shall be tolled from the date the alleged father files his formal application for genetic testing with the Department of Human Services until the date the test results are revealed to the alleged father by the department. After the one-year time period has expired, not including any period of time tolled for the purpose of acquiring genetic testing through the department, the provisions of subsection (2)(b) of this section shall apply.

(3) The Mississippi State Department of Health and the Mississippi Department of Human Services shall cooperate to establish procedures to facilitate the voluntary acknowledgement of paternity by both father and mother at the time of the birth of any child born out of wedlock. Such procedures shall establish responsibilities for each of the departments and for hospitals, birthing centers, midwives, and/or other birth attendants to seek and report voluntary acknowledgements of paternity. In establishing such procedures, the departments shall provide for obtaining the social security account numbers of both the father and mother on voluntary acknowledgements.

(4) Upon the birth of a child out of wedlock, the hospital, birthing center, midwife or other birth attendant shall provide an opportunity for the child's mother and natural father to complete an acknowledgement of paternity by giving the mother and natural father the appropriate forms and information developed through the procedures established in subsection (3). The hospital, birthing center, midwife or other birth attendant shall be responsible for providing printed information, and audio visual material if available, related to the acknowledgement of paternity, and shall be required to provide notary services needed for the completion of acknowledgements of paternity. The information described above shall be provided to the mother and natural father, if present and identifiable, within twenty-four (24) hours of birth or before the mother is released. Such information, including forms, brochures, pamphlets, video tapes and other media, shall be provided at no cost to the hospital, birthing center or midwife by the Mississippi State Department of Health, the Department of Human Services or other appropriate agency.

Mississippi Code Annotated Section 93-9-28 establishes a procedure by which the natural father of an illegitimate child may voluntarily acknowledge the child as his own. Within twenty-four hours of the birth of the child, the health care providers who assisted in the delivery of the child provide the father with a form generated by the Mississippi Department of Health which states that “the execution of the acknowledgment of paternity shall result in the same legal effect as if the father and mother had been married at the time of the birth of the child.” The father

completes and executes the form before a notary public associated with the health care provider. The form is then be forwarded to the Department of Health. Upon receipt, the Department of Health enters the name of the father on the certificate of birth. Section 93-9-28 is the only statute which provides a method for a father voluntarily to acknowledge an illegitimate child as his own. *In re Estate of Farmer*, 964 So. 2d 498, 499-500 (Miss. 2007) (discussing prior version of statute).

### **Parental Obligations**

#### **§ 93-9-7      Obligations of the father:**

The father of a child which is or may be born out of lawful matrimony is liable to the same extent as the father of a child born of lawful matrimony, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement, and for the education, necessary support and maintenance, and medical and funeral expenses of the child. A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband.

#### **§ 93-9-11      Limitation on recovery from father:**

The father's liabilities for past education and necessary support and maintenance and other expenses are limited to a period of one (1) year next preceding the commencement of an action.

#### **§ 93-9-13      Recovery from father's estate:**

The obligation of the estate of the father for liabilities under Section 93-9-7 is limited to amounts accrued prior to his death. However, in order to hold the estate of the father liable under Section 93-9-7, the action must be filed within one (1) year after the death of the father or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less.

#### **§ 93-9-35      Orders to mother:**

(1) If a mother of a natural child be possessed of property and shall fail to support and educate her child, the court having jurisdiction, on the application of the guardian or next friend of the child or, if the child shall receive Temporary Assistance for Needy Families (TANF) benefits or other financial assistance, of the county human services agent or youth counselor, may examine into the matter and after a hearing may make an order charging the mother with the payment of money weekly or otherwise for the support and education of the child. . . .



### **Court's Order of Filiation**

#### **§ 93-9-29      Order of filiation:**

(1) If the finding be against the defendant, the court shall make an order of filiation, declaring paternity and for the support and education of the child.

(2) The order of filiation shall specify the sum to be paid weekly or otherwise. In addition to providing for the support and education, the order shall also provide for the funeral expenses if the child has died; for the support of the child prior to the making of the order of filiation; and such other expenses as the court may deem proper. In the event the defendant has health insurance available to him through an employer or organization that may extend benefits to the dependents of such defendant, the order of filiation may require the defendant to exercise the option of additional coverage in favor of the child he is legally responsible to support.

(3) The court may require the payment to be made to the mother, or to some person or corporation to be designated by the court as trustee, but if the child is or is likely to become a public charge on a county or the state, the public welfare agent of that county shall be made the trustee. The payment shall be directed to be made to a trustee if the mother does not reside within the jurisdiction of the court. The trustee shall report to the court annually, or oftener as directed by the court, the amounts received and paid over.

#### ***See § 93-9-75 Child's death:***

The death of the child, if the mother be living and unmarried, shall not be cause of abatement or bar to any suit brought under this chapter; but the court trying the same shall, on conviction, give judgment for such sum as shall be deemed just.

#### **§ 93-9-49      Settlement agreements:**

An agreement of settlement with the alleged father is binding only when approved by the court.

#### **§ 93-9-31      Security:**

(1) The court shall, if need be, require the father to give security by bond or other security, with sufficient sureties approved by the court, for the payment of the order of filiation. Such security, when required, shall not exceed three (3) times the total periodic sum the father shall be required to pay under the terms of the order of filiation in any one (1) calendar year. If bond or security be required, and

in case the action has been instituted by a public welfare official, the defendant shall also be required to give security that he will indemnify the state and the county where the child was or may be born and every other county against any expense for the support and education of the child, which said undertaking shall also require that all arrears shall be paid by the principal and sureties. In default of such security, when required, the court may commit him to jail, or put him on probation. At any time within one (1) year he may be discharged from jail, but his liability to pay the judgment shall not be thereby affected.

(2) Whenever any order of filiation has been made, but no bond or other security has been required for payment of support of the child, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are due, or such person's legal representative, enter an order requiring that bond or other security be given by the father in accordance with and under such terms and conditions as provided for in subsection (1) of this section. The father shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

(3) Where security is given and default is made in any payment, the court shall cite the parties bound by the security requiring them to show cause why judgment should not be given against them and execution issued thereon. If the amount due and unpaid shall not be paid before the return day of the citation, and no cause be shown to the contrary, judgment shall be rendered against those served with the citation for the amount due and unpaid together with costs, and execution shall issue therefor, saving all remedies upon the bond for future default. The judgment is a lien on real estate and in other respects enforceable the same as other judgments. The amount collected on such judgment or such sums as may have been deposited as collateral, in lieu of bond when forfeited, may be used for the benefit of the child, as provided for in the order of filiation.

(4) If at any time after an order of filiation in paternity proceedings shall have been made, and an undertaking given thereon, in accordance with the provisions of Sections 93-9-1 to 93-9-49 and such undertaking shall not be complied with, or that for any reason a recovery thereon cannot be had, or if the original undertaking shall have been complied with, and the sureties discharged therefrom, or if money were deposited in lieu of bail, and the same shall have been exhausted, and the natural child still needs support, the public welfare official of any county where the natural child for whose support the order of filiation was made shall be at the time, or the Commissioner of the State Welfare Department upon giving proof of the making of the order of filiation, the giving of the above-mentioned undertaking, and the noncompliance therewith, or that the sureties have been discharged from their liability, or that for any reason a recovery cannot be had on

such undertaking, may apply to the court in such county having jurisdiction in filiation proceedings, for a warrant for the arrest of the defendant against whom such order of filiation was made, which shall be executed in the manner provided in criminal procedure for the execution of the warrant; upon the arrest and arraignment of the defendant in said court, and upon proof of the making of the order of filiation, the giving of the above-mentioned undertaking, and the noncompliance therewith, or that for any reason a recovery cannot be had on such undertaking, the said court shall make an order requiring him to give a new undertaking, which said undertaking shall also require that all arrears shall be paid by the principal and sureties, or upon his failure to give such new undertaking, shall commit him to jail, or put him on probation.

(5) If the child and mother die, or the father and mother be legally married to each other, the court in which such security is filed, on proof of such fact, may cause the security to be marked "cancelled" and be surrendered to the obligors.

***See § 93-9-33 Contempt of court:***

The court also has power, on default as aforesaid, to adjudge the father in contempt and to order him committed to jail in the same manner and with the same powers as in case of commitment for default in giving security. The commitment of the father shall not operate to stay execution upon the judgment of the bond.

***See § 93-9-39 Probation authorized:***

Upon a failure to give security as provided herein, the court, instead of imposing sentence or of committing the father or mother to jail, or as a condition of his or her release from jail, may place him or her on probation, upon such terms as to payment of support to or on behalf of the child, and as to personal reports, as the court may direct. Upon violation of the terms imposed, the court may proceed to impose the sentence and commit or recommit to jail in accordance with the sentence.

### Costs

#### **§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity:**

(1) . . . All costs and fees shall be ordered paid to the Department of Human Services in all cases successfully prosecuted with a minimum of Two Hundred Fifty Dollars (\$250.00) in attorney's fees or an amount determined by the court without submitting an affidavit. . . .

#### **§ 93-9-25      Test costs; compensating experts:**

The costs of the blood or other tests required by the court and the compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, and that, after payment by either of the parties or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

#### **§ 93-9-45      Court costs assessed against defendant:**

If the court makes an order of filiation, declaring paternity and for the support and maintenance, and education of the child, court costs, including the cost of the legal services of the attorney representing the petitioner, expert witness fees, the court clerk, sheriff and other costs shall be taxed against the defendant.

### Right to Appeal

#### **§ 93-9-41      Review:**

An appeal in all cases may be taken by the defendant, a guardian ad litem appointed by the court for the child, the mother or her personal representative, or the public welfare official, from any final order or judgment of any court having jurisdiction of filiation proceedings, as provided for in sections 93-9-1 to 93-9-49, directly to the supreme court within thirty (30) days after the entry of said order of judgment. No appeal however shall operate as a stay of execution unless the defendant shall give the security provided for in sections 93-9-1 to 93-9-49, and further security to pay the costs of such appeal. If any such appeal shall be taken by a guardian ad litem, appointed for the child by the court, the court may in its discretion allow payment, for the actual disbursements made by the said guardian ad litem for taking appeal. When allowed by the judge and duly audited, said disbursement shall become a county charge and shall be paid by the county.

### Standard of Review

We will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous. *Williams v. Williams*, 843 So. 2d 720, 722 (Miss. 2003) (citations omitted).

### Modification of a Paternity Order

The chancellor found that the motion had not been brought within a reasonable time. The paternity order was entered in 1990. The DNA testing was completed on April 20, 1999. The motion to set aside the previous order was filed two and a half months later. The chancellor found that M.A.S. could have requested DNA testing during that nine year period. M.A.S. testified that he did ask for blood tests but that DHS officials refused his request. . . . DHS and the mother have not been prejudiced by the failure to seek relief sooner. The mother received child support payments for approximately ten years from the wrong person. . . . Consideration of a Rule 60(b) motion does require that a “balance . . . be struck between granting a litigant a hearing on the merits with the need and desire to achieve finality.” In our opinion, finality should yield to fairness here. M.A.S. has paid child support for someone else's child for over ten years. He will be obligated to support that child for many more years unless the flawed paternity and child support order is vacated. The chancellor's refusal to withdraw the paternity order in the face of unrefuted proof that M.A.S. is not the child's father, was an abuse of discretion. In our opinion, this case is the archetype for the application of Rule 60(b)(6). We now know beyond any reasonable doubt that the 1990 paternity order was incorrect. The child is not that of M.A.S. The question is what can or should be done about the paternity order. . . . This is a special situation in which relief is justified under M.R.C.P. 60(b)(6). A manifest injustice will result if M.A.S. is required to continue making child support payments for a child which unquestionably is not his. Therefore, we reverse the judgment of the Court of Appeals and the order . . . denying M.A.S. relief from the paternity and child support order, and we remand this case to the chancery court with directions that it grant M.A.S. relief from the paternity and child support order in accordance with this opinion and M.R.C.P. 60(b). *M.A.S. v. Mississippi Dep't of Human Servs.*, 842 So. 2d 527, 531 (Miss. 2003).

## **Paternity & Inheritance**

### **§ 93-9-9      Enforcement; surname of child; acknowledgment of paternity; genetic testing:**

[S]uch an adjudication [of paternity] after the death of the defendant must be made only upon clear and convincing evidence.

Adjudging paternity is more than a mere civil dispute persons need fairly resolved so they can get on with the rest of their lives. Where (as here) the claim is brought following the death of the intestate, the claimant must establish paternity by clear and convincing evidence. *In re Estate of Ford*, **552 So. 2d 1065, 1067 (Miss. 1989)**.

### **§ 91-1-15      Illegitimate children:**

(3) An illegitimate shall inherit from and through the illegitimate's natural father and his kindred, and the natural father of an illegitimate and his kindred shall inherit from and through the illegitimate according to the statutes of descent and distribution if:

(a) The natural parents participated in a marriage ceremony before the birth of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or

(b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or

(c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and 91-1-29.

However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less; and such time period shall run notwithstanding the minority of a child. . . .

Under Mississippi law, failure to bring a timely paternity claim bars the nonmarital child's right to inherit as an heir under our statute. *Estate of Elmore v. Williams*, **150 So. 3d 700, 702 (Miss. 2014)**.

In order for an illegitimate child to inherit from his or her natural father, there must be an adjudication of paternity after the death of the intestate based upon clear and convincing evidence. ***Smith v Bell*, 876 So. 2d 1087, 1091 (Miss. Ct. App. 2004).**

Section 91-1-15 allows illegitimate children to adjudicate paternity in order to be established as an heir at law within specified time limits. ***In re Estate of Mathis*, 800 So. 2d 119, 121 (Miss. Ct. App. 2001).**

Mississippi Code Annotated section 91-1-15 requires an illegitimate child to establish paternity before, or within a specific period of time after, the death of the putative father. While Sanders admits she did not institute paternity proceedings within the required time, section 93-9-28 provides, “[T]he execution of the acknowledgment of paternity shall result in the same legal effect as if the father and mother had been married at the time of the birth of the child.” We hold the language of this section satisfies the requirements of section 91-1-15(3)(a), such that the minor can inherit from his natural father where the father has executed an acknowledgment of paternity. . . . ***In re Estate of Farmer*, 964 So. 2d 498, 500 (Miss. 2007).**

## **Disestablishment of Paternity**

### **§ 93-9-10      Disestablishment of paternity:**

(1) This section establishes circumstances under which a legal father may disestablish paternity and terminate a child support obligation when the legal father is not the biological father of the child. To disestablish paternity and terminate a child support obligation, the legal father must file a petition in the court having jurisdiction over the child support obligation. The petition must be served on the mother or other legal guardian or custodian of the child. If the Department of Human Services is or has been a party to the establishment of paternity or collection of child support, the Attorney General of the State of Mississippi must be served with a copy of the petition. The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination.

(b)      (i) The results of a scientific test or tests that are generally acceptable to the scientific community to show a probability of paternity, administered within one (1) year before the filing of the petition, which results indicate that the legal father is excluded as being the biological father of the child, or  
(ii) an affidavit executed by the petitioner stating that he did not have access to the child to have the scientific testing performed before the filing of the petition. A petitioner who files such an affidavit can request in the petition that the court order the child and mother, if available, be tested.

(2) The court shall grant relief on a petition filed in accordance with subsection (1) of this section upon a finding by the court of all of the following:

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination.

(b) The scientific testing required in subsection (1)(b) of this section was properly conducted.

(c) The legal father ordered to pay child support has not adopted the child.

(d) The child was not conceived by artificial insemination while the legal father ordered to pay support and the child's mother were married.



[U]nder Section 93-9-10(2)(d), a father cannot seek to disestablish paternity when the child was conceived by AI during the marriage to the child's mother. *Strickland v. Day*, 239 So. 3d 486, 490 (Miss. 2018).

(e) The legal father ordered to pay child support did not act to prevent the biological father of the child from asserting his parental rights with respect to the child.

(3) Notwithstanding subsection (2) of this section, a court shall not set aside the paternity determination or child support order if the legal father engaged in any of the following conduct:

(a) Married or cohabited with the mother of the child and voluntarily assumed the parental obligation and duty to support the child after having knowledge that he is not the biological father of the child;

(b) Consented to be named as the biological father on the child's birth certificate and signed the birth certificate application or executed a simple acknowledgment of paternity and failed to withdraw consent or acknowledgment within the time provided for by law in Sections 93-9-9 and 93-9-28, unless he can prove fraud, duress or material mistake of fact;

(c) Signed a stipulated agreement of paternity that has been approved by order of the court;

[In Section 93-9-10,] subsection (c) prevents a chancery court from setting aside a paternity determination when a legal father has signed a stipulated agreement of paternity, while subsection (d) prevents a chancery court from setting aside a paternity determination when a legal father has signed a stipulated agreement of support. We agree . . . that it is clear the Legislature intended to draw a distinction between the legal father who stipulates to paternity in subsection (3)(c) versus one who stipulates only to pay child support in subsection (3)(d). A legal father may stipulate to the court to pay child support without a paternity establishment because he is already the legal father by operation of law. Section 93-9-10(3)(d) allows such a legal father an opportunity to disestablish paternity upon negative genetic testing as long as he did not stipulate to support after having knowledge he was not the biological father. In other words, a nonjudicially determined legal father is given greater freedom to disestablish paternity under Section 93-9-10(3) than a father who is

adjudicated a parent through a court order. Thus, based on the language of the statute, subsections (c) and (d) are distinct provisions that apply in different factual scenarios. [Petitioner] does not dispute that he signed a stipulated agreement of paternity that was approved by the chancery court-the exact factual scenario addressed by subsection (c). Accordingly, the chancery court did not err by denying [petitioner]'s motion to disestablish paternity. ***Jones v. Mallett*, 125 So. 3d 650, 653 (Miss. 2013).**

(d) Signed a stipulated agreement of support that has been approved by order of the court after having knowledge that he is not the biological father of the child;

(e) Been named as the legal father or ordered to pay support by valid order of the court after having declined genetic testing;

(f) Failed to appear for a scheduled genetic testing draw pursuant to a valid court order compelling him to submit to genetic testing.

(4) If the petitioner fails to make the requisite showing required by this section, the court shall deny the petition.

(5) Relief granted pursuant to this section is limited to the issues of prospective child support payments, past-due child support payments, termination of parental rights, custody, and visitation privileges as otherwise provided by law. This section shall not be construed to create a cause of action to recover child support paid before the filing of the petition to disestablish paternity.

(6) The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause. However, the court may order that amounts paid as child support be held by the court or the Department of Human Services until final determination of paternity has been made.

(7) The party requesting genetic testing shall pay any fees associated with the testing.

(8) In any action brought pursuant to this section, the court on its own motion, or on the motion of any party, may order the biological mother and child, through the child's legal guardian or custodian, to submit to genetic testing.

(9) If the relief sought under this petition is not granted by the court, the petitioner shall be assessed the court costs, genetic testing fees and reasonable attorney fees.

**CHAPTER 21**

**NAME CHANGE & ALTERATION OF BIRTH CERTIFICATE**

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## CHAPTER 21

### NAME CHANGE & ALTERATION OF BIRTH CERTIFICATE

#### Minor Changes

##### **§ 41-57-21     Correcting or altering birth certificates:**

Where there has been a bona fide effort to register a birth and the certificate thereof on file with the office of vital records does not divulge all of the information required by said certificate, or such certificate contains an incorrect  
first name,  
middle name, or  
sex,

then the state registrar of vital records may, in his discretion, correct such certificate upon affidavit of at least two (2) reputable persons having personal knowledge of the facts in relation thereto.

All other alterations shall be made as provided in Section 41-57-23. Anyone giving false information in such affidavit shall be subject to the penalties of perjury.

Here, we find that the legislature intended to grant the Health Department discretion to correct any combination of errors among the items listed in Section 41-57-21. The legislative scheme clearly envisions two qualitatively different categories of errors on birth certificates. First, there are the minor deficiencies listed in Section 41-57-21. Second, there are the more serious deficiencies, such as errors concerning a person's date of birth, surname or birthplace, which are listed in Section 41-57-23 and which must be corrected by filing a proceeding in chancery court. Nothing in Section 41-57-23 can be read to require that combinations of the minor deficiencies listed in Section 41-57-21 should be treated as more serious errors requiring the expensive and timely mechanism of a chancery court proceeding. While such proceedings may be necessary in some cases, Section 41-57-21 expressly grants the state registrar discretion to determine these on a case-by-case basis. *Dunn v. Mississippi State Dep't of Health*, 708 So. 2d 67, 72 (Miss. 1998).

#### Major Changes

##### **§ 41-57-23     Proceedings to correct birth certificate containing major deficiencies; acknowledgment of paternity:**

(1) Any petition, bill of complaint or other proceeding filed in the chancery court to:

- (a) change the date of birth by two (2) or more days,
- (b) change the surname of a child,
- (c) change the surname of either or both parents,
- (d) change the birthplace of the child because of an error or omission of such information as originally recorded or
- (e) make any changes or additions to a birth certificate resulting from a legitimation, filiation or any changes not specifically authorized elsewhere by statute,

shall be

filed in the county of residence of the petitioner or  
filed in any chancery court district of the state if the petitioner be a  
nonresident petitioner.

**State Board of Health is a Necessary Party**

In all such proceedings, the State Board of Health shall be made a respondent therein, and a certified copy of the petition, bill of complaint or other proceeding shall be forwarded to the State Board of Health. Process may be served upon the State Registrar of Vital Records. The State Board of Health shall file an answer to all such proceedings within the time as provided by general law. The provisions of this section shall not apply to adoption proceedings. Upon receipt of a certified copy of a decree, which authorizes and directs the State Board of Health to alter the certificate, it shall comply with all of the provisions of such decree.

On January 29, 2010, a baby daughter was born out of wedlock to Christina Crawley and Powell, who at the time was just two months shy of his twentieth birthday. The next day, Powell signed two documents: an Acknowledgement of Paternity form and a Name of Child Verification form. . . . Nine months after executing the forms discussed above, Powell filed a complaint for adjudication of paternity, child support, and visitation with Carsyn. Powell also sought to change Carsyn's surname from Crawley to Powell. He named Christina as the only respondent. . . . When Powell filed his complaint, his child already had a birth certificate with her surname listed as Crawley. Therefore, in order to change the child's surname from Crawley to Powell, Powell was required to comply with the provisions of section 41-57-23(1). He did not, inasmuch as he failed to make the State Board of Health a respondent. In denying Powell's request to have his child's surname changed to his, the chancery court stated: "By signing the 'Name of Child Verification,' the plaintiff/natural father

waived his right to have the child's surname changed to his surname. His signature on this statement represents his agreement to allow the child's surname to be the same as the mother's." We need not decide whether the chancery court abused its discretion in refusing to grant the requested relief because, as stated, Powell failed to make the State Board of Health a respondent. Therefore, the chancery court could not have granted the relief even if it had wanted to. ***Powell v. Crawley*, 106 So. 3d 864, 866 (Miss. Ct. App. 2013).**

Mississippi Code Annotated section 41-57-23 provides that any pleading filed in the chancery court to change a birth certificate, "including changes or additions to a birth certificate resulting from a legitimation, filiation or any changes not specifically authorized elsewhere," including specifically the surname of a child, shall name the State Board of Health as a respondent. The petitioner must also send a certified copy of the pleading to the State Board of Health and/or serve process on the State Registrar of Vital Records. Answer by the State Board of Health is mandated. ***Arrington v. Thrash*, 122 So. 3d 144, 151 (Miss. Ct. App. 2013).**

### **Tribal Court Authority**

- (2) (a) If a petition, bill of complaint or other proceeding is filed in the Tribal Court of the Mississippi Band of Choctaw Indians for any of the purposes described in paragraphs (a) through (e) of subsection (1) with regard to the birth certificate of a person of Mississippi Choctaw descent, the tribal court shall have the same authority as the chancery court would have to make any of those changes described in those paragraphs in subsection (1), and the State Board of Health shall comply with a decree from the tribal court in the same manner as if the decree was issued by the chancery court. In all those proceedings in the tribal court, the State Board of Health shall be made a respondent therein, and a certified copy of the petition, bill of complaint or other proceeding shall be forwarded to the State Board of Health.
- (b) The Tribal Court of the Mississippi Band of Choctaw Indians is not the exclusive venue for making changes to the birth certificates of persons of Mississippi Choctaw descent, and changes to the birth certificates of persons of Mississippi Choctaw descent may also be made in proceedings in the chancery court.
- (c) Nothing in this subsection shall be construed to enlarge the subject matter jurisdiction of the Tribal Court of the Mississippi Band of Choctaw Indians.

### **Acknowledgment of Paternity**

(3) If a child is born to a mother who was not married at the time of conception or birth, or at any time between conception and birth, and the natural father acknowledges paternity, the name of the father shall be added to the birth certificate if a notarized affidavit by both parents acknowledging paternity is received on the form prescribed or as provided in Section 93-9- 9. The surname of the child shall be that of the father except that an affidavit filed at birth by both listed mother and father may alter this rule. In the event the mother was married at the time of conception or birth, or at any time between conception and birth, or if a father is already listed on the birth certificate, action must be taken under Section 41-57-23(1) to add or change the name of the father.

(4) (a) A signed voluntary acknowledgment of paternity is subject to the right of any signatory to rescind the acknowledgment within the earlier of:

- (i) One (1) year; or
- (ii) The date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.

(b) After the expiration of the one-year period specified in subsection (3)(a)(i) of this section, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger; the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the pendency of the challenge, except for good cause shown.

Interestingly, section 41-57-23[(4)] allows the listed mother and father on the birth certificate to sign an affidavit to change the child's surname to a name other than the listed father. This same statute also permits voluntary acknowledgment of paternity and allows a signatory to such acknowledgment to rescind the acknowledgment within the earlier of one year, or a judicial proceeding related to the child. As stated, the acknowledgment may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the challenger. *In re Estate of Ivy*, 121 So. 3d 226, 249 n. 17 (Miss. Ct. App. 2012).

***See Miss. R. Civ. Pro. 81.***



**CHAPTER 22**  
**GUARDIANSHIPS**

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## **APPENDIX**

### **Former Chapter 22 Guardianships**

## CHAPTER 22

### GUARDIANSHIPS

#### Authority of Chancery Court

Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution. It is not competent for the Legislature to abate the said powers and duties or for the said court to omit or neglect them. It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non composmentis. The court will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. *Union Chevrolet Co. v. Arrington*, 138 So. 593, 595 (Miss. 595 (Miss. 1932).

#### Difference Between a Guardian and Conservator

Initially, it is appropriate to distinguish guardianships from conservatorships. Guardians may be appointed for minors; incompetent adults; a person of unsound mind; alcoholics or drug addicts; convicts in the penitentiary; persons in the armed forces or merchant seamen reported as missing; or for veterans; or minor wards of a veteran. The guardian is the legally recognized custodian of the person or property of another with prescribed fiduciary duties and responsibilities under court authority and direction. A ward under guardianship is under a legal disability or is adjudged incompetent. In recent decades there has been an increased number of older adults in our society who possess assets in need of protective services provided through guardianships. But modification of laws have broadened the definition of persons for whom assistance can be afforded by the courts, and such statutes do not restrict such protection only to the adult incompetent or insane. Noting that trend in our society, the Mississippi Legislature incorporated into law in 1962 the conservatorship procedure for persons who, by reason of advanced age, physical incapacity, or mental weakness, were incapable of managing their own estates. Thus the Legislature provided a

new procedure through conservatorship for supervision of estates of older adults with physical incapacity or mental weakness, without the stigma of legally declaring the person non compos mentis. This additional procedure was intended to encompass a broader class of people than just the incompetent. Therefore, the distinguishing feature of conservatorship from guardianships lies in part in the lack of necessity of an incompetency determination or the existence of a legal disability for its initiation. After establishment of such protective procedures, the duties, responsibilities and powers of a guardian or conservator are the same. However, the status of the ward in each arrangement is different. *Harvey v. Meador*, 459 So. 2d 288, 291-92 (Miss. 1984).

## **General Provisions**

### **Jurisdiction**

#### **§ 93-20-104 Subject-matter jurisdiction:**

(1) Except to the extent jurisdiction is precluded by the Uniform Child Custody Jurisdiction and Enforcement Act (Title 93, Chapter 27, Mississippi Code of 1972) and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Title 93, Chapter, 14, Mississippi Code of 1972), the chancery court has jurisdiction over a guardianship or conservatorship for a respondent domiciled or present in this state or having property in this state.

(2) After a petition is filed in a proceeding for a guardianship or conservatorship and until termination of the proceeding, the court in which the petition is filed has:

- (a) Exclusive jurisdiction to determine the need for the guardianship or conservatorship;
- (b) Exclusive jurisdiction to determine how property of the respondent must be managed, expended, or distributed to or for the use of the respondent, an individual who is dependent in fact on the respondent, or other claimant;
- (c) Nonexclusive jurisdiction to determine the validity of a claim against the respondent or property of the respondent or a question of title concerning the property; and
- (d) If a guardian or conservator is appointed, exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

(3) A court that appoints a guardian or conservator has exclusive and continuing jurisdiction over the proceeding until the court terminates the proceeding.

(4) This chapter does not apply to a durable legal relative guardianship to facilitate child placement that may be created by a youth court under Section 43-21-609.

### **Venue**

#### **§ 93-20-106 Venue:**

(1) Venue for a guardianship proceeding for a minor is in:

- (a) The county in which the minor resides or is present at the time the proceeding commences; or
- (b) The county in which another proceeding concerning the custody or parental rights of the minor is pending.

- (2) Venue for a guardianship proceeding for an adult is in:
  - (a) The county in which the respondent resides;
  - (b) If the respondent has been admitted to an institution by court order, the county in which the court is located; or
  - (c) If the proceeding is for appointment of an emergency guardian for an adult, the county in which the respondent is present. . . .
- (4) If proceedings under this act are brought in more than one (1) county, the court of the county in which the first proceeding is brought has the exclusive right to proceed unless the court determines venue is properly in another court or that the interest of justice otherwise requires transfer of the proceeding.

**§ 93-20-108 Letters of guardianship or conservatorship:**

- (1) At or before the time of appointment, the guardian or conservator must take and subscribe an oath faithfully to discharge the duties of guardian or conservator of the ward according to law.
- (2) The clerk must issue letters of guardianship to a guardian who takes the proper oath, posts bond if required, and submits a certificate of attorney and certificate of fiduciary, unless waived by the court.
- (3) The clerk must issue letters of conservatorship to a conservator who takes the proper oath, posts bond if required, and submits a certificate of attorney and certificate of fiduciary, unless waived by the court or unless the conservator complies with another asset-protection arrangement required by the court.
- (4) The court in its initial order of appointment or at any subsequent time may limit the powers conferred on a guardian or conservator. The court shall direct the clerk to issue new letters of guardianship or conservatorship that reflect the limitation. The court shall direct the clerk to give notice of the limitation by service of a copy of the court's order with proof of service on the guardian or conservator, the ward, and any other person the court determines.
- (5) Limitations on the powers of a guardian or conservator or on the property subject to conservatorship must be stated in the letters of guardianship or conservatorship.
- (6) Letters of guardianship and conservatorship may be combined in one (1) document if the guardian and conservator are the same person.

## **Guardianship of Minor**

### **Parents are Natural Guardians**

#### **§ 93-13-1 Parental guardianship:**

The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor, or any other matter affecting the minor. If either father or mother die or be incapable of acting, the guardianship devolves upon the surviving parent. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody. But if any father or mother be unsuitable to discharge the duties of guardianship, then the court, or chancellor in vacation, may appoint some suitable person, or having appointed the father or mother, may remove him or her if it appear that such person is unsuitable, and appoint a suitable person.

#### **§ 93-20-201 Basis for appointment of guardian for minor:**

- (1) A person becomes a guardian for a minor only on appointment by the court.
- (2) The court may appoint a guardian for a minor who does not have a guardian if the court finds the appointment is in the minor's best interest, and:
  - (a) Each parent of the minor, after being fully informed of the nature and consequences of guardianship, consents;
  - (b) All parental rights have been terminated; or
  - (c) There is clear and convincing evidence that no parent of the minor is willing or able to exercise the powers the court is granting the guardian.
- (3) The guardian for a minor is not required to retain an attorney of record for the guardianship if the courts finds that this would impose an undue burden on the ward's estate.

### **Petition is Filed**

#### **§ 93-20-202 Petition for appointment of guardian for minor:**

- (1) A person interested in the welfare of a minor, including the minor, may petition for appointment of a guardian for the minor.
- (2) A petition under subsection (1) must comply with the requirement for an affidavit under the Uniform Child Custody Jurisdiction and Enforcement Act (Title 93, Chapter 27, Mississippi Code of 1972) and must also include:
  - (a) The name and address of any attorney for the parents of the minor;
  - (b) The reason guardianship is sought and would be in the best interest of the minor;
  - (c) The name and address of any proposed guardian and the reason the proposed guardian should be selected; and
  - (d) If the minor has property other than personal effects, a general statement of the minor's property with an estimate of its value.
- (3) Notice of a hearing on a petition filed after the appointment of a guardian which seeks an order under this article, together with a copy of the petition, must be given to the ward, the guardian, the parents of the ward, and any other person the court determines.

### **Notice of Hearing**

#### **§ 93-20-203 Notice of hearing for appointment of guardian for minor:**

- (1) If a petition is filed under Section 93-20-202, the court must set a date, time and place for a hearing, and the petitioner must cause summons to be issued and served not less than seven (7) days before the hearing, together with a copy of the petition, on each of the following who is not the petitioner:
  - (a) The minor, if the minor will be fourteen (14) years of age or older at the time of the hearing;
  - (b) Each parent of the minor who can be found with reasonable diligence or, if there is none, the adult nearest in kinship who can be found with reasonable diligence; and
  - (c) Each individual who had primary care or custody of the minor for at least sixty (60) days during the six (6) months immediately before the filing of the petition.
- (2) For any other person the court determines should know of the proceedings,



notice must be provided under Rule 5 of the Mississippi Rules of Civil Procedure.

(3) A petition under this article must state the name and address of an attorney representing the petitioner, if any, and must set forth under the style of the case and before the body of the petition the following language in bold or highlighted type:

THE RELIEF SOUGHT HEREIN MAY AFFECT YOUR LEGAL RIGHTS. YOU HAVE A RIGHT TO NOTICE OF ANY HEARING ON THIS PETITION, TO ATTEND ANY SUCH HEARING, AND TO BE REPRESENTED BY AN ATTORNEY.

(4) If a petitioner is unable to serve summons under subsection (1)(a), the court may appoint a guardian ad litem for the minor for the purpose of receiving summons.

**§ 93-20-204 Attorney for minor:**

The court may appoint an attorney to represent a minor who is the subject of a proceeding under Section 93-20-202 if:

- (a) Requested by the minor who is fourteen (14) years of age or older;
- (b) Recommended by a guardian ad litem; or
- (c) The court determines the minor needs representation.

**Hearing**

**§ 93-20-205 Rights at hearing:**

(1) The court shall require a minor who is the subject of a hearing for appointment of a guardian to attend the hearing and allow the minor to participate in the hearing unless the court determines, by clear and convincing evidence presented at the hearing or at a separate hearing, that:

- (a) The minor consistently and repeatedly refused to attend the hearing after being fully informed of the right to attend and, if the minor is fourteen (14) years of age or older, the potential consequences of failing to do so;
- (b) There is no practicable way for the minor to attend the hearing;
- (c) The minor lacks the ability or maturity to participate meaningfully in the hearing; or
- (d) Attendance would be harmful to the minor.

(2) Unless excused by the court for good cause shown, the person proposed to be appointed as guardian for a minor must attend a hearing for appointment of a guardian.

(3) Each parent of a minor who is the subject of a hearing for appointment of a guardian has the right to attend the hearing.

### **Appointment of Guardian**

#### **§ 93-20-206 Order on appointment; limited guardianship for minor:**

(1) After a hearing under Section 93-20-202, the court may appoint a guardian for a minor, dismiss the proceeding, or take other appropriate action consistent with this act or law of this state other than this act.

(2) In appointing a guardian under subsection (1), the following apply:

(a) The court shall appoint a person nominated as guardian by a parent of the minor in a will or other record unless the court finds the appointment is contrary to the best interest of the minor.

(b) If multiple parents have nominated different persons to serve as guardian, the court shall appoint the nominee whose appointment is in the best interest of the minor, unless the court finds that appointment of none of the nominees is in the best interest of the minor.

(c) If a guardian is not appointed under paragraph (a) or (b), the court shall appoint the person nominated by the minor if the minor is fourteen (14) years of age or older unless the court finds that appointment is contrary to the best interest of the minor. In that case, the court shall appoint as guardian a person whose appointment is in the best interest of the minor.

(3) In the interest of maintaining or encouraging involvement by a minor's parent in the minor's life, developing self-reliance of the minor, or for other good cause, the court, at the time of appointment of a guardian for the minor or later, on its own or on motion of the minor or other interested person, may create a limited guardianship by limiting the powers otherwise granted by this article to the guardian. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

(4) The court, as part of an order appointing a guardian for a minor, shall state rights retained by any parent of the minor, which may include contact or visitation with the minor, decision-making regarding the minor's health care, education, or other matter, or access to a record regarding the minor.

(5) An order granting a guardianship for a minor must state that each parent of the minor is entitled to notice that:

- (a) The location of the minor's residency has changed;
- (b) The court has modified or limited the powers of the guardian; or
- (c) The court has removed the guardian.

**§ 93-20-207 Emergency guardian for minor:**

(1) On a petition by a person interested in a minor's welfare or a petition filed under Section 93-20-202, the court may appoint an emergency guardian for the minor if the court finds:

- (a) Appointment of an emergency guardian is likely to prevent substantial harm to the minor's health, safety, or welfare; and
- (b) No other person appears to have authority and willingness to act in the circumstances.

(2) The duration of authority of an emergency guardian for a minor may not exceed sixty (60) days, and the emergency guardian may exercise only the powers specified in the order of appointment. The emergency guardian's authority may be extended one (1) time for not more than sixty (60) days if the court finds that the conditions for appointment of an emergency guardian in subsection (1) continue.

(3) Except as otherwise provided in subsection (4), summons giving reasonable notice of the date, time, and place of a hearing on a petition for appointment of an emergency guardian for a minor must be given to:

- (a) The minor, if the minor is fourteen (14) years of age or older;
- (b) Any attorney appointed under Section 93-20-204;
- (c) Each parent of the minor;
- (d) Any person, other than a parent, having care or custody of the minor; and
- (e) Any other person the court determines.

(4) The court may appoint an emergency guardian for a minor under subsection (3) without notice or a hearing only if the court finds from an affidavit or testimony that the minor's health, safety, or welfare will be substantially harmed before a hearing after notice of the appointment could be held. If the court appoints an emergency guardian to an unrepresented minor or the attorney for a represented minor without notice, notice of the appointment must be given not later than forty-eight (48) hours after the appointment to the individuals listed in subsection (3) and summons must be issued on continuation of the guardianship. The court must hold a hearing on continuation of a guardianship within five (5)

days of any objection or other contest. Not later than five (5) days after the appointment, the court must hold a hearing on the appropriateness of the appointment.

(5) Appointment of an emergency guardian under this section, with or without notice, is not a determination that a basis exists for appointment of a guardian under Section 93-20-201.

(6) The court may remove an emergency guardian appointed under this section at any time. The emergency guardian must make any report the court requires.

### **Guardian's Duties**

#### **§ 93-20-208 Duties of guardian for minor:**

(1) A guardian for a minor is a fiduciary. Except as otherwise limited by the court, a guardian for a minor has the duties and responsibilities of a parent regarding the minor's support, care, education, health, safety, and welfare. A guardian must act in the minor's best interest and exercise reasonable care, diligence, and prudence.

(2) A guardian for a minor must:

- (a) Become personally acquainted with the minor and maintain sufficient contact with the minor to know and report to the court the minor's abilities, limitations, needs, opportunities, and physical and mental health;
- (b) Take reasonable care of the minor's personal effects and bring a proceeding for a conservatorship if necessary to protect other property of the minor;
- (c) Expend funds of the minor that have been received by the guardian for the minor's current needs for support, care, education, health, safety, and welfare;
- (d) Conserve any funds of the minor not expended under paragraph (c) for the minor's future needs, but if a conservator is appointed for the minor, pay the funds as directed by the court to the conservator to be conserved for the minor's future needs;
- (e) Report the condition of the minor and account for funds and other property of the minor in the guardian's possession or subject to the guardian's control, as required by court rule or ordered by the court on application of a person interested in the minor's welfare;
- (f) Inform the court of any change in the minor's dwelling or address; and
- (g) In determining what is in the minor's best interest, take into account the minor's preferences to the extent actually known or reasonably ascertainable by the guardian.

### ***Guardian's Powers***

#### **§ 93-20-209 Powers of guardian for minor:**

- (1) Except as otherwise limited by court order, a guardian of a minor has the powers a parent otherwise would have regarding the minor's support, care, education, health, safety, and welfare.
- (2) Except as otherwise limited by court order, a guardian for a minor may:
  - (a) Apply for and receive funds up to the amount set forth in Section 93-20-431 and benefits otherwise payable for the support of the minor to the minor's parent, guardian, or custodian under a statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship.
  - (b) Unless inconsistent with a court order entitled to recognition in this state, take custody of the minor and establish the minor's place of dwelling and, on authorization of the court, establish or move the minor's dwelling outside this state.
  - (c) If the minor is not subject to conservatorship, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the minor or make a payment for the benefit of the minor;
  - (d) Consent to health or other care, treatment, or service for the minor; or
  - (e) To the extent reasonable, delegate to the minor responsibility for a decision affecting the minor's well-being.
- (3) The court may authorize a guardian for a minor to consent to the adoption of the minor if the minor does not have a parent.
- (4) A guardian for a minor may consent to the marriage of the minor if authorized by the court.

### ***Termination of Guardianship***

#### **§ 93-20-210 Removal of guardian for minor; termination of guardianship; appointment of successor:**

- (1) Guardianship for a minor under this act terminates:
  - (a) On the minor's death, adoption, emancipation, attainment of majority, or on a date set by the court; or
  - (b) When the court finds that the standard in Section 93-20-201 for

appointment of a guardian is not satisfied, unless the court finds that:

- (i) Termination of the guardianship would be harmful to the minor; and
- (ii) The minor's interest in the continuation of the guardianship outweighs the interest of any parent of the minor in restoration of the parent's right to make decisions for the minor.

(2) A ward or any party may petition the court to terminate the guardianship, modify the guardianship, remove the guardian and appoint a successor guardian.

(3) A petitioner under subsection (2) must give notice of the hearing on the petition to the minor, if the minor is fourteen (14) years of age or older and is not the petitioner, and to the guardian, each parent of the minor, and any other person the court determines.

(4) Not later than thirty (30) days after appointment of a successor guardian for a minor, notice must be given of the appointment to the ward, if the minor is fourteen (14) years of age or older, to each parent of the minor, and to any other person the court determines.

(5) When terminating a guardianship for a minor under this section, the court may issue an order providing for transitional arrangements that will assist the minor with a transition of custody and that is in the best interest of the minor.

(6) A guardian for a minor who is removed must cooperate with a successor guardian to facilitate transition of the guardian's responsibilities and protect the best interest of the minor.

### **Guardianship of Adult**

#### **§ 93-20-301 Basis for appointment of guardian for adult:**

(1) The court may appoint a guardian for an adult when the respondent lacks the ability to meet essential requirements for physical health, safety or self-care because:

(a) The adult is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services or technological assistance; or

(b) The adult is found to be a person with mental illness or a person with an intellectual disability as defined in Section 41-21-61 who is also incapable of taking care of his or her person.

(2) The court shall grant to a guardian only those powers necessitated by the

limitations and demonstrated needs of the ward and must enter orders that will encourage the development of the ward's maximum self-determination and independence. The court must consider any less restrictive alternative that would meet the needs of the ward.

### **Petition is Filed**

#### **§ 93-20-302 Petition for appointment of guardian for adult:**

(1) A proceeding under this article may be instituted by the chancellor or clerk of the chancery court, any relative or friend of the adult, or any other interested party, including the adult for whom the order is sought, by filing a sworn petition in the chancery court of the county of the residence of the adult, setting forth that the adult is alleged to be in need of a guardianship.

(2) The petition must state the name and address of an attorney representing the petitioner, if any, and must set forth under the style of the case and before the body of the petition the following language in bold or highlighted type:

THE RELIEF SOUGHT HEREIN MAY AFFECT YOUR LEGAL RIGHTS. YOU HAVE A RIGHT TO NOTICE OF ANY HEARING ON THIS PETITION, TO ATTEND ANY SUCH HEARING, AND TO BE REPRESENTED BY AN ATTORNEY.

(3) The guardian for an adult is not required to retain an attorney of record for the guardianship if the court finds that this would impose an undue burden on the ward's estate.

### **Notice of Hearing**

#### **§ 93-20-303 Notice of hearing for appointment of guardian for adult; notice of hearing after appointment of guardian:**

(1) On receipt of a petition under Section 93-20-302 for appointment of a guardian for a respondent who is an adult, the court must set a date, time and place for a hearing, and unless the court finds that the adult for whom the guardian is to be appointed is competent and joins in the petition, the petitioner must cause summons to be served not less than seven (7) days before the hearing, together with a copy of the petition, on the adult for whom the guardian is to be appointed. The court may, for good cause shown, direct that a shorter notice be given.

(2) Unless the court finds that the adult for whom the guardian is to be appointed is competent and joins in the petition, summons must also issue to:

- (a) Any conservator appointed to the respondent;
- (b) At least one (1) adult relative of the respondent who resides in Mississippi from the following group in the listed order of preference: spouse, children, parents, siblings; but if none of those can be found:
  - (i) To one (1) adult relative of the respondent who is not the petitioner and who resides in Mississippi if that relative is within the third degree of kinship.
  - (ii) If no relative within the third degree of kinship to the respondent is found residing in the State of Mississippi, the court shall either designate some other appropriate person to receive the summons or appoint a guardian ad litem to receive the summons.

(3) In a proceeding on a petition under this article, notice of the hearing must also be given to any other person the court determines is entitled to notice. Failure to give notice does not preclude the court from appointing a guardian.

(4) If the person for whom the guardian is to be appointed is entitled to any benefit, estate or income paid or payable by or through the Veterans' Administration of the United States government, such administration must also be given a summons.

(5) Notice of a hearing on a petition seeking an order under this article that is filed after the appointment of a guardian, together with a copy of the petition, must be given to the ward, the guardian, and any other person the court determines.

**§ 93-20-304 Appointment of guardian ad litem:**

The court may appoint a guardian ad litem to any respondent and allow suitable compensation payable out of the estate of the respondent, but the appointment shall not be made except when the court considers it necessary for the protection of the interest of the respondent; a judgment of any court is not void or erroneous for failure to have a guardian ad litem.

**§ 93-20-305 Professional evaluation:**

(1) The chancery court must conduct a hearing to determine whether a guardian is needed for the respondent. Before the hearing, the court, in its discretion, may appoint a guardian ad litem to look after the interest of the person in question; the guardian ad litem must be present at the hearing and present the interests of the respondent for whose person a guardian is to be appointed.

(2) The chancery judge shall be the judge of the number and character of the



witnesses and proof to be presented, except that the proof must include certificates made after a personal examination of the respondent by the following professionals, each of whom shall make in writing a certificate of the result of that examination to be filed with the clerk of the court and become a part of the record of the case

- (a) Two (2) licensed physicians; or
- (b) One (1) licensed physician and either one (1) licensed psychologist, nurse practitioner, or physician's assistant.

(3) The personal examination may occur face-to-face or via telemedicine, but any telemedicine examination must be made using an audio-visual connection by a physician licensed in this state and as defined in Section 83-9-351. A nurse practitioner or physician assistant conducting an examination shall not also be in a collaborative or supervisory relationship, as the law may otherwise require, with the physician conducting the examination. A professional conducting an examination under this section may also be called to testify at the hearing.

### **Hearing**

#### **§ 93-20-306 Rights at hearing:**

(1) At a hearing held under this article, the respondent may:

- (a) Present evidence and subpoena witnesses and documents;
- (b) Examine witnesses; and
- (c) Otherwise participate in the hearing.

(2) Unless excused by the court for good cause shown, a proposed guardian must attend a hearing under this article.

(3) A hearing under this article must be closed upon request of the respondent and a showing of good cause.

(4) Any person may request to participate in a hearing under this article. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

#### **§ 93-20-307 Confidentiality of records:**

(1) An adult subject to a proceeding for a guardianship, an attorney designated by the adult, and a person entitled to notice either under Section 93-20-309(4) or a court order may access court records of the proceeding and resulting guardianship,

including the guardian's plan under Section 93-20-315 and guardian's well-being report under Section 93-20-316. A person not otherwise entitled to access court records under this subsection may petition the court for access to court records of the guardianship, including the guardian's report and plan, for good cause. The court shall grant access if access is in the best interest of the respondent or ward or furthers the public interest and does not endanger the welfare or financial interests of the respondent or ward.

(2) A report under Section 93-20-304 of a guardian ad litem or a professional evaluation under Section 93-20-305 may be considered confidential and may be sealed on filing when determined necessary by the court. If the court finds the file should be sealed, the file will remain available to:

- (a) The court;
- (b) The individual who is the subject of the report or evaluation, without limitation as to use;
- (c) The petitioner, guardian ad litem, and petitioner's and respondent's attorneys, for purposes of the proceeding;
- (d) Unless the court orders otherwise, an agent appointed under a power of attorney for health care or power of attorney for finances in which the respondent is the principal; and
- (e) Any other person if it is in the public interest or for a purpose the court orders for good cause.

#### **§ 93-20-308 Who may be guardian for adult:**

(1) Appointment of a guardian for an adult will be at the discretion of the court and in the best interest of the respondent. If two (2) or more persons have requested responsibility as guardian for the adult, the court shall select as guardian the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent, including any designation made in a will, durable power of attorney, or health-care directive, the extent to which the person and the respondent have similar values and preferences, and the likelihood the person will be able to perform the duties of a guardian successfully. The court, acting in the best interest of the respondent, may decline to appoint as guardian a person requesting such an appointment.

(2) If a qualified guardian under this section cannot be determined, or if other circumstances arise where the court determines that a guardian must instead be appointed, the court, at its discretion, may appoint the chancery court clerk for the county in which the proceedings were filed, to serve as the respondent's guardian. The chancery court clerk shall serve in the capacity ordered by the court unless a

conflict of interest arises or the clerk presents circumstances where the court determines the clerk's recusal from appointment is permitted.

(3) A person that provides paid services to the respondent, or an individual who is employed by a person who provides paid services to the respondent or is the spouse, parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as guardian unless:

(a) The individual is related to the respondent by blood, marriage, or adoption; or

(b) The court finds by clear and convincing evidence that the person is the best qualified person available for appointment and the appointment is in the best interest of the respondent.

(4) An owner, operator, or employee of a long-term-care institution at which the respondent is receiving care may not be appointed as guardian unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

### **Appointment of Guardian**

#### **§ 93-20-309 Order on appointment of guardian:**

(1) A court order appointing a guardian for an adult must:

(a) Include a specific finding that clear and convincing evidence established that the identified needs of the respondent cannot be met by a less restrictive alternative, including use of appropriate supportive services and technological assistance; and

(b) Include a specific finding that clear and convincing evidence established the respondent was given proper summons notifying the respondent of the hearing on the petition.

(2) A court order establishing a full guardianship for an adult must state the basis for granting a full guardianship and include specific findings that support the conclusion that a limited guardianship would not meet the functional needs of the ward.

(3) A court order establishing a limited guardianship for an adult must state the specific powers granted to the guardian.

(4) The court, as part of an order establishing a guardianship for an adult, must identify and include the contact information for any person that subsequently is entitled to:

- (a) Notice of the rights of the adult under Section 93-20-310(2);
- (b) Notice of a change in the primary dwelling of the adult;
- (c) Notice that the guardian has delegated:
  - (i) The power to manage the care of the adult;
  - (ii) The power to make decisions about where the adult lives;
  - (iii) The power to make major medical decisions on behalf of the adult;
  - (iv) A power that requires court approval under Section 93-20-314; or
  - (v) Substantially all powers of the guardian;
- (d) A copy of the guardian's plan under Section 93-20-315 and the guardian's well-being report under Section 93-20-316;
- (e) Access to court records relating to the guardianship;
- (f) Notice of the death or significant change in the condition of the adult;
- (g) Notice that the court has limited or modified the powers of the guardian; and
- (h) Notice of the removal of the guardian.

(5) A spouse and adult children of a ward are entitled to notice under Section 93-20-303 unless the court determines notice would be contrary to the preferences or prior directions of the ward or not in the best interest of the ward.

- (6)
  - (a) If the chancellor finds from the evidence that the adult is incapable of taking care of his person, the chancellor shall appoint a guardian over the person.
  - (b) The costs and expenses of the proceedings shall be paid out of the estate of the person if a guardian is appointed. If a guardian is appointed and the adult has no estate, or if no guardian is appointed, then the costs and expenses must be paid by the person instituting the proceedings.

**§ 93-20-310 Notice of order of appointment; rights:**

(1) A guardian appointed under Section 93-20-309 must give the ward and all other persons given notice under Section 93-20-309(4) a copy of the order of appointment, together with notice of the right to request termination or modification. The order and notice must be given not later than fourteen (14) days after the appointment.

(2) Not later than fourteen (14) days after appointment of a guardian under Section 93-20-309, the guardian must request from the court a statement of the rights of the ward and must give the statement to the ward and any other person entitled to notice under Section 93-20-303 or a court order. The statement must

notify the ward of the right to:

- (a) Seek termination or modification of the guardianship, or removal of the guardian, and choose an attorney to represent the adult in these matters;
- (b) Be involved in decisions affecting the adult, including decisions about the adult's care, dwelling, activities, or social interactions, to the extent reasonably feasible;
- (c) Be involved in health-care decision-making to the extent reasonably feasible and supported in understanding the risks and benefits of health-care options to the extent reasonably feasible;
- (d) Be notified at least fourteen (14) days before a change in the adult's primary dwelling or permanent move to a nursing home, mental-health facility, or other facility that places restrictions on the individual's ability to leave or have visitors, unless the change or move is proposed in the guardian's plan under Section 315 or authorized by the court by specific order;
- (e) Object to a change or move described in paragraph (d) and the process for objecting;
- (f) Communicate, visit, or interact with others, including receiving visitors, and making or receiving telephone calls, personal mail, or electronic communications, including through social media, unless:
  - (i) The guardian has been authorized by the court by specific order to restrict communications, visits, or interactions;
  - (ii) A protective order is in effect that limits contact between the adult and a person; or
  - (iii) The guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult, and the restriction is:
    - 1. For a period of not more than seven (7) business days if the person has a family or pre-existing social relationship with the adult; or
    - 2. For a period of not more than sixty (60) days if the person does not have a family or pre-existing social relationship with the adult;
- (g) Receive a copy of the guardian's plan under Section 93-20-315 and the guardian's well-being report under Section 93-20-316; and
- (h) Object to the guardian's plan or report.

## **Guardian's Duties**

### **§ 93-20-312 Duties of guardian for adult:**

(1) A guardian for an adult is a fiduciary. Except as otherwise limited by the court, a guardian for an adult shall make decisions regarding the support, care, education, health, and welfare of the ward to the extent necessitated by the adult's limitations.

(2) A guardian for an adult promotes the self-determination of the adult and, to the extent reasonably feasible, encourages the adult to participate in decisions, act on the adult's own behalf, and develop or regain the capacity to manage the adult's personal affairs. In furtherance of this duty, the guardian may:

(a) Become personally acquainted with the adult and maintain sufficient contact with the adult through regular visitation and other means, and to know the adult's abilities, limitations, needs, opportunities, and physical and mental health;

(b) To the extent reasonably feasible, identify the values and preferences of the adult and involve the adult in decisions affecting the adult, including decisions about the adult's care, dwelling, activities, or social interactions; and

(c) Make reasonable efforts to identify and facilitate supportive relationships and services for the adult.

(3) A guardian for an adult at all times shall exercise reasonable care, diligence, and prudence when acting on behalf of or making decisions for the adult. In furtherance of this duty, the guardian shall:

(a) Take reasonable care of the personal effects, pets, and service or support animals of the adult and bring a proceeding for a conservatorship if necessary to protect the adult's property;

(b) Expend funds and other property of the adult received by the guardian for the adult's current needs for support, care, education, health, and welfare;

(c) Conserve any funds and other property of the adult not expended under paragraph (b) for the adult's future needs, but if a conservator has been appointed for the adult, pay the funds and other property at least quarterly to the conservator to be conserved for the adult's future needs; and

(d) Monitor the quality of services, including long-term care services, provided to the adult.

(4) In making a decision for a ward, the guardian must make the decision the

guardian reasonably believes the adult would make if the adult were able unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult. To determine the decision the ward would make if able, the guardian shall consider the adult's previous or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the guardian.

(5) If a guardian for an adult cannot make a decision under subsection (4) because the guardian does not know and cannot reasonably determine the decision the adult probably would make if able, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the adult, the guardian must act in accordance with the best interest of the adult. In determining the best interest of the adult, the guardian may consider:

- (a) Information received from professionals and persons that demonstrate sufficient interest in the welfare of the adult;
- (b) Other information the guardian believes the adult would have considered if the adult were able to act; and
- (c) Other factors a reasonable person in the circumstances of the adult would consider, including consequences for others.

(6) A guardian for an adult immediately must notify the court if the condition of the adult has changed so that the adult is capable of exercising rights previously removed.

### **Guardian's Powers**

#### **§ 93-20-313 Powers of guardian for adult:**

(1) Except as limited by court order, a guardian for an adult may:

- (a) Apply for and receive funds and benefits for the support of the adult, unless a conservator is appointed for the adult and the application or receipt is within the powers of the conservator;
- (b) Unless inconsistent with a court order, establish the adult's place of dwelling;
- (c) Consent to health or other care, treatment, or service for the adult;
- (d) If a conservator for the adult has not been appointed, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the adult or pay funds for the adult's benefit;
- (e) To the extent reasonable, delegate to the adult responsibility for a

decision affecting the adult's well-being; and

(f) Receive personally identifiable health-care information regarding the adult.

(2) In exercising a guardian's power under subsection (1)(b) to establish the adult's place of dwelling, the guardian must:

(a) Select a residential setting the guardian believes the adult would select if the adult were able, in accordance with the decision-making standard in Section 93-20-312(4) and (5). If the guardian does not know and cannot reasonably determine what setting the ward likely would choose if able, or if the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the adult, the guardian must choose in accordance with Section 93-20-312(5) a residential setting that is consistent with the adult's best interest;

(b) In selecting among residential settings, give priority to a residential setting in a location that will allow the adult to interact with persons important to the adult and meet the adult's needs in the least restrictive manner reasonably feasible unless to do so would be inconsistent with the decision-making standard in Section 93-20-312(4) and (5);

(c) Establish or move the permanent place of dwelling of the adult to a nursing home, mental-health facility, or other facility that places restrictions on the adult's ability to leave or have visitors only if:

(i) The establishment or move is in the guardian's plan under Section 93-20-315;

(ii) The court authorizes the establishment or move; or

(iii) The guardian gives notice of the establishment or move at least fourteen (14) days before the establishment or move to the adult and all persons entitled to notice under Section 93-20-309(4) or court order, and no objection is filed;

(d) Establish or move the place of dwelling of the adult outside this state only if consistent with the guardian's plan and authorized by the court by specific order;

(e) Take action that would result in the sale of or surrender of the lease to the primary dwelling of the adult only if:

(i) The action is specifically included in the guardian's plan under Section 93-20-315;

(ii) The court authorizes the action by specific order; or

(iii) Notice of the action was given at least fourteen (14) days before the action to the adult and all persons entitled to the notice under Section 93-20-309(4) or court order and no objection has been filed; and



(f) Notify the court that the adult's dwelling or permanent residence has become so damaged by fire, flood, or other emergency circumstance that the guardian has had to temporarily or permanently relocate the adult to another residential setting.

(3) In exercising a guardian's power under subsection (1)(c) to make health-care decisions, the guardian shall:

(a) Involve the adult in decision-making to the extent reasonably feasible, including, when practicable, by encouraging and supporting the adult in understanding the risks and benefits of health-care options;

(b) Defer to a decision by an agent under an advanced healthcare directive executed by the adult and cooperate to the extent feasible with the agent making the decision; and

(c) Take into account:

(i) The risks and benefits of treatment options; and

(ii) The current and previous wishes and values of the adult, if known or reasonably ascertainable by the guardian.

#### **§ 93-20-314 Special limitations on guardian's power:**

(1) Unless authorized by the court by specific order, a guardian for an adult does not have the power to revoke or amend an advanced health-care directive or power of attorney for finances executed by the adult. If an advanced health-care directive is in effect, unless there is a court order to the contrary, a health-care decision of an agent takes precedence over that of the guardian and the guardian must cooperate with the agent to the extent feasible. If a power of attorney for finances is in effect, unless there is a court order to the contrary, a decision by the agent which the agent is authorized to make under the power of attorney for finances takes precedence over that of the guardian and the guardian must cooperate with the agent to the extent feasible.

(2) A guardian for an adult may not initiate the commitment of the adult to a mental health facility except in accordance with the state's procedure for involuntary civil commitment.

(3) A guardian for an adult may not restrict the ability of the adult to communicate, visit, or interact with others, including receiving visitors and making or receiving telephone calls, personal mail, or electronic communications, including through social media, or participating in social activities, unless:

(a) Authorized by the court by specific order;

(b) A protective order is in effect that limits contact between the adult and

a person; or

(c) The guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult and the restriction is:

(i) For a period of not more than seven (7) business days if the person has a family or pre-existing social relationship with the adult; or

(ii) For a period of not more than sixty (60) days if the person does not have a family or pre-existing social relationship with the adult.

#### **§ 93-20-315 Guardian's plan:**

(1) If required by the court, a guardian must file with the court a plan for the care of the adult no later than ninety (90) days after the court's order of appointment or order to file a plan. If a plan is required and there is a significant change in circumstances, or if the guardian seeks to deviate significantly from the guardian's plan, a guardian must file with the court a revised plan no later than ninety (90) days after the change in circumstances or decision to deviate from the plan. Every plan must be based on the needs of the adult and take into account the best interest of the adult as well as the adult's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. Along with other items determined necessary by the court, the guardian's plan must include:

(a) The living arrangement, services, and supports the guardian expects to arrange, facilitate, or continue for the adult;

(b) Social and educational activities the guardian expects to facilitate on behalf of the adult;

(c) Any person with whom the adult has a close personal relationship or relationship involving regular visitation and any plan the guardian has for facilitating visits with the person;

(d) The anticipated nature and frequency of the guardian's visits and communication with the adult;

(e) Goals for the adult, including any goal related to the restoration of the adult's rights, and how the guardian anticipates achieving the goals;

(f) Whether the adult has an existing plan and, if so, whether the guardian's plan is consistent with the adult's plan; and

(g) A statement or list of the amount the guardian proposes to charge for each service the guardian anticipates providing to the adult.

(2) A guardian must give reasonable notice of the filing of the guardian's plan under subsection (1), and a copy of the plan, to the adult ward, the adult ward's spouse, parents, children, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later

than fourteen (14) days after the filing.

(3) After the guardian's plan filed under this section is approved by the court, the guardian must provide a copy of the plan to the adult ward, the adult ward's spouse, parents, children, and any other person the court determines.

**§ 93-20-316 Guardian's well-being report; monitoring of guardianship:**

(1) If there is a significant change in circumstances, or if the guardian seeks to deviate significantly from the guardian's plan, a guardian must file with the court a report in a record regarding the condition of the adult and accounting for funds and other property in the guardian's possession or subject to the guardian's control within ninety (90) days after being so ordered by the court.

(2) A report under subsection (1) must state:

- (a) The mental, physical, and social condition of the adult;
- (b) The living arrangements of the adult during the reporting period;
- (c) A summary of any technological assistance, medical services, educational and vocational services, and other supports and services provided to the adult and the guardian's opinion as to the adequacy of the adult's care;
- (d) A summary of the guardian's visits with the adult, including the dates of the visits;
- (e) Action taken on behalf of the adult;
- (f) The extent to which the adult has participated in decision-making;
- (g) If the adult is living in a mental health facility or living in a facility that provides the adult with health-care or other personal services, whether the guardian considers the facility's current plan for support, care, treatment, or habilitation consistent with the adult's preferences, values, prior directions, and best interest;
- (h) Any business relation the guardian has with a person the guardian has paid or that has benefited from the property of the adult;
- (i) A copy of the guardian's most recently approved plan under Section 93-20-315 and a statement whether the guardian has deviated from the plan and, if so, how the guardian has deviated and why;
- (j) Plans for future care and support of the adult;
- (k) A recommendation as to the need for continued guardianship and any recommended change in the scope of the guardianship, when determined applicable by the court;
- (l) Whether any co-guardian or successor guardian appointed to serve when a designated event occurs is alive and able to serve;
- (m) Photographs of the adult ward and the adult ward's living conditions,

as required by the court at its discretion; and

(n) Any amounts requested for reimbursement by the guardian of fees related to the administration of the guardianship or legal fees incurred for matters related to the guardianship.

(3) The court may appoint a guardian ad litem to review a report submitted under this section or any guardian's plan submitted under Section 93-20-315, interview the guardian or ward, or investigate any other matter involving the guardianship.

(4) Notice of the filing under this section of a guardian's well-being report, together with a copy of the report, must be given to the adult ward, the adult ward's spouse, parents, children, and any other person the court determines. The notice and report must be delivered not later than fourteen (14) days after the filing.

(5) The court must establish procedures for monitoring a report submitted under this section and review each report at least annually to determine whether:

(a) The report provides sufficient information to establish if the guardian has complied with the guardian's duties;

(b) The guardianship should continue; and

(c) The guardian's requested fees, if any, should be approved.

(6) If the court determines there is reason to believe a guardian for an adult has not complied with the guardian's duties or the guardianship should be modified or terminated, the court:

(a) Shall notify the adult ward, the adult ward's spouse, parents, children, and persons entitled to notice under Section 93-20-309(4) or a court order;

(b) May appoint a guardian ad litem to interview the adult or guardian or investigate any matter involving the guardianship; and

(c) May hold a hearing to consider removal of the guardian, termination of the guardianship, or a change in the powers granted to the guardian or terms of the guardianship.

(7) A guardian for an adult may petition the court for approval of a report filed under this section. The court after review may approve the report. If the court approves the report, there is a rebuttable presumption the report is accurate as to a matter adequately disclosed in the report.

### **Removal of Guardian**

#### **§ 93-20-317 Removal of guardian for adult; appointment of successor:**

- (1) Upon petition and for good cause shown, the court may hold a hearing to consider whether to remove a guardian for an adult for failure to perform the guardian's duties and appoint a successor guardian to assume the duties of guardian.
- (2) Notice of a petition under this section must be given to the ward, the guardian, and any other person the court determines.
- (3) A ward who seeks to remove the guardian and have a successor guardian appointed has the right to choose an attorney for representation in this matter. The court shall award reasonable attorney's fees to the attorney for the adult as provided in Section 93-20-118.
- (4) Not later than ten (10) days after appointing a successor guardian, the court shall give notice of the appointment to the adult ward, the adult ward's spouse, parents, children, and any person entitled to notice under a court order.

### **Termination of Guardianship**

#### **§ 93-20-318 Termination or modification of guardianship for adult:**

- (1) Upon petition and for good cause shown, the court may hold a hearing to consider whether termination of the guardianship exists on the ground that a basis for appointment under Section 93-20-301 does not exist or termination would be in the best interest of the adult or for other good cause; or modification of the guardianship exists on the ground that the extent of protection or assistance granted is not appropriate or for other good cause.
- (2) Notice of a petition under this section must be given to the ward, the guardian, and any other person the court determines.
- (3) On presentation of prima facie evidence for termination of a guardianship for an adult, the court shall order termination unless it is proven that a basis for appointment of a guardian under Section 93-20-301 exists.
- (4) The court shall modify the powers granted to a guardian for an adult if the powers are excessive or inadequate due to a change in the abilities or limitations of the adult, the adult's supports, or other circumstances.

(5) Unless the court otherwise orders for good cause shown, before terminating or modifying a guardianship for an adult, the court shall follow the same procedures to safeguard the rights of the adult which apply to a petition for guardianship.

(6) A ward who seeks to terminate or modify the terms of the guardianship has the right to choose an attorney for representation in the matter. The court shall award reasonable attorney's fees to the attorney for the adult as provided in Section 118.

**APPENDIX**

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**CHAPTER 22**

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## **CHAPTER 22**

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## **CHAPTER 22**

### **GUARDIANS**

#### **Authority of Chancery Court**

Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution. It is not competent for the Legislature to abate the said powers and duties or for the said court to omit or neglect them. It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non compos mentis. The court will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. *Union Chevrolet Co. v. Arrington*, 138 So. 593, 595 (Miss. 1932).

#### **Difference Between a Guardian and Conservator**

Initially, it is appropriate to distinguish guardianships from conservatorships. Guardians may be appointed for minors; incompetent adults; a person of unsound mind; alcoholics or drug addicts; convicts in the penitentiary; persons in the armed forces or merchant seamen reported as missing; or for veterans; or minor wards of a veteran. The guardian is the legally recognized custodian of the person or property of another with prescribed fiduciary duties and responsibilities under court authority and direction. A ward under guardianship is under a legal disability or is adjudged incompetent. In recent decades there has been an increased number of older adults in our society who possess assets in need of protective services provided through guardianships. But modification of laws have broadened the definition of persons for whom assistance can be afforded by the courts, and such statutes do not restrict such protection only to the adult incompetent or insane. Noting that trend in our society, the Mississippi Legislature incorporated into law in 1962 the conservatorship procedure for persons who, by reason of advanced age, physical incapacity, or mental weakness, were incapable of managing their own estates. Thus the Legislature provided a new procedure through conservatorship for supervision of estates of older adults with physical incapacity or mental weakness, without the stigma of legally

declaring the person non compos mentis. This additional procedure was intended to encompass a broader class of people than just the incompetent. Therefore, the distinguishing feature of conservatorship from guardianships lies in part in the lack of necessity of an incompetency determination or the existence of a legal disability for its initiation. After establishment of such protective procedures, the duties, responsibilities and powers of a guardian or conservator are the same. However, the status of the ward in each arrangement is different. *Harvey v. Meador*, 459 So. 2d 288, 291-92 (Miss. 1984).

### **Parents are Natural Guardians**

#### **§ 93-13-1      Parental guardianship:**

The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor, or any other matter affecting the minor. If either father or mother die or be incapable of acting, the guardianship devolves upon the surviving parent. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody. But if any father or mother be unsuitable to discharge the duties of guardianship, then the court, or chancellor in vacation, may appoint some suitable person, or having appointed the father or mother, may remove him or her if it appear that such person is unsuitable, and appoint a suitable person.

**Parents May Appoint Guardian**

**§ 93-13-7 Testamentary appointment by parent:**

Any parent, even though under twenty-one (21) years of age, may, by an instrument to take effect at the parent's death and wholly written and signed by him or her, or attested by two (2) or more credible witnesses, not including the person appointed as guardian, if not so written, appoint some suitable person as guardian of his motherless or her fatherless child that has not been married, though the child be then unborn and though the child be under some legal disability other than or in addition to minority. Such parent may by such an instrument waive the furnishing by the guardian of bond, inventory and accounting, subject to the approval of the court.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

**§ 93-13-9 Qualification of appointed guardian:**

The guardian appointed in the manner provided for in Section 93-13-7 shall, before he exercises any authority over the ward or his estate, appear before the chancery court and declare in writing his acceptance of the guardianship, exhibiting and filing therewith the instrument of appointment, which shall be recorded with the acceptance in the records of wills; and he shall qualify according to law. The validity of the instrument may be contested like that of a will. If the guardian fails to qualify for the space of three (3) months after his right to the guardianship shall have accrued, or earlier as the court may direct, he shall be summoned to appear and declare his acceptance or renunciation of the guardianship. If he fails to appear after being summoned, or appearing, renounce or fail to qualify, the court shall appoint some other person guardian of the ward.

That an action at common law cannot be maintained between a guardian and a ward, while that relation exists, is clear. The character of the relation, the capacity in which the guardian acts, the duty to the ward's property (even if a guardian ad litem may be appointed where he is interested), forbid that he should occupy the distinctly adverse position of suitor at common law, especially as to transactions occurring since the guardianship commenced. ***Davis v. Davis*, 135 Miss. 214, 99 So. 673, 673 (1924).**

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### **Court May Appoint Guardian**

#### **§ 93-13-13 Appointment by court:**

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

#### **Selection by Court**

When a testamentary guardian has not been appointed by the parent, or if appointed, has not qualified, the chancery court of the county of the residence of a ward who has an estate, real or personal, shall appoint a general guardian of his estate for him or may appoint a general guardian of his person and estate for him. If a ward have no estate the chancery court of the county of the residence of such ward may appoint a general guardian of his person only for him, giving preference in all cases to the natural guardian, or next of kin, if any apply, unless the applicant be manifestly unsuitable for the discharge of the duties.

#### **Selection by Ward**

The court may allow a minor who is over the age of fourteen (14) years and under no legal disability except minority to select a general guardian, by petition to the court, signed and acknowledged before the clerk or a justice of the peace, and duly filed, but if the general guardian so selected by the minor be guardian of the person and estate of the minor or the person only of the minor then such general guardian so selected by said minor shall be a suitable and qualified person who is a resident of this state and the county in which the guardianship proceedings are pending. If the said minor desires to so select a person as general guardian of his person and estate or of his person only who is a resident of this state but who is not a resident of the county in which the guardianship proceedings are pending he may do so but thereupon such guardianship proceedings or cause shall be transferred to the county of the residence of such general guardian so selected and thereupon the minor shall be and become a legal resident of the county of the residence of such general guardian so selected. The said minor may select in the above manner a general guardian of his estate only which may be a corporation but such corporation shall be duly qualified to do business in this state and otherwise suitable. If said minor select a person other than the natural guardian to be either the general guardian of his estate or general guardian of his person and estate or general guardian of his person only the court shall, notwithstanding, have power to appoint the natural guardian, if deemed suitable. And if any such minor over the age of fourteen (14) years fail to appear and select a general guardian of his estate only or of his estate and person or of his person only when summoned, or if the general guardian chosen fail to qualify, and no other be chosen in his stead, the court shall appoint a general guardian to the minor as if he were under fourteen (14) years.

### **Non-Resident Ward**

When any ward, who is not a resident of the state, owns property, real or personal, in this state, the chancery court of the county in which the property may be, may appoint a general guardian for such ward who shall be the general guardian of his estate only. If the ward be a minor over fourteen (14) years of age and under no legal disability except minority, the selection of guardian may be made before a clerk of a court of record of the state or county of his residence, and a certificate of such clerk, under his seal of office, shall be received as evidence of the selection.

The statute does not identify the parties entitled to notice incident to the establishment of a guardianship for minor children. We are not without guidance, however. We confronted a similar problem in *In re Guardianship of Watson*, 317 So. 2d 30 (Miss. 1975). . . . On appeal, this Court . . . confronted the fact that the statute “does not mandate service of process.” The paternal grandparents, however, at the very least enjoyed eligibility for consideration under Section 93-13-13's “next of kin” preference. That eligibility was necessarily rendered meaningless where they were not given reasonable advance notice and the opportunity to be heard prior to the commencement of the guardianship proceedings. This Court vacated the guardianship decree, reversed the judgment below, and directed that, upon remand, notice be given to the next of kin, the maternal and paternal grandparents, so that a guardian may be appointed to best serve the interest of these minors. Applied to this case, *Watson* required that, prior to final action on the guardianship application of July 24, 1989, the paternal grandmother, [should have been] given reasonable advance notice and the opportunity to be heard, because she is an eligible next of kin within Section 93-13-13. *In re Guardianship of Jefferson*, 573 So. 2d 769, 772-73 (Miss. 1990).

***See Miss. R. Civ. Pro. 81.***

### **Guardian's Oath & Bond**

#### **§ 93-13-17     Guardian's bond and oath:**

Every guardian, before he shall have authority to act, shall, unless security be dispensed with by will or writing or as hereinafter provided, enter into bond payable to the state, in such penalty and with such sureties as the court may require; and the bond shall be recorded and may be put in suit for any breach of the condition, whether the appointment be legal or not; and the condition shall be as follows:

The condition of the above obligation is that if the above bound \_\_\_\_\_, as guardian of \_\_\_\_\_, of \_\_\_\_\_ County, shall faithfully discharge all the duties required of him by law, then the above obligation shall cease.

And the guardian shall also take and subscribe an oath, at or prior to the time of his appointment, faithfully to discharge the duties of guardian of the ward according to law.

A guardian need not enter into bond, however, as to such part of the assets of the ward's estate as may, pursuant to an order of the court in its discretion, be deposited in any one or more banking corporations, building and loan associations or savings and loan associations in this state so long as such deposits are fully insured, such deposits there to remain until the further order of the court, and a certified copy of the order for deposit having been furnished the depository or depositories and its receipt acknowledged.

A guardian has no authority to act in behalf of a minor unless the guardian has posted the bond required by decree of the chancellor giving the guardian authority to act. While it is true in the case at bar that Mrs. Joyce posted a \$500 bond required by the decree granting her letters of guardianship, that bond merely qualified her to act in the capacity of a guardian. She had no authority to act further in the matter of settling her ward's claim until she received permission to do so by court order. Mrs. Joyce received that permission in the court's decree granting her authority to settle the doubtful claim, but that authority was conditioned upon the proper posting of the bond required by that decree. Mrs. Joyce never posted the required \$6,000 bond and therefore had no authority to settle any claim of her ward. Since Mrs. Joyce acted without authority in releasing the Browns from further claims, the release which she executed is null and void. *Joyce v. Brown*, 304 So. 2d 634, 635 (Miss. 1974).

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### **Responsibilities of a Guardian**

#### **§ 93-13-38 Guardian's general functions:**

(1) All the provisions of the law on the subject of executors and administrators, relating to settlement or disposition of property limitations, notice to creditors, probate and registration of claims, proceedings to insolvency and distribution of assets of insolvent estates, shall, as far as applicable and not otherwise provided, be observed and enforced in a guardianship of the person and estate. The



requirements in a guardianship of the person are modified to the extent that notice to creditors is not required, reports will be made only as often as the court requires, and the guardianship may be closed without the need for any accounting unless otherwise determined by the court. Any assets that are received shall be reported immediately and at that point the guardianship shall be deemed to be a guardianship of the person and estate and all requirements for guardianship of the person and estate shall be followed.

(2) It shall be the duty of the guardian of wards as defined by Section 1-3-58, to improve the estate committed to his charge, and to apply so much of the income, profit or body thereof as may be necessary for the comfortable maintenance and support of the ward and of his family, if he have any, after obtaining an order of the court fixing the amount. And such guardian may be authorized by the court or chancellor to purchase on behalf of and in the name of the ward with any funds of such ward's estate sufficient and appropriate property for a home for such ward or his family on five (5) days' notice to a member of said family, or the necessary funds may be borrowed and the property purchased given as security. The guardian is empowered to collect and sue for and recover all debts due his said ward, and shall make payment of his debts out of the personal estate as executors and administrators discharge debts out of the estate of decedents, but the exempt property of the ward shall not be liable for debts, and no debts against such estate shall be payable by such guardian unless first probated and registered, as required of claims against the estate of decedent.

(3) The word "family" shall be taken for the purpose of this section to mean husband or wife and children; if there be no husband, wife or children, the father and mother; and if there be no father or mother, then the grandfather and grandmother, sisters and brothers of said ward.

(4)(a) On application of the guardian or any interested party, and after notice to all interested persons and to such other persons as the court may direct, and on a showing that the ward will probably remain incompetent during his lifetime, the court may, after hearing and by order, authorize the guardian to apply such principal or income of the ward's estate as is not required for the support of the ward during his lifetime or of his family towards the establishment of an estate plan for the purpose of minimizing income, estate, inheritance, or other taxes payable out of the ward's estate. The court may authorize the guardian to make gifts of the ward's personal property or real estate, outright or in trust, on behalf of the ward, to or for the benefit of

- (i) organizations to which charitable contributions may be made under the Internal Revenue Code and in which it is shown the ward would reasonably have an interest,
- (ii) the ward's heirs at law who are identifiable at the time of the order,

- (iii) devisees under the ward's last validly executed will, if there be such a will, and
- (iv) a person serving as guardian of the ward provided he is eligible under either category (ii) or (iii) above.

(b) The person making application to the court shall outline the proposed estate plan, setting forth all the benefits to be derived therefrom. The application shall also indicate that the planned disposition is consistent with the intentions of the ward insofar as they can be ascertained. If the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of his estate as herein provided.

(c) The court:

- (i) Shall appoint a guardian ad litem for the ward; and
- (ii) May appoint a guardian ad litem for any interested party at any stage of the proceedings, if deemed advisable for the protection of the interested party.

(d) Subsequent modifications of an approved plan may be made by similar application to the court.

(e) Before signing an order to effectuate the provisions of this subsection (4), the chancellor shall review the ward's will, if the will is known or can be produced, to determine that a gift made under this subsection (4) is consistent with the will.

***See §§ 93-13-39 to -57 Guardian responsibilities.***

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### **Annual Accounting**

#### **§ 93-13-67    Annual accounts:**

(1) Except as herein provided, and as provided in Section 93-13-7, or 93- 13-37 and 93-13-38, every guardian shall, at least once in each year, and oftener if required, exhibit his account, showing the receipts of money on account of his ward, and showing the annual product of the estate under his management, and the sale or other disposition thereof, and showing also each item of his expenditure in the maintenance and education of his ward and in the preservation and management of his estate, supported by legal vouchers. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the Department of Finance and Administration of the State of

Mississippi or of the comptroller of the currency of the United States and such account, or the petition for the approval of same, shall contain a statement under oath by an officer of said bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company; the court on its own motion or on the motion of any interested party may require that the vouchers be produced and inspected at any hearing of any objections to the annual account. The accounts shall be examined, approved, and allowed by the court in the same way that the accounts of executors and administrators are examined, approved, and allowed. Compliance with the duties required, in this section, of guardian shall be enforced by the same means and in the same manner as is provided in respect to the accounts of executors and administrators.

(a) However, when the funds and personal property of the ward do not exceed the sum or value of Three Thousand Dollars (\$3,000.00) and there is no prospect of further receipt to come into the hands of the guardian other than interest thereon, or in guardianships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by the Department of Human Services for the benefit of the ward, the chancery court or chancellor in vacation, may, for good cause shown, in his discretion and upon being satisfied it is to the best interest and welfare of the ward, authorize the guardian to dispense with further such annual accounts, except such as may be a final account. Furthermore, the chancery court or chancellor in vacation may dispense with annual accounts if the ward's assets consist solely of funds on deposit at any banking corporation, building and loan association or savings and loan association in this state; have been so deposited under order of the court to remain until otherwise ordered; are fully insured; and a certified copy of the order to deposit, properly receipted, furnished the depository. If the court, or chancellor in vacation, authorizes the discontinuance of annual accounts, the guardian may, without further order of the court, from time to time pay the court costs and bond premiums owing by the estate or him as guardian, and, as well, he may likewise pay emergency obligations as he may have been empowered and allowed to do by necessity except for this section; but, he shall not pay from guardianship funds any other sums without further order of such court or chancellor without having first obtained order of the court or chancellor to do so. If emergency expenditure is needed for the immediate and necessary welfare of the ward, it shall at once be reported to the court, or chancellor in vacation, for approval. Furthermore, the court on its own motion or on the motion of

any interested party may require the resumption and continuance of annual accounts.

(b) At the time of any annual account, the court, or a judge thereof in vacation, in its discretion, may allow to the guardian a minimum commission of One Hundred Dollars (\$100.00) per annum for its services, anything in the statutes of this state to the contrary notwithstanding.

(2) If the ward was a minor and the guardianship terminates by any means upon the ward obtaining majority, if a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

Mississippi Code Annotated Section 93-13-67 does require a conservator to file an annual accounting, and the failure to file such annual accountings is a breach of the conservator's duties. However, neither the statute nor case law indicates that the failure to file accountings is fatal to the approval of a final accounting. In *Chambers*, the Mississippi Supreme Court held that the failure to file annual accountings impacted only the amount of fees payable to the executor and attorneys. *In re Appointment of a Conservator for Vinson*, 972 So. 2d 694, 701 (Miss. Ct. App. 2007) (citations omitted).

A minor under guardianship is a ward of the Chancery Court. All receipts and disbursements of his estate are required to be under the authority and direction of the Chancery Court or the Chancellor in vacation. The expenses for the maintenance and support of the ward cannot be proved in any other way. The object of the law is to guard against dishonesty and mismanagement of the estate by the guardian. The result is that the court erred in permitting the guardian to prove in the manner adopted by him his expenditures in the maintenance and support of the ward. The law does not leave the amount of the expenditures by the guardian for the maintenance, support and education to his discretion. "The sum must be fixed by the court." If the guardian contracts therefor without the sanction of the Chancery Court or Chancellor, the liability therefor is personal to him, and he cannot be allowed for it in his accounts for the ward. The guardian has no power to bind the estate of his ward without the sanction of the Chancery Court or the Chancellor. . . . *Welch v. Childers*, 195 Miss. 415, 15 So. 2d 690, 691 (1943).

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### *Settlement of Claim on Ward's Behalf*

#### **§ 93-13-59     Selling or compromising claims:**

Guardians may be empowered by the court, or chancellor in vacation, to sell or compromise claims due their wards, on the same proceedings and under the same circumstances prescribed in reference to the sale or compromise by an executor or administrator of claims belonging to the estate of a deceased person. And the guardian in such case is authorized to receive in satisfaction of claims, when to the interest of the ward, property, real or personal, the title to be taken in the name of the ward.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

#### ***See Uniform Chancery Court Rule 6.10, Petitions for Authority to Compromise Claims for Wrongful Death or Injury:***

Every petition for authority to compromise and settle a claim for wrongful death or injury shall set forth the facts in relation thereto and the reason for such compromise and settlement and the amount thereof. The material witnesses concerning the injury or death and the damages resulting therefrom shall be produced before the Chancellor for examination. Where counsel representing the petition has investigated the matter and advised settlement, he shall so appear and give testimony touching the result of his investigation.

On “future payment” or “structured settlement” cases, a certified copy of any insurance policy or other security guaranteeing payment shall be made a part of the court file within ninety (90) days from the date of the entry of the judgment or decree authorizing the settlement, unless good cause is shown.

To comply with the statutes, the petition had to be filed under Section 93-13-59 by a duly appointed and acting legal guardian. ***Mississippi State Bar Ass'n v. Moyo, 525 So. 2d 1289, 1296-97 (Miss. 1988).***

### *Court Must Conduct a Hearing*

To make a compromise settlement by a guardian effective against their wards in any case the judicial sanction thereof must be upon a real and not a perfunctory or merely formal hearing. For equal reason, the chancellor is not authorized to conduct a hearing and enter a decree wherein no witness in behalf of the wards is

heard, or where the only witness is one who in the very nature of things is adverse to them. These sections contemplate and require that the chancellor in acting thereunder shall not proceed unless the interests of the infants are actually represented and protected at the hearing. To hear only the witness or witnesses who are adverse to the minors would be equivalent to taking a default against them-- indeed, it would be equivalent in legal effect to a refusal to hear the witnesses in their behalf. And while it is permissible for an attorney to represent both sides in presenting such a petition, provided he fully advise the chancellor thereof, he must in so doing see to it that the testimony and the witness or witnesses who will give the full facts in behalf of the minors are presented and are heard, and if this is not done then there is a fundamental omission which amounts to legal fraud, however free from any thought of wrong the attorney may have been throughout. ***Union Chevrolet Co. v. Arrington*, 138 So. 593, 595-96 (Miss. 1932).**

In *Union Chevrolet Co. v. Arrington*, a widow, as legal guardian, had secured chancery court authority to settle the claims for her seven minor children over the death of their father in a motor vehicle accident. When the guardian's petition for settlement was presented to the chancellor, only the attorney for the defendant and the driver of the defendant's truck appeared. The decree authorizing the settlement recited all jurisdictional requirements, including the specific finding that the outcome of the cause of action was doubtful. A year later the widow filed a bill in chancery to set aside the settlement. The chancery court held that the original settlement was not binding on the minors. In affirming, this Court held that the two 1930 Code sections should be reviewed in connection with the original principles of equity jurisdiction in which they were embedded. Our holding in *Union Chevrolet* is just as strong today as when Justice Griffith made the eloquent pronouncement for this Court over a half century ago. It has lost none of its vitality. When a chancery court deals with minor's affairs, not just the letter, but the spirit of the law must be carried out. A proceeding which meets all technical statutory requirements may still fail if the minor's interests were not in fact protected. Indeed, the letter--all technical requirements of the statute--must be completely met, and chancery's inherent obligations to children must be fulfilled. In our jurisprudence the chancery court sits as the superior, overriding guardian of minors' affairs placed before it, with the responsibility in each case of making an actual first-hand inquiry into the facts, from which it determines the best interest of the minors, before any binding order affecting them may be entered. Any statute which decreased this solemn obligation would violate our constitution. ***Mississippi State Bar Ass'n v. Moyo*, 525 So. 2d 1289, 1295-96 (Miss. 1988).**

## Small Claims

### **§ 93-13-211 Assets up to \$25,000:**

(1) When a ward is entitled under a judgment, order or decree of any court, or from any other source, to a sum of money not greater than Twenty-five Thousand Dollars (\$25,000.00), or to personal property not exceeding in value that sum, the chancery court of the county of the residence of the ward or the chancery court of the county wherein the person is entitled to the money or property, may order the money or property to be delivered to the ward or to some other person for him if he has no guardian, and compliance with the order shall acquit and release the person so delivering the same.

(2) However, if the sum of money or personal property is not due the ward under a judgment, order or decree of a court, the chancery court before ordering the money or personal property paid over or delivered as provided in this section shall fully investigate the matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid, either as liquidated or unliquidated damages because of any claim of the ward whatsoever whether arising ex delicto or ex contractu, is a fair settlement of the claim of the ward, and that it is to the best interest of the ward that the settlement be made, or that the personal property be delivered to the ward. Thereupon the chancery court may authorize and decree that said sum of money or personal property be accepted by the ward and paid or delivered by the party owing or having the same as authorized by the decree of the court, and compliance with the order in the latter event shall acquit and release the person so paying or delivering the same. He, who under the order shall receive the money or property of a person under such disability, shall thereby become amenable to the court for the disposition of it for the use and benefit of the person under disability but shall not be required to furnish security therefor unless the chancery court shall so order.

Also, there is a chapter on legal guardians of minors. Within that chapter, Section 93-13-59 authorizes a duly appointed legal guardian to compromise doubtful claims, the same as an executor or administrator is authorized to settle claims. Finally, Section 93-13-211 authorizes the chancery court to settle a small claim of a minor without necessity of a guardianship. *Mississippi State Bar Ass'n v. Moyo*, 525 So. 2d 1289, 1294 (Miss. 1988).

As the Mississippi Supreme Court detailed in *Mississippi State Bar Association v. Moyo*, there are three ways to bind a minor in a settlement: (1) removal of the disability of minority, (2) the formal appointment of a guardian, and (3) the chancery court's approval, without a guardianship,

when the claim is worth \$25,000 or less. *In re Wilhite*, 121 So. 3d 301, 305 (Miss. Ct. App. 2013).

Section 93-13-211 states nothing about who should file a petition for settlement of a claim thereunder. Our law is that a petition on behalf of a minor should be brought by an adult next friend. Miss.R.Civ.P. Rule 17(c): "If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend." Also blatant is the fact that the chancery court had no statutory authority to settle this claim under Section 93-13-211. Even under the 1986 amendment to Section 93-13-211, the maximum settlement without absolute necessity of a guardianship is \$10,000. This settlement was for \$22,500. The sum of \$10,000.00 as it appears in Section 93-13-211 refers to the gross amount of the settlement of a minor's claim, not the net amount. In sum, under our case law the proceeding was voidable and under our statutes an absolute nullity. *Mississippi State Bar Ass'n v. Moyo*, 525 So. 2d 1289, 1296-97 (Miss. 1988) (discussing prior version of statute).

*See* 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).

### Necessary Parties

#### Parents

Far more basic, however, when there is no legal guardian, is the necessity that both parents are absolutely essential parties to such a proceeding, either as petitioners or as defendants, unless one of them has the complete custody and this fact is made clear in the petition and order. *Mississippi State Bar Ass'n v. Moyo*, 525 So. 2d 1289, 1296 (Miss. 1988).

### Department of Human Services

#### **§ 43-19-35 Effect of accepting public assistance:**

(1) By currently or previously accepting public assistance or making application for child support services for and on behalf of a child or children, the recipient shall be deemed to have made an assignment to the State Department of Human Services of any and all rights and interests in any cause of action, past, present or future, that said recipient or the children may have against any parent failing to provide for the support and maintenance of said minor child or children; said department shall be subrogated to any and all rights, title and interest the recipient or the children may have against any and all property belonging to the absent or nonsupporting parent in the enforcement of any claim for child or spousal support, whether liquidated through court order or not. . . .



### **Workers' Compensation Commission**

The principal issue is whether a settlement of a tort claim by an injured employee with a negligent third party, before any action is brought, and without the approval of the Workmen's Compensation Commission, is valid and binding on the employer and compensation insurer. . . . These provisions are in pari materia with the one in Section 30 requiring approval by the Commission of settlements with a third party before an action is brought. Failure to obtain such approval is in direct violation of the statute, and such attempted settlements without Commission approval are invalid and void. ***Powe v. Jackson*, 109 So. 2d 546, 548 (Miss. 1959) (claim involving a fifteen-year-old delivery boy).**

### **Motion to Set Aside Settlement**

In this case, Guardians of a minor child settled all claims against the defendant, Laura Carpenter. Approximately three years after approving the settlement, the Guardians filed a petition to set aside the settlement, and the chancellor granted the requested relief under Rule 60(b) of the Mississippi Rules of Civil Procedure. . . . After a hearing, the chancellor issued an order granting the petition to set aside settlement. . . . The chancellor considered the petition to set aside the settlement under Mississippi Rule of Civil Procedure 60(b). This Court must evaluate the granting of a Rule 60(b) motion for abuse of discretion. We are bound to affirm the chancellor's decision unless it was manifestly wrong, clearly erroneous, or applied an incorrect legal standard. . . . This is no ordinary Rule 60(b) case, because it involved the rights of a minor under guardianship. "A minor under guardianship is a ward of the Chancery Court." . . . Additional considerations are presented because the procedures promulgated by our court rules pertaining to the settlement of Ryheim's claims were not followed. . . . While the petition for settlement requested that the Chancellor find the settlement of \$25,000 to be a fair, just, and equitable settlement in the minor's best interest, it did not state "the reason for such compromise and settlement." It set forth only a cursory description of the facts relating to the claim. And, no "material witnesses concerning the injury or death and the damages resulting therefrom" were "produced before the Chancellor for examination." Thus, the chancellor had no witness testimony before him substantiating the minor's injury and the potential value of the case. . . . Evidence before the chancellor showed that the prior proceedings were flawed and not in the best interest of the minor child. Specifically, the petition for settlement was incomplete, and there was no witness testimony on the minor's injury or damages. The prior settlement proceedings were inadequate to have enabled the chancellor's determination that the settlement was fair and reasonable to the minor under guardianship. It is apparent that the chancellor recognized his error in approving the settlement, as well as his ultimate duty to assure that the

settlement was fair to the minor under guardianship, and appropriately set aside the settlement. . . . The chancellor properly exercised the discretion afforded by Rule 60(b)(6) by finding that the need to fairly protect the ward's interests outweighed the need for finality, and it cannot be said under these facts that the chancellor's decision to set aside the minor settlement agreement was manifestly wrong or clearly erroneous. Therefore, we affirm the set-aside of the minor's settlement. To reiterate our pronouncement in *Joyce*, we note that it is incumbent upon a settling defendant to assure that all of the procedures set out by this Court are followed or risk a set-aside of the settlement. We clarify that, because the chancellor had no special duty to protect the Guardians, and the Guardians' claims were properly dismissed by the order as agreed by the parties, we affirm the set-aside of the minor's settlement only. ***Carpenter v. Berry*, 58 So. 3d 1158, 1159-64 (Miss. 2011) (citations omitted).**

This is not to say that Emile is wholly without a remedy. If in fact it may be shown that the 1977 decree was procured by fraud - as Emile alleges - entitlement to relief may follow. Our law has long recognized that the rights of minors overreached in settlements will be scrupulously regarded. We have recently reiterated this policy. But such an action must be brought in the court wherein the decree sought to be attacked was rendered, in this instance, the Chancery Court of the First Judicial District of Hinds County, Mississippi. Emile defends his attempt to challenge the 1977 decree in the Chancery Court of Warren County by reference to our venue statute applicable to paternity actions. He points out quite correctly that any paternity action must be brought in the county where the alleged father resides where he is a resident of this state. But this does not change the rule that an attack upon a decree on grounds it has been procured by fraud, sham, pretense or collusion must be brought in the court which entered the decree. To succeed in his action, Emile must apply to the Chancery Court for the First Judicial District of Hinds County and convince that court that the 1977 decree was procured by fraud, sham, pretense or collusion and thus should be set aside, and only then may he proceed under our paternity statutes against Atwood in the appropriate Warren County court. Our judgment reversing the decision of the court below and rendering judgment for Atwood here is without prejudice to Emile's right to proceed in the Chancery Court of the First Judicial District of Hinds County to attack the 1977 decree on such grounds as may be appropriate. ***Atwood v. Hicks ex. rel. Hicks*, 538 So. 2d 404, 408-09 (Miss. 1989).**

## **SETTLEMENT OF CLAIM ON WARD'S BEHALF**

### **PETITION**

Are all the necessary parties properly joined?

Ward - petitions through guardian or next friend.

Parents - both parents, if living, are essential parties unless child is placed under legal guardianship of one parent (i.e., by divorce) or of a third party. If neither party is living & no legal guardianship has been established, a guardianship should be established before going forward with settlement.

Is there any need to join 3rd parties?

Petition must comply with U.C.C.R. 6.10.

### **HEARING**

The court must conduct a hearing regarding settlement of a ward's claim, and a witness on the ward's behalf must be heard.  
U.C.C.R. 6.10 requirements must be met.

### **APPROVAL OR DISAPPROVAL OF SETTLEMENT**

The court may apply terms & conditions for holding the minor property during the period of guardianship.

Guardianship is not required for settlements consisting of money or property valued at \$25,000 or less.

### **ACCOUNTING**

When a guardianship is established, annual accounts of receipts & expenditures are required unless excused by the court.

A final accounting is required.

### **Termination of Guardianship**

#### **§ 93-13-75 Termination of guardianship:**

The powers and duties of every guardian of a minor over the person and estate of the ward shall cease and determine when the ward shall arrive at

the age of twenty-one (21) years,

the age of eighteen (18) years, in the discretion of the chancellor,

And the powers and duties of every guardian of the estate of a minor, person of unsound mind, or convict of felony, may also cease and determine on the approval of the chancery court or of the chancellor in vacation, when the funds and personal property, either or both, of the ward do not exceed the sum or value of \$2,000.00 and there is no prospect of further receipts to come into the hands of the guardian; provided that the court or chancellor, on the approval of the final account of such guardian, shall have power to require the property of such minor or adult incompetent, to be delivered to him or to some person, or bank for him, under such conditions and restrictions as the court or chancellor may impose; and compliance by the guardian with such order shall acquit him and his sureties. Any person or bank who under such an order or decree shall receive the money or property of a person under such disability shall thereby become amenable to the court for the proper disposition of it for the use and benefit of such incompetent; but shall not be required to give security therefor unless the court or chancellor shall so order. In either event the guardian shall forthwith deliver to the ward, or to such person or bank as the court or chancellor may designate, as the case may be, all the property of every description of the ward in his hands, and on failure, shall be liable to an action on his bond.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### **Final Accounting**

#### **§ 93-13-77 Final settlement:**

When the guardianship shall cease in any manner, except as provided in Section 93-13-37 or 93-13-67, the guardian shall make a final settlement of his guardianship by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of his annual accounts, either as debits or credits, and also all other charges, expenditures, and amounts received, and not contained in any previous annual account. The final account shall remain on file for the inspection of the ward, and summons for him shall be issued, which shall notify him to appear on a day not less than one month after service thereof or completion of its publication, and show cause why the final account of the guardian should not be allowed and approved. In the event that the account shall be presented by a bank or trust company which is subject to

the supervision of the Mississippi Department of Banking and Consumer Finance or of the comptroller of the currency of the United States and the account, or the petition for the approval of the account, shall contain a statement under oath by an officer of the bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company, and the court on its own motion, or on the motion of any interested party, may require that the vouchers be produced and inspected at the time of hearing of any objections that may be filed to any final account. The court shall examine the final account, and hear the evidence for and against it; and if the court is satisfied, after examination, that the account is just and true, shall make a final decree of approval, or may allow only so much of the account as is right; and in the decree it shall make an allowance to the guardian for his trouble, not exceeding ten percent (10%) on the value of the estate; and shall also decree that the property of the ward shall be delivered to him, if not already delivered, and that the guardian be discharged. In like manner, and under like restrictions, it shall be made the duty of an executor or administrator of a deceased guardian to make final settlement of their testator's or intestate's guardianship accounts in the chancery court in which the same may be pending; but any ward arriving at the age of twenty-one (21) years may petition the chancery court in which the guardianship is pending to waive the final settlement required by this section and discharge the guardian and his sureties, which petition shall be verified by oath, and the court shall grant the same unless there be reason to suspect that the petition was procured by the guardian through fraud or undue influence over the ward, in which case the court shall require proof of the good faith thereof. If a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

***Selected Statutes Authorizing Guardianship***

<b>Minors</b>	<b>§ 93-13-13</b>
<b>Person in need of mental treatment</b>	<b>§ 93-13-111</b>
<b>Incompetent adults</b>	<b>§ 93-13-121</b>
<b>Person of unsound mind</b>	<b>§ 93-13-125</b>
<b>Alcoholics or drug addicts</b>	<b>§ 93-13-131</b>
<b>Convicts in the penitentiary</b>	<b>§ 93-13-135</b>
<b>Persons in the armed forces</b>	<b>§ 93-13-161</b>
<b>Veterans</b>	<b>§ 35-5-5</b>
<b>Minor wards of a veteran</b>	<b>§ 35-5-7</b>

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### **Person in Need of Mental Treatment**

#### **§ 93-13-111 Guardians of person and/or estate:**

The chancellor may appoint guardians of the person and estate, or either, of persons found to be in need of mental treatment as defined in Section 41-21-61 et seq. and incapable of taking care of his person and property, upon the motion of the chancellor or clerk of the chancery court, or upon the application of relatives or friends of such persons or upon the application of any other interested party. Such proceeding may be instituted by any relative or friend of such person or any other interested party by the filing of a sworn petition in the chancery court of the county of the residence of such person, setting forth that such person is in need of mental treatment and incapable of taking care of his person and estate, or either. Upon the filing of such petition, the chancellor of said court shall, by order, fix the day, time and place for the hearing thereof, either in termtime or in vacation, and the person who is alleged to be in need of mental treatment and incapable of taking care of his person or property shall be summoned to be and appear before said court at the time and place fixed, which said summons shall be served upon such person not less than five (5) days prior to the date fixed for such hearing. At such hearing all interested parties may appear and present evidence as to the truth and correctness of the allegations of the said petition. If the chancellor should find from the evidence that such person is in need of mental treatment and incapable of taking care of his estate and person, or either, the chancellor shall appoint a guardian of such person's estate and person, or either, as the case may be. In such cases, the costs and expenses of the proceedings shall be paid out of the estate of such person if a guardian is appointed. If a guardian is appointed and such person has no estate, or if no guardian is appointed, then such costs and expenses shall be paid by the person instituting the proceedings.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

### **Incompetent Adult**

#### **§ 93-13-121 Incompetent resident adults, guardian appointed:**

In any case where a guardian has been appointed for an adult person by a court of competent jurisdiction of any state, and the adult thereafter, at the time of filing the petition provided for in this section, is a resident of this state and is incompetent to manage his or her estate, the chancery court of the county of the domicile of the adult shall have jurisdiction and authority to appoint a guardian for the incompetent adult upon the conditions specified in this section; however, infirmities of old age shall not be considered elements of infirmities. The petition for the appointment of a guardian under the provisions of this section shall be

filed by the incompetent person or his guardian in the office of the clerk of the chancery court in the county of the residence of the incompetent person and process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section. Upon the return day of the process, the chancellor, if in vacation, or the court, if in termtime, shall cause the applicant to appear in person and then and there examine the applicant and all interested parties, and if, after the examination, the chancellor in vacation or the court in termtime is of the opinion that the applicant is incompetent to manage his or her estate, then it shall be the duty of the court to appoint a guardian of the estate of the applicant; however, in no instance shall the court have authority to appoint a guardian under the provisions of this section unless it examines the applicant in person and finds after the examination that the applicant is incompetent to manage his or her estate. A guardian appointed under the provisions of this section shall be required to make and file annual accounts of his acts and doings as in case of guardians for persons with mental illness.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

**Person of Unsound Mind**

**§ 93-13-125 Certain mentally incapable residents, appointment:**

The chancery court of any county in which may be situated the property or any part thereof, or debt due to, or right of action of any citizens of this state who have not been adjudged to be of unsound mind, or may have been so adjudged in proceedings which did not fully comply with the law in effect at the time of such adjudication, may appoint guardians of the estates of such persons, provided such persons:

- (1) have been continuously confined in a mental hospital operated by the State of Mississippi or by the United States government within the State of Mississippi for a period of more than one year and are still so confined,
- (2) are of unsound mind,
- (3) are mentally incapable of taking care of their estates, and
- (4) are incapable of responding to process.

Such appointment may be made upon the sworn petition of a relative or friend of such person or upon the petition of any other interested party and if there is attached to such petition a certificate of the director of the hospital in which such person is confined showing the existence of the conditions hereinabove prescribed, no process upon such person or further proof of incompetency shall be required. If at any time it be made to appear to the satisfaction of the court that such person has been restored to sanity, such guardianship may be terminated and ended as now provided by law.

***See § 93-13-123 Nonresidents of unsound mind, appointment.***

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

**Habitual Drunkard & Drug Addict**

**§ 93-13-131 Drug users, appointment of guardians:**

The chancery court of the county in which an habitual drunkard, habitual user of cocaine, opium or morphine resides, may appoint a guardian to him, on the application of a relative or friend; and when an application therefor is presented, if the court be satisfied there is probable grounds therefor, it shall direct a writ to the sheriff, commanding him to summon the person alleged to be an habitual drunkard, habitual user of cocaine, or opium or morphine. On return of the summons executed, the court shall examine the question and determine whether the person be an habitual drunkard, habitual user of cocaine, opium or morphine, and for that purpose may summon and hear witnesses, orally or by deposition, and hear the parties and their evidence. If the court be satisfied that the person is an habitual drunkard, habitual user of cocaine, opium or morphine, it shall appoint a guardian to take care of him and his estate, both real and personal, and the costs of the inquisition shall be paid out of the estate. And the court or chancellor may direct the confinement of any person adjudged to be an habitual drunkard, habitual user of cocaine, or opium or morphine, in an asylum.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

**Convict in the Penitentiary**

**§ 93-13-135 Convict, appointment of guardian:**

(1) When any offender shall be sentenced to the Penitentiary for a year or longer, the chancery court of the county of his residence, or where any of his property may be, may appoint a guardian, who shall take charge of the real and personal estate of the offender. The guardianship shall cease when the term of imprisonment shall expire or the offender dies; and so much of the estate of the offender as may be then in the hands of his guardian, shall be restored to him, or his legal representatives in case of his death, the guardian having such reasonable allowance therefrom for his services as the court may deem proper.

(2) A chancery court of the county of residence of an offender who is a resident of Mississippi may appoint a guardian to make health-care decisions for the offender. Process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section. The health-care guardianship shall cease when the offender's term of imprisonment expires or the



offender dies. A guardian appointed under this subsection shall make and file annual accounts of the health-care decisions made on behalf of the offender.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

**Missing Military Member**

**§ 93-13-161 Missing military members, merchant seamen:**

(1) Whenever a person, hereinafter referred to as an absentee, who while serving in or with the armed forces of the United States, or while serving as a merchant seaman, has been officially reported or listed as missing, or missing in action, or interned in a neutral country, or beleaguered, besieged, or captured by an enemy, has an interest in any property in this state or is a legal resident of this state and has not appointed an attorney-in-fact with authority to act in his behalf in regard to his property or interest, then the chancery court, or the chancellor in vacation, of the county of such absentee's legal residence, or of the county where the absentee's property is situated, upon petition alleging the foregoing facts and showing the necessity for providing care of the property of such absentee made by any person authorized under law to act as guardian, giving preference to next of kin as now provided by law, and upon good cause being shown, may appoint a guardian to take charge of the absentee's estate.

(2) The court shall have full discretionary authority to appoint any suitable person as such guardian and may require such guardian to post an adequate corporate surety bond and to make such reports as required by law. The guardian shall have the same powers and authority as the guardian of the estate of an infant or incompetent, depending upon whether the absentee is an infant or adult, and in the latter case, the powers and authority shall be the same as in the guardianship of an incompetent.

(3) At any time upon petition signed by the absentee, or on petition of an attorney-in-fact acting under power of attorney granted by the absentee, the court shall direct the termination of the guardianship and the transfer of all property held thereunder to the absentee or to the designated attorney-in-fact. Likewise, if at any time subsequent to the appointment of a guardian it shall appear that the absentee has died and an executor or administrator had been appointed for his estate, the court shall direct the termination of the guardianship and the transfer of all property of the deceased absentee held thereunder to such executor or administrator.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

## **Veteran**

### **§ 35-5-5      Petition for appointment:**

Whenever, pursuant to any laws of the United States or regulation of the bureau, the director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the bureau to the last known address of such person indicating the necessity for the same, a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this state.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the

bureau and shall set forth the amount of moneys then due and the amount of probable future payments. The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward. In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the bureau in accordance with the laws and regulations governing the bureau.

## **Veteran's Ward**

### **§ 35-5-7      Minors; prima facie evidence of necessity:**

Where a petition is filed for the appointment of a guardian of a minor ward, a certificate of the director, or his representative, setting forth the age of such minor as shown by the records of the bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the bureau, shall be prima facie evidence of the necessity for such appointment.

## **REMOVAL OF DISABILITY OF MINORITY**

### **Venue**

#### **§ 93-19-1      Real estate:**

The chancery court of the county in which a minor resides, or the chancery court of a county in which a resident minor owns real estate in matters pertaining to such real estate, may remove the disability of minority of such minor. In cases of married minors, the residence of the husband shall be the residence of the parties. The chancery court of a county in which a nonresident minor of the State of Mississippi owns real estate or any interest in real estate may remove the disability of minority of such minor as to such real estate, so as to enable said minor to do and perform all acts with reference to such real estate, to sell and convey, to mortgage, to lease, and to make deeds of trust and contracts, including promissory notes, concerning said real estate, or any interest therein which may be owned by such minor, as fully and effectively as if said minor were twenty-one (21) years of age. The jurisdiction thus exercised shall be that of a court of general equity jurisdiction, and all presumptions in favor of that adjudged shall be accorded at all times.

[Sections] 93-19-1 [to] -9 authorize chancery courts to remove disabilities of minority partially or generally. The proceeding must be filed by a next friend and both parents, if living, joined as party defendants. The proceeding may be ex parte if both parents unite with the minor and his next friend in the petition. In hearing the matter the court is required to make "such decree thereon as may be for the best interest of the minor." *Mississippi State Bar Ass'n v. Moyo*, 525 So. 2d 1289, 1294 (Miss. 1988) (citations omitted).

#### **§ 93-19-3      Application; parties:**

The application therefor shall be made in writing by the minor by his next friend, and it shall state the age of such minor and join as defendants his parent or parents then living, or, if neither be living, two of his adult kin within the third degree, computed according to the civil law, and the reasons on which the removal of disability is sought; and, when such petition shall be filed, the clerk shall issue process as in other suits to make such person or persons parties defendants, which shall be executed and returned as in other cases, and shall make publication for nonresident defendants as required by law, and any person so made a party, or any other relative or friend of the minor, may appear and resist the application.

In cases where a minor has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent, or parents, as the case may be, shall be joined as defendants in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a minor has been by decree of court awarded to one of the natural parents to the exclusion of the other, it shall be sufficient herein to join as defendant only the parent to whom the custody and control has been awarded.

**§ 93-19-5      Necessary parties:**

If the parent or parents then living, or, if they both be not living, if any two of his adult kin within the third degree shall unite with the minor and his next friend in his application, or if the minor has no parent then living and no kindred within the prescribed degree whose place of residence is known to him or his next friend, it shall not be necessary to make any person defendant thereto. But the court shall proceed to investigate the merits of such application, and decree thereon as in other cases.

In cases where a minor has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent or parents, as the case may be, may unite with the minor and his next friend in his application in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a minor has been by decree of court awarded to one of the natural parents or adopted parents, as the case may be, to the exclusion of the other, it shall be sufficient herein for only the parent to whom the custody and control has been awarded to unite with the minor and his next friend in his application, as herein provided.

**§ 93-19-7      Determination:**

When the proper persons have been made parties to the application, the court shall examine it, and the objections to it, if any, and may hear testimony in open court, in reference thereto, and shall make such decree thereon as may be for the best interest of the minor.

In hearing the matter the court is required to make “such decree thereon as may be for the best interest of the minor.” *Mississippi State Bar Ass'n v. Moyo*, 525 So. 2d 1289, 1294 (Miss. 1988).

## Court Decree

### **§ 93-19-9 Decree, contents:**

The decree may be for the partial removal of the disability of the minor so as to enable him to do some particular act proposed to be done and specified in the decree; or it may be general, and empower him to do all acts in reference to his property, and making contracts, and suing and being sued, and engaging in any profession or avocation, which he could do if he were twenty-one years of age; and the decree made shall distinctly specify to what extent the disability of the minor is removed, and what character of acts he is empowered to perform notwithstanding his minority, and may impose such restrictions and qualifications as the court may adjudge proper.

The chancellor held that Mississippi Code Annotated section 93-19-9 (1972) disclosed a clear and unambiguous intention on the part of the legislature to allow the chancery court, after hearing evidence justifying the action, to remove the disabilities of minority of a minor generally, and in such a case specifically empowered the court to decree that the minor might engage “in any profession or avocation which he could do if he were twenty-one years of age.” *Mississippi State Tax Comm'n v. Reynolds*, 351 So. 2d 326, 327 (Miss. 1977).

### **§ 93-19-11 Actions involving marital rights:**

A married minor shall not be under the disability of minority for the purpose of bringing or defending a suit for divorce, separate maintenance and support, temporary maintenance or support, custody of children or any other action involving marital rights as between the parties, and any married minor may file or defend such a suit in his own name without the necessity of being represented by a next friend or guardian ad litem, and be considered adult for the purposes of such a suit.

### **§ 93-19-13 Personal property contracts, 18-year-olds:**

All persons eighteen (18) years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. Nothing in this section shall be construed to affect any contracts entered into prior to July 1, 1976.

In any legal action founded on a contract entered into by a person eighteen (18) years of age or older, the said person may sue in his own name as an adult and be sued in his own name as an adult and be served with process as an adult.

Pursuant to Mississippi Code Annotated section 93-19-13, Braxton could not legally sign a contract of this nature to waive liability.<sup>1</sup> Braxton's contract was not legally binding because of his age and the nature of the contract. *Colyer v. First United Methodist Church of New Albany*, 214 So. 3d 1084, 1088 (Miss. Ct. App. 2016).

[Section] 93-19-13, however, authorizes persons eighteen years of age or over to enter into contractual relations affecting personal property. We have interpreted this as authority to settle a tort claim. *Mississippi State Bar v. Attorney Y*, 585 So. 2d 768, 771 (Miss. 1991).

Mississippi Code Annotated section 93-19-13 provides that all persons eighteen years or older shall have the capacity to enter into binding contractual relationships affecting personal property. *Peoples Bank of Mendenhall v. Wyatt*, 441 So. 2d 117, 119 (Miss. 1983).

It is not necessary for us to decide the question presented by this argument because section 93-19-13 authorizes all persons 18 years of age or older, if not otherwise disqualified or prohibited by law, to enter into contracts affecting personal property. . . . We must determine if the statute authorizes persons 18 years of age or older to settle a tort claim for personal injuries and execute a release for the claim. Stated differently, is a chose in action personal property within the meaning of the statute? . . . We therefore hold that the language in section 93-19-13 authorizing all persons 18 years of age or older, “to enter into binding contractual relationships affecting personal property,” authorizes such person to enter into a contract affecting a chose in action of such person. This is in accord with the definition of personal property in section 1-3-41 as construed by this Court and is also in accord with the common law definition of personal property. We therefore hold section 93-19-13 effectively removes the disability of minority of all persons 18 years of age or older for the purpose of entering into contracts affecting personal property including the right to settle a claim for personal injuries, to execute a contract settling the claim, and to accept money in settlement of the claim. *Garrett v. Gay*, 394 So. 2d 321, 322-23 (Miss. 1981).

## **CHAPTER 23**

### **COMMITMENTS**

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## **CHAPTER 23**

### **COMMITMENT OF MENTALLY ILL PERSONS**

#### **Jurisdiction**

##### **§ 41-21-63      Commitment proceedings; jurisdiction of chancery court and circuit court:**

(1) No person, other than persons charged with crime, shall be committed to a public treatment facility except under the provisions of Sections 41-21-61 through 41-21-107 or 43-21-611 or 43-21-315. . . .

(2)(a) The chancery court, or the chancellor in vacation, shall have jurisdiction under Sections 41-21-61 through 41-21-107 except over persons with unresolved felony charges unless paragraph (b) of this subsection applies.

(b) If a circuit court with jurisdiction over unresolved felony charges enters an order concluding that the person is incompetent to stand trial and is not restorable to competency in the foreseeable future, the matter should be referred to the chancery court to be subject to civil commitment procedures under Sections 41-21-61 through 41-21-107. The order of the circuit court shall be in lieu of the affidavit for commitment provided for in Section 41-21-65. The chancery court shall have jurisdiction and shall proceed with civil commitment procedures under Sections 41-21-61 through 41-21-107. . . .

#### **Venue**

##### **§ 41-21-65      Affidavit:**

(5) If any person is alleged to be in need of treatment, any relative of the person, or any interested person, may make affidavit of that fact and shall file the Uniform Civil Commitment Affidavit with the clerk of the chancery court of the county in which the person alleged to be in need of treatment resides, but the chancellor or duly appointed special master may, in his or her discretion, hear the matter in the county in which the person may be found. . . .

#### **Procedure**

##### **§ 41-21-65      Affidavit:**

(2) The Uniform Civil Commitment Affidavit developed by the Department of Mental Health under this section must be provided by the clerk of the chancery court to any party or affiant seeking a civil commitment under this section, and

must be utilized in all counties to commence civil commitment proceedings under this section. . . .

(5) If any person is alleged to be in need of treatment, any relative of the person, or any interested person, may make affidavit of that fact and shall file the Uniform Civil Commitment Affidavit with the clerk of the chancery court of the county in which the person alleged to be in need of treatment resides, but the chancellor or duly appointed special master may, in his or her discretion, hear the matter in the county in which the person may be found.

The affidavit shall set forth

the name and address of the proposed patient's nearest relatives and whether the proposed patient resides or has visitation rights with any minor children, if known, and the reasons for the affidavit.

The affidavit must contain factual descriptions of the proposed patient's recent behavior, including a description of the behavior, where it occurred, and over what period of time it occurred, if known. Each factual allegation may be supported by observations of witnesses named in the affidavit.

The Department of Mental Health, in consultation with the Mississippi Chancery Clerks' Association, shall develop a simple, one-page affidavit form for the use of affiants as provided in this section. The affidavit also must state whether the affiant has consulted with a Community Mental Health Center or a physician to determine whether the alleged acts by the proposed respondent warrant civil commitment in lieu of other less-restrictive treatment options. No chancery clerk shall require an affiant to retain an attorney for the filing of an affidavit under this section.

### **Writ Issued**

#### **§ 41-21-67 Proceedings upon affidavit; physician or psychologist authority for temporary commitment:**

(1) Whenever the affidavit provided for in Section 41-21-65 is filed with the chancery clerk, the clerk, upon direction of the chancellor of the court, shall issue a writ directed to the sheriff of the proper county to take into custody the person alleged to be in need of treatment and to take the person for pre-evaluation screening and treatment by the appropriate community mental health center established under Section 41-19-31. The community mental health center will be designated as the first point of entry for pre-evaluation screening and treatment. If the community mental health center is unavailable, any reputable licensed physician, psychologist, nurse practitioner or physician assistant, as allowed in the

discretion of the court, may conduct the pre-evaluation screening and examination as set forth in Section 41-21-69. The order may provide where the person shall be held before being taken for pre-evaluation screening and treatment. However, when the affidavit fails to set forth factual allegations and witnesses sufficient to support the need for treatment, the chancellor shall refuse to direct issuance of the writ. Reapplication may be made to the chancellor. If a pauper's affidavit is filed by an affiant who is a guardian or conservator of a person in need of treatment, the court shall determine if either the affiant or the person in need of treatment is a pauper and if, the affiant or the person in need of treatment is determined to be a pauper, the county of the residence of the respondent shall bear the costs of commitment, unless funds for those purposes are made available by the state. In any county in which a Crisis Intervention Team has been established under the provisions of Sections 41-21-131 through 41-21-143, the clerk, upon the direction of the chancellor, may require that the person be referred to the Crisis Intervention Team for appropriate psychiatric or other medical services before the issuance of the writ.

The chancellor must then determine whether to direct the chancery clerk to issue a writ directing the sheriff to take the proposed patient into custody. The chancellor's decision hinges on whether the affidavit meets the criteria of section 41-21-65. If the affidavit fails to set forth factual allegations and witnesses sufficient to support the need for treatment, the chancellor must refuse to direct the clerk to issue the writ. However, if the chancellor finds that the affidavit meets the requirements of section 41-21-65, and the chancellor so directs, the chancery clerk shall issue a writ of custody.

***Koestler v. Koestler*, 976 So. 2d 372, 383 (Miss. Ct. App. 2008) (prior version of statute).**

### **Appointment of Physicians**

#### **§ 41-21-67      Proceedings upon affidavit; physician or psychologist authority for temporary commitment:**

(2) Upon issuance of the writ, the chancellor shall immediately appoint and summon two (2) reputable, licensed physicians or one (1) reputable, licensed physician and either one (1) psychologist, nurse practitioner or physician assistant to conduct a physical and mental examination of the person at a place to be designated by the clerk or chancellor and to report their findings to the clerk or chancellor. However, any nurse practitioner or physician assistant conducting the examination shall be independent from, and not under the supervision of, the other physician conducting the examination. A nurse practitioner or psychiatric nurse practitioner conducting an examination under this chapter must be functioning within a collaborative or consultative relationship with a physician as

required under Section 73-15-20(3). In all counties in which there is a county health officer, the county health officer, if available, may be one (1) of the physicians so appointed. If a licensed physician is not available to conduct the physical and mental examination within forty-eight (48) hours of the issuance of the writ, the court, in its discretion and upon good cause shown, may permit the examination to be conducted by the following:

- (a) two (2) nurse practitioners, one (1) of whom must be a psychiatric nurse practitioner; or
- (b) one (1) psychiatric nurse practitioner and one (1) psychologist or physician assistant.

Neither of the physicians nor the psychologist, nurse practitioner or physician assistant selected shall be related to that person in any way, nor have any direct or indirect interest in the estate of that person nor shall any full-time staff of residential treatment facilities operated directly by the State Department of Mental Health serve as examiner.

#### **Appointment of Attorney**

#### **§ 41-21-67     Proceedings upon affidavit; physician or psychologist authority for temporary commitment:**

(3) The clerk shall ascertain whether the respondent is represented by an attorney, and if it is determined that the respondent does not have an attorney, the clerk shall immediately notify the chancellor of that fact. If the chancellor determines that the respondent for any reason does not have the services of an attorney, the chancellor shall immediately appoint an attorney for the respondent at the time the examiners are appointed.

Due process is guaranteed under Mississippi Code Annotated Section 41-21-63 and Section 41-21-73 which require and provide for pre-commitment hearings before the chancery judge and for an attorney to represent the person during the hearing. ***Bethany v. Stubbs*, 393 So. 2d 1351, 1353 (Miss. 1981) (prior version of statute).**

### Pre-Hearing Detention

#### **§ 41-21-67 Proceedings upon affidavit; physician or psychologist authority for temporary commitment:**

(4) If the chancellor determines that there is probable cause to believe that the respondent is mentally ill and that there is no reasonable alternative to detention, the chancellor may order that the respondent be retained as an emergency patient at any licensed medical facility for evaluation by a physician, nurse practitioner or physician assistant and that a peace officer transport the respondent to the specified facility. If the community mental health center serving the county has partnered with Crisis Intervention Teams under the provisions of Sections 41-21-131 through 41-21-143, the order may specify that the licensed medical facility be a designated single point of entry within the county or within an adjacent county served by the community mental health center. If the person evaluating the respondent finds that the respondent is mentally ill and in need of treatment, the chancellor may order that the respondent be retained at the licensed medical facility or any other available suitable location as the court may so designate pending an admission hearing. If necessary, the chancellor may order a peace officer or other person to transport the respondent to that facility or suitable location. Any respondent so retained may be given such treatment as is indicated by standard medical practice. However, the respondent shall not be held in a hospital operated directly by the State Department of Mental Health, and shall not be held in jail unless the court finds that there is no reasonable alternative.

Section 41-21-67(4) authorizes a chancellor or duly appointed special master to order the temporary detention of an individual in jail if he finds probable cause to believe the person is mentally ill and that jail is the only reasonable location for detention. By challenging the chancellor's statutory prerogative to temporarily detain mentally ill persons in jail, the plaintiff launches a facial attack on the constitutionality of the statute. . . . The court is cognizant of no reason why a county may not, in the interest of societal safety, temporarily detain in jail an individual who has exhibited violent tendencies. If substantive due process is deprived, be it jail or mental health facility, the deprivation is caused by a failure to provide constitutionally adequate food, clothing, shelter, medical care and other safe conditions of confinement--not by any official title placed over the front entrance. Consequently, the court declines to hold that use of jails for temporary detention of persons awaiting civil commitment proceedings is unconstitutional per se. *Boston v. Lafayette County*, 743 F. Supp. 462, 469 (Miss. 1990) (prior version of statute).

(5)(a) Whenever a licensed psychologist, nurse practitioner or physician assistant who is certified to complete examinations for the purpose of commitment or a licensed physician has reason to believe that a person poses an immediate substantial likelihood of physical harm to himself or others or is gravely disabled and unable to care for himself by virtue of mental illness, as defined in Section 41-21-61(e), then the physician, psychologist, nurse practitioner or physician assistant may hold the person or may admit the person to and treat the person in a licensed medical facility, without a civil order or warrant for a period not to exceed seventy-two (72) hours. However, if the seventy-two-hour period begins or ends when the chancery clerk's office is closed, or within three (3) hours of closing, and the chancery clerk's office will be continuously closed for a time that exceeds seventy-two (72) hours, then the seventy-two-hour period is extended until the end of the next business day that the chancery clerk's office is open. The person may be held and treated as an emergency patient at any licensed medical facility, available regional mental health facility, or crisis intervention center. The physician or psychologist, nurse practitioner or physician assistant who holds the person shall certify in writing the reasons for the need for holding.

If a person is being held and treated in a licensed medical facility, and that person decides to continue treatment by voluntarily signing consent for admission and treatment, the seventy-two-hour hold may be discontinued without filing an affidavit for commitment. Any respondent so held may be given such treatment as indicated by standard medical practice. Persons acting in good faith in connection with the detention and reporting of a person believed to be mentally ill shall incur no liability, civil or criminal, for those acts.

(b) Whenever an individual is held for purposes of receiving treatment as prescribed under paragraph (a) of this subsection, and it is communicated to the mental health professional holding the individual that the individual resides or has visitation rights with a minor child, and if the individual is considered to be a danger to the minor child, the mental health professional shall notify the Department of Child Protection Services prior to discharge if the threat of harm continues to exist, as is required under Section 43-21-353.

### **Physicians' Examination & Report**

#### **§ 41-21-69 Examination; attorney may be present:**

(1)(a) The appointed examiners shall immediately make a full inquiry into the condition of the person alleged to be in need of treatment and shall make a mental examination and physical evaluation of the person, and each examiner must make a report and certificate of the findings of all mental and acute physical problems to the clerk of the court. Each report and certificate must set forth the facts as found



by the appointed examiner and must state whether the examiner is of the opinion that the proposed patient is suffering a disability defined in Sections 41-21-61 through 41-21-107 and should be committed to a treatment facility. The statement shall include the reasons for that opinion. The examination may be based upon a history provided by the patient and the report and certificate of findings shall include an identification of all mental and physical problems identified by the examination.

(b) If the appointed examiner finds:

- (i) the respondent has mental illness;
- (ii) the respondent is capable of surviving safely in the community with available supervision from family, friends or others;
- (iii) based on the respondent's treatment history and other applicable medical or psychiatric indicia, the respondent is in need of treatment in order to prevent further disability or deterioration that would result in significant deterioration in the ability to carry out activities of daily living; and
- (iv) his or her current mental status or the nature of his or her illness limits or negates his or her ability to make an informed decision to seek voluntarily or comply with recommended treatment;

the appointed examiners shall so show on the examination report and certification and shall recommend outpatient commitment. The appointed examiners shall also show the name, address and telephone number of the proposed outpatient treatment physician or facility.

(2) The examinations shall be conducted and concluded within forty-eight (48) hours after the order for examination and appointment of attorney, and the certificates of the appointed examiners shall be filed with the clerk of the court within that time, unless the running of that period extends into nonbusiness hours, in which event the certificates must be filed at the beginning of the next business day. However, if the appointed examiners are of the opinion that additional time to complete the examination is necessary, and this fact is communicated to the chancery clerk or chancellor, the clerk or chancellor shall have authority to extend the time for completion of the examination and the filing of the certificate, the extension to be not more than eight (8) hours.

**Right for Attorney to be Present**

(3) At the beginning of the examination, the respondent shall be told in plain language of the purpose of the examination, the possible consequences of the examination, of his or her right to refuse to answer any questions, and his or her

right to have his or her attorney present.

### **Hearing**

#### **§ 41-21-71 Dismissal or hearing:**

If the chancellor or chancery clerk finds, based upon the appointed examiners' certificates and any other relevant evidence, that the respondent is in need of treatment and the certificates are filed with the chancery clerk within forty-eight (48) hours after the order for examination, or extension of that time as provided in Section 41-21-69, the clerk shall immediately set the matter for a hearing. The hearing shall be set within seven (7) days of the filing of the certificates unless an extension is requested by the respondent's attorney. In no event shall the hearing be more than ten (10) days after the filing of the certificates.

#### **§ 41-21-73 Notice and conduct of hearing; allocation of costs:**

(1) The hearing shall be conducted before the chancellor. However, the hearing may be held at the location where the respondent is being held. Within a reasonable period of time before the hearing, notice of same shall be provided the respondent and his attorney, which shall include:

- (a) notice of the date, time and place of the hearing;
- (b) a clear statement of the purpose of the hearing;
- (c) the possible consequences or outcome of the hearing;
- (d) the facts that have been alleged in support of the need for commitment;
- (e) the names, addresses and telephone numbers of the examiner(s); and
- (f) other witnesses expected to testify.

(2) The respondent must be present at the hearing unless the chancellor determines that the respondent is unable to attend and makes that determination and the reasons therefor part of the record. At the time of the hearing the respondent shall not be so under the influence or suffering from the effects of drugs, medication or other treatment so as to be hampered in participating in the proceedings. The court, at the time of the hearing, shall be presented a record of all drugs, medication or other treatment that the respondent has received pending the hearing, unless the court determines that such a record would be impractical and documents the reasons for that determination.

(3) The respondent shall have the right to offer evidence, to be confronted with the witnesses against him and to cross-examine them and shall have the privilege against self-incrimination. The rules of evidence applicable in other judicial proceedings in this state shall be followed.

(4) If the court finds by clear and convincing evidence that the proposed patient is a person with mental illness or a person with an intellectual disability and, if after careful consideration of reasonable alternative dispositions, including, but not limited to, dismissal of the proceedings, the court finds that there is no suitable alternative to judicial commitment, the court shall commit the patient for treatment in the least restrictive treatment facility that can meet the patient's treatment needs. Treatment before admission to a state-operated facility shall be located as closely as possible to the patient's county of residence and the county of residence shall be responsible for that cost. Admissions to state-operated facilities shall be in compliance with the catchment areas established by the State Department of Mental Health. A nonresident of the state may be committed for treatment or confinement in the county where the person was found. Alternatives to commitment to inpatient care may include, but shall not be limited to:

- voluntary or court-ordered outpatient commitment for treatment with specific reference to a treatment regimen,
- day treatment in a hospital,
- night treatment in a hospital,
- placement in the custody of a friend or relative or the provision of home health services.

For persons committed as having mental illness or having an intellectual disability, the initial commitment shall not exceed three (3) months.

(5) No person shall be committed to a treatment facility whose primary problems are the physical disabilities associated with old age or birth defects of infancy.

(6) The court shall state the findings of fact and conclusions of law that constitute the basis for the order of commitment. The findings shall include a listing of less restrictive alternatives considered by the court and the reasons that each was found not suitable.

(7) A stenographic transcription shall be recorded by a stenographer or electronic recording device and retained by the court.

(8) Notwithstanding any other provision of law to the contrary, neither the State Board of Mental Health or its members, nor the State Department of Mental Health or its related facilities, nor any employee of the State Department of Mental Health or its related facilities, unless related to the respondent by blood or marriage, shall be assigned or adjudicated custody, guardianship, or conservatorship of the respondent.

(9) The county where a person in need of treatment is found is authorized to charge the county of the person's residence for the costs incurred while the person

is confined in the county where such person was found.

Due process is guaranteed under Mississippi Code Annotated Section 41-21-63 and Section 41-21-73 which require and provide for pre-commitment hearings before the chancery judge and for an attorney to represent the person during the hearing. ***Bethany v. Stubbs*, 393 So. 2d 1351, 1353 (Miss. 1981) (prior version of statute).**

### **Waiver of Hearing**

#### **§ 41-21-76      Waivers:**

The respondent in any involuntary commitment proceeding held pursuant to the provisions of Sections 41-21-61 through 41-21-107 may make a knowing and intelligent waiver of his rights in such proceeding, provided that the waiver is made by his attorney with the informed consent of the respondent and with the approval of the court. The reasons for the waiver shall be made a part of the record.

### **Dismissal**

#### **§ 41-21-71      Dismissal or hearing:**

If, as a result of the examination, the appointed examiners certify that the person is not in need of treatment, the chancellor or clerk shall dismiss the affidavit without the need for a further hearing. . . .

## **COMMITMENT OF MENTALLY ILL PERSON**

### **Uniform Civil Commitment Affidavit Filed**

With the chancery clerk which must include:

- name(s) & address(es) of person's nearest relative(s)
- whether person resides or has visitation rights with any minor children, if known
- reason(s) for the affidavit
- factual description(s) of person's recent behavior, place(s) of occurrence, & time period(s) of behavior

§ 41-21-65

If affidavit is sufficient,

### **Writ Issued**

directing sheriff to take person into custody

§ 41-21-67

### **Appointment of Attorney**

If person does not have an attorney, court shall appoint an attorney for him/her at time examiners are appointed  
§ 41-21-67

### **Appointment of Examiners**

-to conduct a mental & physical examination of person

§ 41-21-67

### **Pre-Hearing Detention**

If court finds probable cause to believe person is mentally ill & there is no reasonable alternative, the person may be retained as a patient at a medical facility or other suitable location  
§ 41-21-67

### **Appointed Examiners' Reports Due**

within 48 hours after order for examination is issued & attorney is appointed

§ 41-21-69

7 days

### **Hearing**

- Must be held within 7 days of filing of the examiners' reports unless an extension is requested & then for no more than 10 days after filing
- Person must attend unless excused by court
- Person may make informed waiver of hearing

§ 41-21-73

### **Adjudication**

Person confined upon  
**CLEAR & CONVINCING EVIDENCE**  
that he/she is mentally ill or intellectually disabled to least restrictive facility than can meet person's treatment needs.

§ 41-21-73

Initial commitment cannot exceed 3 months

### **Alternatives to Commitment Include:**

- Voluntary outpatient treatment with specific regimen
- Day treatment in hospital
- Night treatment in hospital
- Placement with friend or relative
- Home health services

## Outpatient Treatment

### § 41-21-74     **Outpatient treatment:**

(1) If the commitment order directs outpatient treatment, the outpatient treatment physician may prescribe or administer to the respondent treatment consistent with accepted medical standards.

(2) If the respondent fails or clearly refuses to comply with outpatient treatment, the director of the treatment facility, his designee or an interested person shall make all reasonable efforts to solicit the respondent's compliance. These efforts shall be documented and, if the respondent fails or clearly refuses to comply with outpatient treatment after such efforts are made, such efforts shall be documented with the court by affidavit. Upon the filing of the affidavit, the sheriff of the proper county is authorized to take the respondent into his custody.

(3) The respondent may be returned to the treatment facility as soon thereafter as facilities are available. The respondent may request a hearing within ten (10) days of his return to the treatment facility. Such hearing shall be held pursuant to the requirements set forth in Section 41-21-81.

Though section 41-21-74 does not explicitly state which venue is proper for outpatient hearings requested by patients confined at Whitfield, we find that, after reading the statutes together in light of what the Legislature intended, any hearing by a patient confined at Whitfield at the time a petition is filed under section 41-21-74 must be heard in the Chancery Court of Hinds County. *Smith v. State*, 229 So. 3d 178, 183 (Miss. Ct. App. 2017).

(4) The chancery court of the county where the public facility is located or the committing court shall have jurisdiction over matters concerning outpatient commitments when such an order is sought subsequent to an inpatient course of treatment pursuant to Sections 41-21-61 through 41-21-107, 43-21-611, 99-13-7 and 99-13-9. An outpatient shall not have or be charged for a recommitment process within a period of twelve (12) months of the initial outpatient order.

### **Commitment to Treatment Facility**

#### **§ 41-21-77      Commitment to treatment facility:**

If admission is ordered at a treatment facility, the sheriff, his or her deputy or any other person appointed or authorized by the court shall immediately deliver the respondent to the director of the appropriate facility. Neither the Board of Mental Health or its members, nor the Department of Mental Health or its related facilities, nor any employee of the Department of Mental Health or its related facilities, shall be appointed, authorized or ordered to deliver the respondent for treatment, and no person shall be so delivered or admitted until the director of the admitting institution determines that facilities and services are available. Persons who have been ordered committed and are awaiting admission may be given any such treatment in the facility by a licensed physician as is indicated by standard medical practice. Any county facility used for providing housing, maintenance and medical treatment for involuntarily committed persons pending their transportation and admission to a state treatment facility shall be certified by the State Department of Mental Health under the provisions of Section 41-4-7(kk). No person shall be delivered or admitted to any non-Department of Mental Health treatment facility unless the treatment facility is licensed and/or certified to provide the appropriate level of psychiatric care for persons with mental illness. It is the intent of this Legislature that county-owned hospitals work with regional community mental health/intellectual disability centers in providing care to local patients.

The clerk shall provide the director of the admitting institution with a certified copy of the court order, a certified copy of the appointed examiners' certificates, a certified copy of the affidavit, and any other information available concerning the physical and mental condition of the respondent. Upon notification from the United States Veterans Administration or other agency of the United States government, that facilities are available and the respondent is eligible for care and treatment in those facilities, the court may enter an order for delivery of the respondent to or retention by the Veterans Administration or other agency of the United States government, and, in those cases the chief officer to whom the respondent is so delivered or by whom he is retained shall, with respect to the respondent, be vested with the same powers as the director of the Mississippi State Hospital at Whitfield, or the East Mississippi State Hospital at Meridian, with respect to retention and discharge of the respondent.

### **Costs of Commitment**

#### **§ 41-21-79     Liability for costs:**

The costs incidental to the court proceedings including, but not limited to, court costs, prehearing hospitalization costs, cost of transportation, reasonable physician's, psychologist's, nurse practitioner's or physician assistant's fees set by the court, and reasonable attorney's fees set by the court, shall be paid out of the funds of the county of residence of the respondent in those instances where the patient is indigent unless funds for those purposes are made available by the state. However, if the respondent is not indigent, those costs shall be taxed against the respondent or his or her estate. The total amount that may be charged for all of the costs incidental to the court proceedings shall not exceed Four Hundred Dollars (\$400.00). Costs incidental to the court proceedings permitted under this section may not be charged to the affiant nor included in the fees and assessments permitted under Section 41-21-65(6).

#### **§ 41-21-65     Affidavit; legislative intent; form; fees:**

(6) The chancery clerk may charge a total filing fee for all services equal to the amount set out in Section 25-7-9(o), and the appropriate state and county assessments as required by law which include, but are not limited to, assessments for the Judicial Operation Fund (Section 25-7-9(3)(b)); the Electronic Court System Fund (Section 25-7-9(3)(a)); the Civil Legal Assistance Fund (Section 25-7-9(1)(k)); the Court Education and Training Fund (Section 37-26-3); State Court Constituent's Fund (Section 37-26-9(4)); and reasonable court reporter's fee. Costs incidental to the court proceedings as set forth in Section 41-21-79 may not be included in the assessments permitted by this subsection. The total of the fees and assessments permitted by this subsection may not exceed One Hundred Fifty Dollars (\$150.00).

#### **§ 41-21-65     Affidavit; legislative intent; form; fees:**

(7) The prohibition against charging the affiant other fees, expenses, or costs shall not preclude the imposition of monetary criminal penalties under Section 41-21-107 or any other criminal statute, or the imposition by the chancellor of monetary penalties for contempt if the affiant is found to have filed an intentionally false affidavit or filed the affidavit in bad faith for a malicious purpose.



### **Post-Confinement Issues**

#### **§ 41-21-81 Proceedings regarding continued hospitalization:**

If at any time within twenty (20) days after admission of a patient to a treatment facility the director determines that the patient is in need of continued hospitalization, he shall give written notice of his findings, together with his reasons for such findings, to the respondent, the patient's attorney, the clerk of the admitting court and the two (2) nearest relatives or guardian of the patient, if the addresses of such relatives or guardian are known. The patient, or any aggrieved relative or friend or guardian shall have sixty (60) days from the date of such notice to request a hearing on the question of the patient's commitment for further treatment. The patient, or any aggrieved relative or guardian or friend, may request a hearing by filing a written notice of request within such sixty (60) days with the clerk of the county within which the facility is located; provided, however, that the patient may request such a hearing in writing to any member of the professional staff, which shall be forwarded to the director and promptly filed with the clerk of the county within which the facility is located and provided further that if the patient is confined at the Mississippi State Hospital, Whitfield, Mississippi, said notice of request shall be filed with the Chancery Clerk of the First Judicial District of Hinds County, Mississippi.

A copy of the notice of request must be filed by the patient or on his behalf with the director and the chancery clerk of the admitting court. The notice of the need for continued hospitalization shall be explained to the patient by a member of the professional staff and the explanation documented in the clinical record. At the same time the patient shall be advised of his right to request a hearing and of his right to consult a lawyer prior to deciding whether to request the hearing, and the fact that the patient has been so advised shall be documented in the clinical record. Hearings held pursuant to this section shall be held in the chancery court of the county where the facility is located; provided, however, that if the patient is confined at the Mississippi State Hospital at Whitfield, Mississippi, the hearing shall be conducted by the Chancery Court of the First Judicial District of Hinds County, Mississippi.

**§ 41-21-99 Rights of patients:**

The director or a physician on the staff of said treatment facility shall, as often as practicable but not less frequently than every six (6) months, examine the patient and review the records as to the need for continued treatment of each patient and make the results of such examination a part of the patient's clinical record. The patient shall have the right to request a hearing at least annually, pursuant to Section 41-21-83. The patient shall be advised of his right to request a hearing and of his right to consult an attorney prior to his decision concerning whether or not to request such hearing, and the fact that the patient has been so advised shall be documented in the clinical record.

**§ 41-21-83 Hearing concerning continued commitment:**

If a hearing is requested as provided in Section 41-21-74, 41-21-81 or 41-21-99, the court shall not make a determination of the need for continued commitment unless a hearing is held and the court finds by clear and convincing evidence that

- (a) the person continues to have mental illness or have an intellectual disability; and
- (b) involuntary commitment is necessary for the protection of the patient or others; and
- (c) there is no alternative to involuntary commitment.

Hearings held under this section shall be held in the chancery court of the county where the facility is located; however, if the patient is confined at the Mississippi State Hospital at Whitfield, Mississippi, the hearing shall be conducted by the Chancery Court of the First Judicial District of Hinds County, Mississippi.

Thus, reading sections 41-21-74 and 41-21-83 together, we find section 41-21-83's plain and unambiguous language controlling of the jurisdictional issue at hand. Because Smith was undisputedly “confined at the Mississippi State Hospital at Whitfield” when he filed his petition for outpatient treatment, we find the plain language of section 41-21-83 required that the matter be resolved by the Chancery Court of the First Judicial District of Hinds County. *Smith v. State*, 229 So. 3d 178, 183 (Miss. Ct. App. 2017).

The hearing shall be held within fourteen (14) days after receipt by the court of the request for a hearing. The court may continue the hearing for good cause shown. The clerk shall ascertain whether the patient is represented by counsel, and, if the patient is not represented, shall notify the chancellor who shall appoint counsel for him if the chancellor determines that the patient for any reason does not have the services of an attorney; however, the patient may waive the appointment of counsel subject to the approval of the court. Notice of the time and place of the

hearing shall be served at least seventy-two (72) hours before the time of the hearing upon the patient, his attorney, the director, and the person requesting the hearing, if other than the patient, and any witnesses requested by the patient or his attorney, or any witnesses the court may deem necessary or desirable.

The patient must be present at the hearing unless the chancellor determines that the patient is unable to attend and makes that determination and the reasons therefor part of the record.

The court shall put its findings and the reasons supporting its findings in writing and shall have copies delivered to the patient, his attorney, and the director of the treatment facility.

An appeal from the final commitment order by either party may be had on the terms prescribed for appeals in civil cases; however, such appeal shall be without supersedeas. The record on appeal shall include the transcript of the commitment hearing.

### Appeals

[O]nly final judgments are appealable. “A final, appealable judgment is one that adjudicates the merits of the controversy which settles all issues . . . and requires no further action by the [chancery] court.” . . . “The court may appoint one or more persons in each county to be masters of the court, and the court in which any action is pending may appoint a special master therein.” “[A] master's report has no effect until it is either accepted or rejected by the chancellor.” Here, there is no order by the chancellor accepting the special master's report, and there has been no ruling on J.W.'s motion to reconsider. Because there is no final, appealable judgment, we lack jurisdiction and must dismiss. ***In Matter of J.W.*, 220 So. 3d 202, 203 (Miss. Ct. App. 2017) (citations omitted).**

[T]he question being placed before this Court [is] concerning whether Bauman's involuntary mental commitment was supported by substantial evidence and [whether it] is a moot point. The lower court ordered Bauman to be committed involuntarily . . . and he was released 16 days later . . . without ever having actually been admitted to the . . . State Hospital. Bauman argues that the case sub judice should not be considered moot as it is a matter of public interest and contends that his case falls within the purview of the “capable of repetition yet evading review” doctrine which was adopted in *Strong v. Bostick*, 420 So. 2d 1356, 1358-59 (Miss. 1982). In *Strong*, the Supreme Court held that this exception to the moot doctrine was limited to situations where:

- (1) The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and
- (2) There was a reasonable expectation that the same complaining party would be subject to the same action again. . . .

In addition, this Court finds the case sub judice to involve a question affecting the public interest. As the Mississippi Supreme Court stated, “there is an exception to the general rule as respects moot cases, when the question concerns a matter of such a nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct.” Therefore, it is necessary that this Court address the question affecting the public interest and make a decision thereon. Accordingly, we hold that this appeal is one of public interest and, thus, we will entertain Bauman's appeal. . . . After a thorough review of the record, we find that there was certainly sufficient medical evidence to meet the statutory requirements for Bauman to be committed under the provisions of the Mississippi Code Annotated Section 41-21-61, *et seq. In re Bauman*, 878 So. 2d 1033, 1037-39 (Miss. Ct. App. 2004) (citations omitted).

Because Thelma was discharged from Whitfield, she concedes that her appeal could be considered moot. . . . We follow the precedent we set in *Bauman* and find that Thelma's appeal falls squarely under the “capable of repetition yet evading review” exception to the mootness doctrine. Thelma's commitment was very brief. She did not have time to appeal before her discharge. Further, there is a reasonable expectation that Thelma could be subject to the same action. . . . Accordingly, we will consider the merits of Thelma's arguments on appeal. To be entirely clear, this opinion is in no way to be construed as establishing a bright line rule. That is, we do not find as a matter of law that when an individual is committed, subsequently discharged, and then later appeals, that his or her appeal automatically falls within the exception discussed above. We merely find that Thelma's appeal falls within this exception. *Koestler v. Koestler*, 976 So. 2d 372, 379-80 (Miss. Ct. App. 2008) (citations omitted).

#### **§ 41-21-85 Costs of second hearing:**

All costs of the hearing or appeal under Section 41-21-83, including, but not limited to, costs of all writs, notices, petitions, appeals, and attorney's fees and transportation of the patient to and from the place of the hearing shall be borne by the treatment facility in those instances where the patient is indigent, provided that if the patient is not indigent, all costs shall be taxed to the patient.

## **Termination & Discharge**

### **§ 41-21-87     Discharge at initiative of director:**

(1) The director of either the treatment facility where the patient is committed or the treatment facility where the patient resides while awaiting admission to any other treatment facility may discharge any civilly committed patient upon filing his certificate of discharge with the clerk of the committing court, certifying that the patient, in his judgment, no longer poses a substantial threat of physical harm to himself or others.

### **Return Patient to Committing Court**

(2) A director of a treatment facility specified in subsection (1) above may return any patient to the custody of the committing court upon providing seven (7) days' notice and upon filing his certificate of same as follows:

- (a) When, in the judgment of the director, the patient may be treated in a less restrictive environment; however, treatment in such less restrictive environment shall be implemented within seven (7) days after notification of the court; or
- (b) When, in the judgment of the director, adequate facilities or treatment are not available at the treatment facility.

### **Transfer to Another Facility**

(3) Except as provided in Section 41-21-88, no committing court shall enjoin or restrain any director of a treatment facility specified in subsection (1) above from discharging a patient under this section whose treating professionals have determined that the patient meets one (1) of the criteria for discharge as outlined in subsection (1) or (2) of this section. The director of the treatment facility where the patient is committed may transfer any civilly committed patient from one (1) facility operated directly by the Department of Mental Health to another as necessary for the welfare of that or other patients. Upon receiving the director's certificate of transfer, the court shall enter an order accordingly.

(4) Within twenty-four (24) hours prior to the release or discharge of any civilly committed patient, . . . the director shall give or cause to be given notice of such release or discharge to one (1) member of the patient's immediate family, provided the member of the patient's immediate family has signed the consent to release form provided under subsection (5) and has furnished in writing a current address and telephone number, if applicable, to the director for such purpose. . . . The notice to the family member shall include the psychiatric diagnosis of any chronic mental disorder incurred by the civilly committed patient and any medications

provided or prescribed to the patient for such conditions.

(5) All providers of service in a treatment facility, whether in a community mental health/intellectual disability center, region or state psychiatric hospital, are authorized and directed to request a consent to release information from all patients which will allow that entity to involve the family in the patient's treatment. Such release form shall be developed by the Department of Mental Health and provided to all treatment facilities, community mental health/intellectual disability centers and state facilities. All such facilities shall request such a release of information upon the date of admission of the patient to the facility or at least by the time the patient is discharged.

(6) Each month the Department of Mental Health-operated facilities shall provide the directors of community mental health centers the names of all individuals who were discharged to their catchment area with referral for community-based services. The department shall require community mental health care providers to report monthly the date that service(s) were initiated and type of service(s) initiated.

**§ 41-21-89 Discharge; initiative of patient; representative:**

Nothing in Sections 41-21-61 through 41-21-107 shall preclude any patient, his attorney, or relative or guardian from seeking a patient's release from a treatment facility by application for writ of habeas corpus; provided that the application shall be made to the chancellor of the county in which the patient is hospitalized. Provided, further, that if the patient is hospitalized at the Mississippi State Hospital at Whitfield, Mississippi, the said application shall be made to a chancellor of the first judicial district of Hinds County, Mississippi.

**§ 41-21-104 Continuing Jurisdiction:**

The court shall have continuing jurisdiction over a person committed to an inpatient or outpatient treatment program under this chapter for one (1) year after completion of the treatment program. During that time, the court, upon affidavit in the same cause of action, may conduct a hearing consistent with this chapter or Title 41, Chapter 31, to determine whether the person needs to be recommitted for further mental health treatment or to determine whether the person is in need of alcohol and drug treatment. Upon a finding by the court that the person is in need of further treatment, the court may commit the person to an appropriate treatment facility. The person subject to commitment must be afforded the due process to which he or she is entitled under Chapters 21 and 31 of Title 41. This section may not be construed so as to conflict with the provisions of Section 41-21-87.

## **COMMITMENT OF ONE ADDICTED TO ALCOHOL OR DRUGS**

### **Jurisdiction & Venue**

#### **§ 41-31-3      Initiation or institution of proceedings:**

(4) Proceedings for detention, care and treatment of any person alleged to be an alcoholic or drug addict may be initiated or instituted by such person's husband, wife, child, mother, father, next of kin, or by any friend or relative thereof, or by the county health officer. Such proceedings shall be instituted by the filing of the Uniform Alcohol and Drug Commitment Affidavit in the chancery court of the county of such person's residence or of the county in which he may be found. . . .

### **Procedure**

#### **§ 41-31-3      Initiation or institution of proceedings:**

(4) It shall be necessary that the affidavit allege that such person is an alcoholic or drug addict, as the case may be, is a resident citizen of this state, and because of his alcoholism or drug addiction is incapable of or unfit to look after and conduct his affairs, or is dangerous to himself or others, or has lost the power of self-control because of periodic, constant or frequent use of alcoholic beverages or habit-forming drugs, and that he is in need of care and treatment, and that his detention, care and treatment at an institution will improve his health.

A chancery clerk may not require an affiant to retain an attorney for the filing of an affidavit under this section. All proceedings authorized by this chapter may be had and conducted either in termtime or in vacation of said court.

### **Hearing**

#### **§ 41-31-5      Proceedings after filing of petition:**

(1) Whenever an affidavit is filed, the chancellor of said court shall, by order, fix a time upon a day certain for the hearing thereof, either in termtime or in vacation, which hearing shall be fixed not less than five (5) days nor more than twenty (20) days from the filing of the affidavit. The person alleged to be an alcoholic or drug addict shall be served with a citation to appear at said hearing not less than three (3) days prior to the day fixed for said hearing, and there shall be served with such citation a true and correct copy of the affidavit.

### **Appointment of Attorney**

(2) The clerk must ascertain whether the respondent is represented by an attorney, and if it is determined that the respondent does not have an attorney, the clerk immediately must notify the chancellor of that fact. If the chancellor determines that the respondent for any reason does not have the services of an attorney, the chancellor shall appoint an attorney for the respondent before a hearing on the affidavit.

(3) At the time fixed, the chancellor shall hear evidence on the affidavit, with or without the presence of the alleged alcoholic or drug addict, and all persons interested shall have the right to appear and present evidence touching upon the truth and correctness of the allegations of the affidavit.

### **Court May Order a Medical Examination**

(3) The said chancellor, in his discretion, may require that the alleged alcoholic or drug addict be examined by the county health officer or by such other competent physician or physicians as the chancellor may select, and may consider the results of such examination in reaching a decision in said matter.

(4) If the alleged alcoholic or drug addict shall admit the truth and correctness of the allegations of the affidavit, or if the chancellor should find from the evidence that such person is an alcoholic or drug addict, and is in need of detention, care and treatment in an institution, and that the other material allegations of said petition are true, then he shall enter an order so finding, and shall order that such person be remanded and committed to and confined in the proper state institution under this chapter or a private treatment facility under the provisions of Title 41, Chapter 32, Mississippi Code of 1972, or, in the case of an alcoholic to an approved public or private treatment facility pursuant to the provisions of Title 41, Chapter 30, Mississippi Code of 1972, for care and treatment for a period of not less than thirty (30) days nor more than ninety (90) days as the necessity of the case may, in his discretion, require. However, when such person shall be so committed, the medical director of the said institution shall be vested with full discretion as to the treatment and discharge of such person, and may discharge and release such person at any time when the condition of such person shall so justify.

Thus, this section imposes on the chancellor a mandatory duty to order the commitment of the respondent if the respondent admits that the allegations in the petition are true. ***A.B. v. Y.Z.*, 60 So. 3d 737, 740 (Miss. 2011) (prior version of statute).**



(5)(a) If the chancellor determines under this section that the alleged alcoholic or drug addict is in need of care and treatment but also affirmatively finds that the alleged alcoholic or drug addict would benefit from the less restrictive option of an outpatient treatment program, the chancellor, in his discretion and upon agreement of both the affiant and the person in need of treatment, may order the alleged alcoholic or drug addict into an outpatient treatment program.

(b) If the order directs outpatient treatment, the outpatient treatment provider may prescribe or administer to the respondent treatment consistent with accepted alcohol and drug abuse treatment standards. If the respondent fails or clearly refuses to comply with outpatient treatment, the director of the treatment program, his designee or an interested person must make all reasonable efforts to solicit the respondent's compliance. These efforts must be documented and, if the respondent fails or clearly refuses to comply with outpatient treatment after the efforts are made, the efforts must be documented with the court by affidavit. Upon the filing of the affidavit, the sheriff of the proper county may take the respondent into custody. The chancellor thereafter may order the respondent to inpatient treatment as soon as a treatment facility is available.

(c) The respondent may request a hearing within ten (10) days of commitment to inpatient treatment by filing a written request with the chancery clerk of the committing court, or the respondent may request such a hearing in writing to any member of the professional staff of the treatment facility, which must be forwarded to the director and promptly filed with the chancery clerk of the committing court. The respondent must be advised of the right to request such a hearing and of the right to consult a lawyer.

### **Court May Issue Writ**

#### **§ 41-31-9      Enforcement powers:**

The chancellor shall have the power to order the issuance of such writs and other process as may be necessary to enforce his orders in such matters, including writs directed to the sheriff of any proper county to take such person into custody and to deliver him to the director of the proper institution. Such writs and other process shall be issued and executed accordingly.

***See § 41-31-21 Grounds to refuse admission*** (If in the opinion of the medical director . . . any person willfully and consistently fails to be rehabilitated after three commitments to any state institution, said medical director may refuse further admission to such person notwithstanding the order of any court . . . ).

## **Right to Appeal**

### **§ 41-31-7 Right to appeal:**

Any person who shall be ordered to be committed to an institution as provided in this chapter, and who shall feel aggrieved at such decision, may appeal therefrom to the supreme court of this state by giving notice thereof in the manner provided by law and by furnishing a good and sufficient bond in an amount to be fixed by the chancellor, and to be approved by the clerk of said court, which said bond shall be conditioned to pay all costs of the proceedings and the appeal, and that said person will appear to abide the decision of the court on such appeal. On such appeal, the record shall be made and prepared as in other cases, and all of the provisions of the general law shall apply thereto except that it shall be necessary that the proper notice be given and the requisite bond furnished within five (5) days from the date of the final determination of the chancellor.

[The petitioner] concedes that the statute is ambiguous but argues that the ambiguity should be resolved in favor of protection of his liberty interest [by granting a stay pending appeal]. We disagree. The ambiguity in such circumstances should be resolved in a manner consistent with the best and most rational reading which may be given the entire statutory scheme. The statute makes most sense when it operates to provide for a sensitive balancing of the necessity for prompt and effective intervention in the lives of those in need of treatment for chemical dependency, on the one hand, with the individual's liberty interest, on the other. An automatic right of supersedeas or stay is inconsistent therewith. *McIntire v. Moore*, 512 So. 2d 687, 689 (Miss. 1987).

### **§ 41-31-18 Continuing Jurisdiction:**

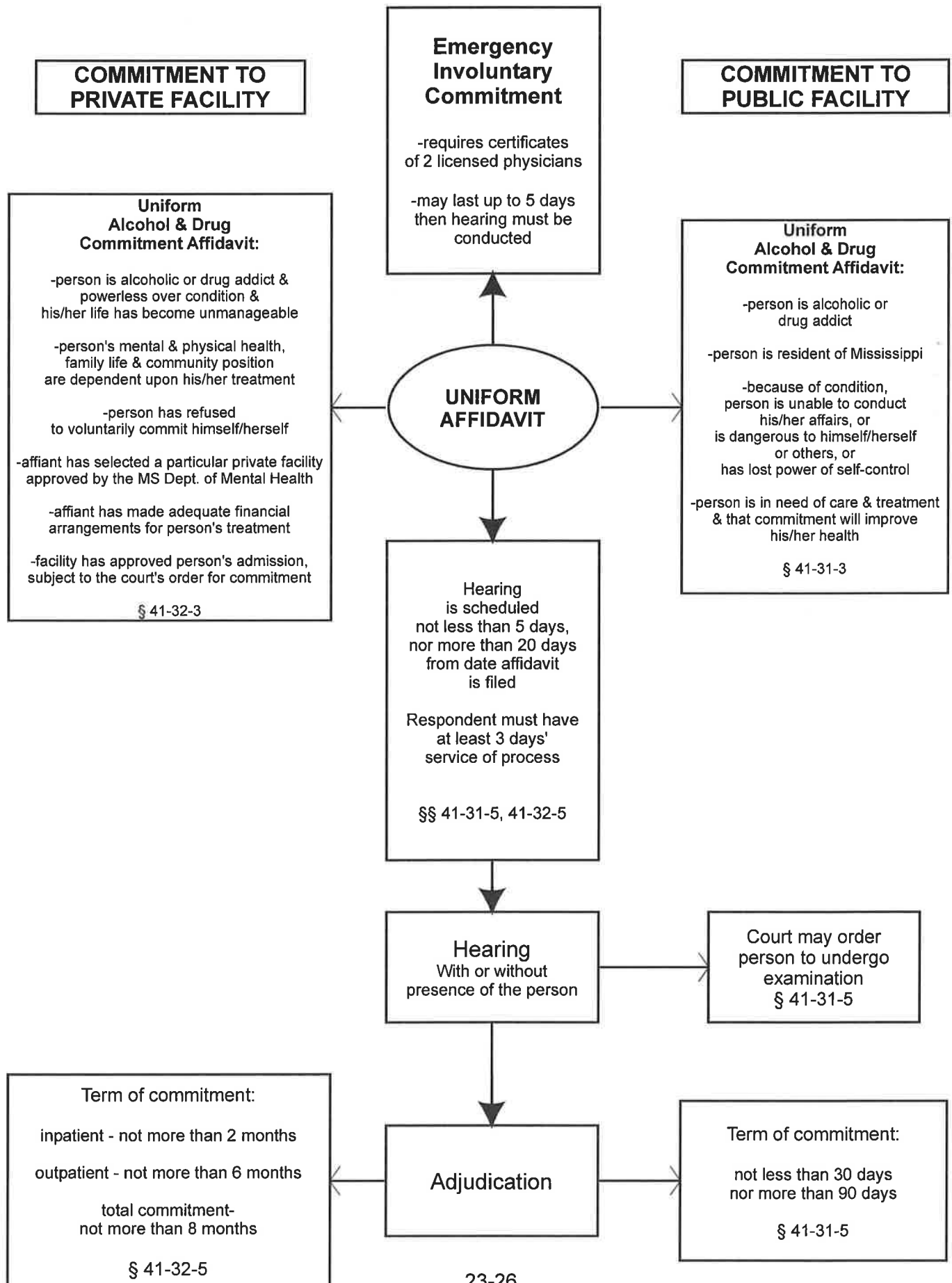
The court shall have continuing jurisdiction over a person committed to an inpatient or outpatient treatment program under this chapter for one (1) year after completion of the treatment program. During that time and upon affidavit in the same cause of action, the court may conduct a hearing consistent with this chapter or Title 41, Chapter 21, Mississippi Code of 1972, to determine whether the person needs to be recommitted for further alcohol and drug treatment or to determine whether the person suffers from a mental or nervous condition or affliction requiring commitment for mental health treatment. Upon a finding by the court that the person is in need of further treatment, the court may commit the person to an appropriate treatment facility. The person subject to commitment must be afforded the due process entitled to him or her under Title 41, Chapters 21 and 31, Mississippi Code of 1972. This section may not be construed so as to conflict with the provisions of Section 41-21-87.

### **Costs of Commitment**

#### **§ 41-31-15     Costs of commitment and support:**

The provisions of the law with respect to the costs of commitment and the cost of support, including the prohibition in Section 41-21-65 regarding the charging of extra fees and expenses to persons initiating commitment proceedings, methods of determination of persons liable therefor, and methods of determination of financial ability, and all provisions of law enabling the state to secure reimbursement of any such items of cost, applicable to the commitment to and support of the mentally ill persons in state hospitals, shall apply with equal force in respect to each item of expense incurred by the state in connection with the commitment, care, custody, treatment, and rehabilitation of any person committed to the state hospitals and maintained in any institution or hospital operated by the State of Mississippi under the provisions of this chapter.

## **COMMITMENT OF ONE ADDICTED TO ALCOHOL OR DRUGS**



**COMMITMENT OF ONE ADDICTED TO ALCOHOL OR DRUGS**  
**TO A PRIVATE TREATMENT FACILITY**

**Jurisdiction & Venue**

**§ 41-32-1      Provisions supplemental; involuntary commitment:**

A person may be involuntarily committed for alcoholism or drug addiction, or both, to a private treatment facility, upon a judgment of the chancery court of the county of such person's residence, or in the county where such person may be found.

**Procedure**

**§ 41-32-3      Contents of complaint:**

Any interested person may file a Uniform Alcohol and Drug Commitment Affidavit with the chancery court for a judgment of committal in termtime or in vacation. The affidavit shall state facts to establish:

- (a) the defendant is an alcoholic or drug addict, i.e., he is powerless over alcohol or drugs, or both, and his life has thereby become unmanageable;
- (b) defendant's mental and physical health, his continued family life or his position in the community are dependent on his treatment at a chemical dependency unit, alcohol and drug unit, outpatient house or another private treatment facility, or combination of facilities, providing treatment for chemically dependent persons;
- (c) the defendant has refused to commit himself to such private treatment facility, though having been requested so to do by persons who genuinely care for his well-being;
- (d) the affiant has selected a particular private treatment facility which, if located in this state, has been approved by the Department of Mental Health, Division of Alcohol and Drug Abuse;
- (e) the affiant has made adequate financial arrangements for defendant's treatment at such facility; and
- (f) such facility has approved the admission of the defendant, subject to commitment by the chancery court.

### **Pre-Hearing Detention**

#### **§ 41-32-7 Defendants likely to flee or physically harm themselves or others:**

Upon allegation in the affidavit and upon clear and convincing proof that the defendant is under the influence of alcohol or drugs, or both, to the extent that if the defendant is served with process he will, in all likelihood, flee the jurisdiction of the court or physically harm himself or others, then the chancellor may, in his discretion, set the matter for hearing not more than five (5) days, excluding Saturdays, Sundays and legal holidays, from the filing of the affidavit, and order the defendant committed and confined, without notice, until the hearing, to a chemical dependency unit, alcohol and drug unit, outpatient house or any other private facility for the treatment of chemically dependent persons.

### **Hearing**

#### **§ 41-32-5 Hearing; orders authorized:**

(1) The chancellor shall schedule with the affiant a time on a day certain for the hearing thereof, not less than five (5) days nor more than twenty (20) days from the filing of the affidavit. The case shall be triable upon three (3) days' service of process and service of notice of the time for the hearing. At the time fixed, the chancellor shall hear the evidence in the presence of the defendant if he will appear, and without the presence of the defendant if he will not appear, and all persons interested shall have the right to appear and present evidence touching upon the truth and correctness of the allegations of the affidavit.

#### **Appointment of Attorney**

(2) The clerk must ascertain whether the respondent is represented by an attorney, and if it is determined that the respondent does not have an attorney, the clerk immediately must notify the chancellor of that fact. If the chancellor determines that the respondent for any reason does not have the services of an attorney, the chancellor must appoint an attorney for the respondent before a hearing on the affidavit.

(3) If the defendant admits the truth and correctness of the allegations of the affidavit, or if the chancellor shall find from the evidence that the defendant is an alcoholic or drug addict, or both, and is in need of detention, care and treatment in a private treatment facility, and that the other material allegations of the affidavit are true, then the chancellor shall enter a judgment so finding, and shall order that such person be committed to and confined in a chemical dependency unit, alcohol and drug unit, outpatient house or any other private treatment facility, within or outside the state, for the treatment of chemically dependent persons, as the

chancellor, in his discretion, deems to be in the best interest of the defendant. Any such order for the commitment of the defendant shall require that the defendant be committed for such period of time as the chancellor shall determine, in his discretion, as is necessary to provide for the care and treatment of the defendant or for such other period of time as may be established by authorized personnel at the designated facility or facilities; however, in no event shall such period of confinement extend beyond a period of eight (8) months. The chancellor may require treatment at a combination of facilities or may designate commitment at an inpatient facility for not more than two (2) months and an outpatient facility for not more than six (6) months, subject to institutional earlier release.

***See § 41-32-11 Assistance of sheriffs*** (The chancellor may order assistance by the sheriff of the county, or any other county in confining and transporting the defendant to the facility, at the expense of the committing county.).

### **Right to Appeal**

#### **§ 41-32-9      Right to appeal:**

Any person who shall be ordered to be committed to a private treatment facility as provided in this chapter, and who shall feel aggrieved at such decision, may appeal therefrom to the supreme court of this state by giving notice thereof in the manner provided by law and by furnishing a good and sufficient bond in an amount to be fixed by the chancellor, and to be approved by the clerk of said court, such bond to be conditioned to pay all costs of the proceedings and the appeal, and that said person will appear to abide the decision of the court on such appeal. On such appeal, the record shall be made and prepared as in other cases, and all of the provisions of the general law shall apply thereto except that it shall be necessary that the proper notice be given and the requisite bond furnished within five (5) days from the date of the final determination of the chancellor.



## **EMERGENCY INVOLUNTARY COMMITMENT**

### **§ 41-30-27 Applications for emergency involuntary commitment:**

#### **Petition**

(1)(a) A person may be admitted to an approved public or private treatment facility for emergency care and treatment upon a decree of the chancery court accepting an application for admission thereto accompanied by the certificate of two (2) licensed physicians. The application shall be to the chancery court of the county of such person's residence and may be made by any one (1) of the following: Either certifying physician, the patient's spouse or guardian, any relative of the patient, or any other person responsible for health, safety or welfare of all or part of the citizens within said chancery court's territorial jurisdiction.

The application shall state facts to support the need for immediate commitment, including factual allegations showing that the person to be committed has  
threatened,  
attempted or  
actually inflicted physical harm upon himself or another.

The physicians' certificates shall state that they examined the person within two (2) days of the certificate date and shall set out the facts to support the physicians' conclusion that the person is an alcoholic or drug addict who has lost the power of self-control with respect to the use of alcoholic beverages or habit-forming drugs and that unless immediately committed he is likely to inflict physical harm upon himself or others.

#### **Hearing**

A hearing on such applications shall be heard by the chancery court in term time or in vacation, and the hearing shall be held in the presence of the person sought to be admitted unless he fail or refuse to attend. Notice of the hearing shall be given to the person sought to be admitted, as soon as practicable after the examination by the certifying physicians, and the person sought to be admitted shall have an opportunity to be represented by counsel, and shall be entitled to have compulsory process for the attendance of witnesses.

(b) For the purpose of this section, the term "drug addict" shall have the meaning ascribed to it by Section 41-31-1(d).

***See § 41-31-1(d) Definitions*** ("Drug addict" means any person who chronically and habitually uses any form of habit-forming drugs, such as opioids, opiates and the derivatives thereof, barbiturates, and every tablet, powder, substance, liquid or fluid, patented or not, containing

habit-forming drugs if same is capable of being used by human beings and produces drug addiction in any form or degree.).

(2) The chancery judge may refuse an application if in his opinion the application and certificate fail to sustain the grounds for commitment. Upon acceptance of the application after hearing thereon and decree sustaining the application by the judge, the person shall be transported to the facility by a peace officer, health officer, the applicant for commitment, the patient's spouse or the patient's guardian. The person shall be retained at the facility that admitted him, or be transferred to any other appropriate treatment resource, until discharged pursuant to subsection (3).

(3) The attending physician shall discharge any person committed pursuant to this section when he determines that the grounds for commitment no longer exist, but no person committed pursuant to this section shall be retained in any facility for more than five (5) days.

(4) The application filed pursuant to subsection (1) of this section shall also contain an affidavit for involuntary commitment pursuant to Title 41, Chapter 31, Mississippi Code of 1972. If the application for emergency involuntary commitment is accepted under subsection (2) of this section, the chancery judge shall order a hearing on the affidavit for commitment pursuant to Title 41, Chapter 31, Mississippi Code of 1972, to be held on the fifth day of such involuntary emergency commitment, the provisions of Section 41-31-5 regarding the time of hearing to the contrary notwithstanding; provided, however, that at the time of such involuntary commitment the alleged alcoholic or drug addict shall be served with a citation to appear at said hearing and shall have an opportunity to be represented by counsel.

**CHAPTER 24**  
**CONSERVATORSHIPS**

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## **APPENDIX**

### **Former Chapter 24 Conservatorships**

## CHAPTER 24

### CONSERVATORSHIPS

#### Authority of Chancery Court

Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution. It is not competent for the Legislature to abate the said powers and duties or for the said court to omit or neglect them. It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non composmentis. The court will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. *Union Chevrolet Co. v. Arrington*, 138 So. 593, 595 (Miss. 595 (Miss. 1932)).

#### Difference Between a Guardian and Conservator

Initially, it is appropriate to distinguish guardianships from conservatorships. Guardians may be appointed for minors; incompetent adults; a person of unsound mind; alcoholics or drug addicts; convicts in the penitentiary; persons in the armed forces or merchant seamen reported as missing; or for veterans; or minor wards of a veteran. The guardian is the legally recognized custodian of the person or property of another with prescribed fiduciary duties and responsibilities under court authority and direction. A ward under guardianship is under a legal disability or is adjudged incompetent. In recent decades there has been an increased number of older adults in our society who possess assets in need of protective services provided through guardianships. But modification of laws have broadened the definition of persons for whom assistance can be afforded by the courts, and such statutes do not restrict such protection only to the adult incompetent or insane. Noting that trend in our society, the Mississippi Legislature incorporated into law in 1962 the conservatorship procedure for persons who, by reason of advanced age, physical incapacity, or mental weakness, were incapable of managing their own estates. Thus the Legislature provided a new procedure through conservatorship for supervision of estates of older adults

with physical incapacity or mental weakness, without the stigma of legally declaring the person non compos mentis. This additional procedure was intended to encompass a broader class of people than just the incompetent. Therefore, the distinguishing feature of conservatorship from guardianships lies in part in the lack of necessity of an incompetency determination or the existence of a legal disability for its initiation. After establishment of such protective procedures, the duties, responsibilities and powers of a guardian or conservator are the same. However, the status of the ward in each arrangement is different. *Harvey v. Meador*, 459 So. 2d 288, 291-92 (Miss. 1984).

## **General Provisions**

### **Jurisdiction**

#### **§ 93-20-104 Subject-matter jurisdiction:**

(1) Except to the extent jurisdiction is precluded by the Uniform Child Custody Jurisdiction and Enforcement Act (Title 93, Chapter 27, Mississippi Code of 1972) and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Title 93, Chapter, 14, Mississippi Code of 1972), the chancery court has jurisdiction over a guardianship or conservatorship for a respondent domiciled or present in this state or having property in this state.

(2) After a petition is filed in a proceeding for a guardianship or conservatorship and until termination of the proceeding, the court in which the petition is filed has:

- (a) Exclusive jurisdiction to determine the need for the guardianship or conservatorship;
- (b) Exclusive jurisdiction to determine how property of the respondent must be managed, expended, or distributed to or for the use of the respondent, an individual who is dependent in fact on the respondent, or other claimant;
- (c) Nonexclusive jurisdiction to determine the validity of a claim against the respondent or property of the respondent or a question of title concerning the property; and
- (d) If a guardian or conservator is appointed, exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

(3) A court that appoints a guardian or conservator has exclusive and continuing jurisdiction over the proceeding until the court terminates the proceeding.

(4) This chapter does not apply to a durable legal relative guardianship to facilitate child placement that may be created by a youth court under Section 43-21-609.

### **Venue**

#### **§ 93-20-106 Venue:**

(3) Venue for a conservatorship proceeding is in:

- (a) The county in which the respondent resides, whether or not a guardian has been appointed in another county or other jurisdiction; or
- (b) If the respondent does not reside in this state, in any county in which

property of the respondent is located.

(4) If proceedings under this act are brought in more than one (1) county, the court of the county in which the first proceeding is brought has the exclusive right to proceed unless the court determines venue is properly in another court or that the interest of justice otherwise requires transfer of the proceeding.

**§ 93-20-108 Letters of guardianship or conservatorship:**

(1) At or before the time of appointment, the guardian or conservator must take and subscribe an oath faithfully to discharge the duties of guardian or conservator of the ward according to law.

(2) The clerk must issue letters of guardianship to a guardian who takes the proper oath, posts bond if required, and submits a certificate of attorney and certificate of fiduciary, unless waived by the court.

(3) The clerk must issue letters of conservatorship to a conservator who takes the proper oath, posts bond if required, and submits a certificate of attorney and certificate of fiduciary, unless waived by the court or unless the conservator complies with another asset-protection arrangement required by the court.

(4) The court in its initial order of appointment or at any subsequent time may limit the powers conferred on a guardian or conservator. The court shall direct the clerk to issue new letters of guardianship or conservatorship that reflect the limitation. The court shall direct the clerk to give notice of the limitation by service of a copy of the court's order with proof of service on the guardian or conservator, the ward, and any other person the court determines.

(5) Limitations on the powers of a guardian or conservator or on the property subject to conservatorship must be stated in the letters of guardianship or conservatorship.

(6) Letters of guardianship and conservatorship may be combined in one (1) document if the guardian and conservator are the same person.



## Conservatorship of Minor

### Petition is Filed

#### **§ 93-20-402 Petition for appointment of conservator; notice:**

- (1) A person interested in the estate, financial affairs, or welfare of the individual, including a person that would be adversely affected by lack of effective management of property or financial affairs of the individual, may petition for the appointment of a conservator for the individual.
- (2) The proceeding may be instituted by the chancellor or clerk of the chancery court, any relative or friend of the individual, or any other interested party, including the individual for whom the order is sought, by filing a sworn petition in the chancery court of the residence of the individual setting forth that the individual is alleged to be in need of a conservatorship.
- (3) The petition must state the name and address of an attorney representing the petitioner, if any, and must set forth under the style of the case and before the body of the petition the following language in bold or highlighted type:

THE RELIEF SOUGHT IN THIS PETITION MAY AFFECT YOUR  
LEGAL RIGHTS. YOU HAVE A RIGHT TO NOTICE OF ANY  
HEARING ON THIS PETITION, TO ATTEND ANY HEARING, AND  
TO BE REPRESENTED BY AN ATTORNEY.

### Notice of Hearing

#### **§ 93-20-403 Notice and hearing for appointment of conservator:**

- (1) On receipt of a petition under Section 93-20-402 for appointment of a conservator for a respondent, the court must set a date, time, and place for a hearing on the petition, and unless the court finds that the respondent for whom the conservator is to be appointed is competent and joins in the petition, the petitioner must cause summons to be served not less than seven (7) days before the hearing, together with a copy of the petition, on the person for whom the conservator is to be appointed. The court may, for good cause shown, direct that a shorter notice be given.
- (2) Unless the court finds that the respondent for whom the conservator is to be appointed is competent and joins in the petition, the summons must also issue to:
  - (a) Any guardian appointed to the respondent; and

- (b) At least one (1) adult relative of the respondent who resides in Mississippi from the following group in the listed order of preference: spouse, children, parents, siblings; but if none of those can be found:
- (i) To one (1) adult relative of the respondent and who is not the petitioner and who resides in Mississippi if that relative is within the third degree of kinship.
  - (ii) If no relative within the third degree of kinship to the respondent is found residing in the State of Mississippi, the court must either designate some other appropriate person to receive the summons or appoint a guardian ad litem to receive the summons.

(3) In a proceeding under this article, notice of the hearing also must be given to any other person interested in the respondent's welfare the court determines is entitled to notice. Failure to give notice under this subsection does not preclude the court from appointing a guardian.

(4) If the person for whom the conservator is to be appointed is entitled to any benefit, estate or income paid or payable by or through the Veterans' Administration of the United States government, such administration shall also be given summons.

(5) Notice of a hearing on a petition seeking an order under this article that is filed after the appointment of a conservator, together with a copy of the petition, must be given to the ward, the conservator, and any other person the court determines.

**§ 93-20-404 Order to preserve or apply property while proceeding pending:**

The court may appoint a guardian ad litem to any respondent and allow suitable compensation payable out of the estate of the respondent, but the appointment shall not be made unless the court considers it necessary; a judgment of any court is not void or erroneous because of the failure to have a guardian ad litem.

**§ 93-20-405 Appointment and role of guardian ad litem:**

The court may appoint a guardian ad litem to any respondent and allow suitable compensation payable out of the estate of the respondent, but the appointment shall not be made unless the court considers it necessary for the protection of the interest of the respondent; a judgment of any court is not void or erroneous because of the failure to have a guardian ad litem.

**§ 93-20-406 Appointment of attorney:**

If the respondent in a proceeding for appointment of a conservator is not

represented by an attorney, the court, in its discretion, may appoint an attorney to represent the respondent.

**§ 93-20-407 Professional evaluation:**

(1) The chancery court must conduct a hearing to determine whether a conservator is needed for the respondent. Before the hearing, the court, in its discretion, may appoint a guardian ad litem, and the guardian ad litem must be present at the hearing and present the interests of the respondent.

(2) The chancery judge shall be the judge of the number and character of the witnesses and proof to be presented, except that the proof must include certificates made after a personal examination of the respondent by the following professionals, each of whom must make in writing a certificate of the result of that examination to be filed with the clerk of the court and become a part of the record of the case.

- (a) Two (2) licensed physicians; or
- (b) One (1) licensed physician and either one (1) licensed psychologist, nurse practitioner, or physician's assistant.

(3) The personal examination may occur face-to-face or via telemedicine, but any telemedicine examination must be made using an audiovisual connection by a physician licensed in this state and as defined in Section 83-9-351. A nurse practitioner or physician assistant conducting an examination shall not also be in a collaborative or supervisory relationship, as the law may otherwise require, with the physician conducting the examination. A professional conducting an examination under this section may also be called to testify at the hearing.

(4) The personal examination requirement in subsections (2) and (3) does not apply if the respondent is:

- (a) Missing, detained or unable to return to the United States; or
- (b) A minor with no other disability or incapacity.

However, a personal examination is required to extend a conservatorship beyond the age of majority.

**Hearing**

**§ 93-20-408 Rights at hearing:**

(1) At a hearing under this article, the respondent may:

- (a) Present evidence and subpoena witnesses and documents;
- (b) Examine witnesses; and
- (c) Otherwise participate in the hearing.

(2) Unless excused by the court for good cause, a proposed conservator must attend a hearing under this article.

(3) A hearing under this article must be closed on request of the respondent and a showing of good cause.

(4) Any person may request to participate in a hearing under this article. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

**§ 93-20-409 Confidentiality of records:**

(1) An individual subject to a proceeding for a conservatorship, an attorney designated by the respondent or ward, and a person entitled to notice either under Section 93-20-411(5) or court order may access court records of the proceeding and resulting conservatorship, including the conservator's plan under Section 93-20-419 and the conservator's report under Section 93-20-423. A person not otherwise entitled to access to court records under this section for good cause may petition the court for access to court records of the conservatorship, including the conservator's plan and report. The court must grant access if access is in the best interest of the respondent or ward or furthers the public interest and does not endanger the welfare or financial interests of the respondent or individual.

(2) A report under Section 93-20-405 of a guardian ad litem or professional evaluation under Section 93-20-407 may be confidential and may be sealed on filing when determined necessary by the court. If the court finds the file should be sealed, the file shall remain available to:

- (a) The court;
- (b) The individual who is the subject of the report or evaluation, without limitation as to use;
- (c) The petitioner, guardian ad litem and petitioner's and respondent's attorneys, for purposes of the proceeding;
- (d) Unless the court directs otherwise, a person appointed under a power of attorney for finances in which the respondent is identified as the principal; and
- (e) Any other person if it is in the public interest or for a purpose the court orders for good cause.

**§ 93-20-410 Who may be conservator:**

(1) Appointment of a conservator is at the discretion of the court, and in the best interest of the respondent. If two (2) or more persons have requested responsibility as conservator, the court shall select as conservator the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent including any designation made in a will, durable power of attorney, or health-care directive, the extent to which the person and the respondent have similar values and preferences, and the likelihood the person will be able to perform the duties of a conservator successfully. The court, acting in the best interest of the respondent, may decline to appoint as conservator a person requesting the appointment.

(2) If a qualified conservator cannot be determined, the court, in its discretion, may appoint the chancery court clerk or probate administrator for the county in which the proceedings were filed to serve as the respondent's conservator. The chancery court clerk or the probate administrator shall serve in the capacity ordered by the court unless a conflict of interest arises or the clerk or the probate administrator presents circumstances where the court determines the clerk's recusal from appointment is permitted.

(3) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as conservator unless:

(a) The individual is related to the respondent by blood, marriage, or adoption; or

(b) The court finds by clear and convincing evidence that the person is the best qualified person available for appointment and the appointment is in the best interest of the respondent.

(4) An owner, operator, or employee of a long-term-care institution at which the respondent is receiving care may not be appointed as conservator unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

**Appointment of Conservator**

**§ 93-20-401 Basis for appointment of conservator:**

(1) **For a minor.** The court may appoint a conservator for the property or financial

affairs of a minor if the court finds by clear and convincing evidence that appointment of a conservator is in the minor's best interest, and:

- (a) If the minor has a parent, the court gives weight to any recommendation of the parent whether an appointment is in the minor's best interest; and
- (b) Either:
  - (i) The minor owns funds or other property requiring management or protection that otherwise cannot be provided;
  - (ii) The minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age; or
  - (iii) Appointment is necessary or desirable to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the minor.

**§ 93-20-411 Order on appointment of conservator:**

(1) A court order appointing a conservator for a minor must include findings to support appointment of a conservator and, if a full conservatorship is granted, the reason a limited conservatorship would not meet the identified needs of the minor.  
...

(4) A court order establishing a limited conservatorship must state the specific property placed under the control of the conservator and the powers granted to the conservator.

(5) The court, as part of an order establishing a conservatorship, must identify and include the contact information for any person that subsequently is entitled to:

- (a) Notice of the rights of the ward under Section 93-20-412(2);
- (b) Notice of a sale of or surrender of a lease to the primary dwelling of the individual;
- (c) Notice that the conservator has delegated a power that requires court approval under Section 93-20-414 or substantially all powers of the conservator;
- (d) Notice that the conservator will be unavailable to perform the conservator's duties for more than one (1) month;
- (e) A copy of the conservator's plan under Section 93-20-419 and the conservator's report under Section 93-20-423;
- (f) Access to court records relating to the conservatorship;
- (g) Notice of a transaction involving a substantial conflict between the conservator's fiduciary duties and personal interests;
- (h) Notice of the death or significant change in the condition of the

individual;

(i) Notice that the court has limited or modified the powers of the conservator; and

(j) Notice of the removal of the conservator. . . .

(7) If a ward is a minor, each parent and adult sibling of the minor is entitled to notice under subsection (5) unless the court determines notice would not be in the best interest of the minor.

(8) (a) If the chancellor finds from the evidence that the person is in need of a conservatorship, the chancellor must appoint a conservator over the estate of the person.

(b) The costs and expenses of the proceedings shall be paid out of the estate of the respondent if a conservator is appointed. If a conservator is not appointed, the costs and expenses shall be paid by the person instituting the proceedings unless the proceedings were instituted by the court or the chancery clerk.

**§ 93-20-412 Notice of order of appointment; rights:**

(1) A conservator appointed under Section 93-20-411 must give to the ward and to all other persons given notice under Section 93-20-403 a copy of the order of appointment. The order and notice must be given not later than fourteen (14) days after the appointment.

(2) Not later than fourteen (14) days after appointment of a conservator under Section 93-20-411, the court must give to the ward, the conservator, and any other person entitled to notice under Section 93-20-411(5), a statement of the rights of the ward and procedures to seek relief if the ward is denied those rights. The statement must be in plain language, in at least sixteen-point font, and to the extent feasible, in a language in which the ward is proficient. The statement must notify the ward of the right to:

(a) Seek termination or modification of the conservatorship, or removal of the conservator, and choose an attorney to represent the individual in these matters;

(b) Participate in decision-making to the extent reasonably feasible;

(c) Receive a copy of the conservator's plan under Section 93-20-419, the conservator's inventory under Section 93-20-420, and the conservator's report under Section 93-20-423; and

(d) Object to the conservator's inventory, plan, or report.

(3) If a conservator is appointed for the reasons stated in Section

93-20-401(2)(a)(ii) and the ward is missing, notice under this section to the individual is not required.

**§ 93-20-416 Bond; oath; waiver; financial institutions; alternative asset-protection arrangement:**

(1) Except as otherwise provided in subsection (3), the court shall require a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement, conditioned on faithful discharge of all duties of the conservator. The court may waive or partially waive the requirement if:

(a) The respondent is a minor and the minor's parent has waived the requirement in a valid holographic will or another instrument to take effect at the parent's death that is signed by the parent and attested by two (2) or more credible witnesses, not including the person nominated as conservator; or

(b) Part of the assets of the ward's estate are deposited in one or more banking corporations, building and loan associations or savings and loan associations ("financial institutions") in this state if the deposits are fully insured by the Federal Deposit Insurance Corporation (FDIC) and will remain on deposit in that institution until further order of the court, a certified copy or MEC-filed copy of the order for deposit having been furnished to the depository or depositories and its receipt acknowledged in a form that substantially complies with subsection (7); or

(c) The court finds that a bond or other asset-protection arrangement is not necessary to protect the interests of the individual subject to conservatorship. Except as otherwise provided in subsection (3), the court may not waive the requirement of bond or other asset-protection arrangement if the conservator is in the business of serving as a conservator and is being paid for the conservator's service.

(2) Unless the court directs otherwise, the bond required under this section must be in the amount of the aggregate capital value of the conservatorship estate, plus one (1) year's estimated income, less the value of property deposited under an arrangement requiring a court order for its removal and real property the conservator lacks power to sell or convey without specific court authorization. The court, in place of surety on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

(3) A banking institution insured by the FDIC qualified to do trust business in this state is not required to give a bond under this section.



(4) Every bond must be filed in the records of the chancery court and may be put in suit for any breach of the condition, whether the appointment be legal or not; and the condition shall be as follows:

The condition of the above obligation is that if the above bound, as conservator of \_\_\_\_\_ in \_\_\_\_\_ County shall faithfully discharge all the duties required of him by law, then the above obligation shall cease.

The conservator must also take and subscribe on oath, at or before the conservator's appointment, faithfully to discharge the duties of conservator of the ward according to law.

(5) A financial institution that substantially complies with the provisions of this article when acting as a depository of conservatorship funds is not liable to any person for so acting except for willful default, gross negligence or malfeasance.

(6) A financial institution that acts as a depository of the funds may charge a fee for servicing the account.

(7)

ACKNOWLEDGMENT OF RECEIPT OF ORDER FOR DEPOSIT AND  
RECEIPT OF CASH FUNDS

The Chancery Court of \_\_\_\_\_ County, Mississippi, having rendered its order in the above-entitled and numbered cause on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, designating a banking institution insured by the Federal Deposit Insurance Corporation as the depository of the funds of \_\_\_\_\_, by and through \_\_\_\_\_, as conservator, and the conservator, having elected to use \_\_\_\_\_ (Name of Financial Institution) as the aforesaid depository, I, acting pursuant to my authority in and for said bank, do hereby acknowledge that I have received a copy of the order of the chancery court, duly certified as true and correct by the chancery clerk of \_\_\_\_\_ County, Mississippi, or a MEC-filed copy of the order of the chancery court. I further note that said order provides that all funds so deposited to the account shall remain on deposit until further order of the court.

Receipt is also hereby acknowledged of the funds in the amount of \$ \_\_\_\_\_ in this matter. \_\_\_\_\_ (Name of Financial Institution) hereby acknowledges that the funds, described above, shall not be disbursed without further order of this court.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.  
STATE OF MISSISSIPPI  
COUNTY OF \_\_\_\_\_

Personally came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named \_\_\_\_\_  
(Name of Bank Officer), who is \_\_\_\_\_ (Job Title)  
of \_\_\_\_\_ (Name of Financial Institution) and who  
acknowledged to me that he/she signed and delivered the above and foregoing  
Acknowledgment of Receipt of Order for Deposit and Receipt of Cash Funds as  
the act and deed of said bank, he/she being first duly authorized so to do.

Given under my hand and official seal, this the \_\_\_\_\_ day of  
\_\_\_\_\_, \_\_\_\_\_.

Notary Public

My commission expires

**§ 93-20-417 Terms and requirements of bond:**

(1) The following rules apply to the bond required under Section 93-20-416:

- (a) Except as otherwise provided by the bond, the surety and the conservator are jointly and severally liable.
- (b) By executing a bond provided by a conservator, the surety submits to the personal jurisdiction of the court that issued letters of office to the conservator in a proceeding relating to the duties of the conservator in which the surety is named as a party. Notice of the proceeding must be given to the surety at the address shown in the records of the court in which the bond is filed and any other address of the surety then known to the person required to provide the notice.
- (c) On petition of a successor conservator or person affected by a breach of the obligation of the bond, a proceeding may be brought against the surety for breach of the obligation of the bond.
- (d) A proceeding against the bond may be brought until liability under the bond is exhausted.

(2) A proceeding may not be brought under this section against a surety of a bond on a matter as to which a proceeding against the conservator is barred.

(3) If a bond under Section 93-20-416 is not renewed by the conservator, the surety or sureties immediately must give notice to the court and the attorney for the conservatorship.

## Conservator's Duties

### **§ 93-20-418 Duties of conservator:**

(1) A conservator is a fiduciary and has duties of prudence and loyalty to the ward.

(2) A conservator must promote the self-determination of the ward and, to the extent feasible, encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs.

(3) In making a decision for a ward, the conservator must make the decision the conservator reasonably believes the ward would make if able, unless doing so would fail to preserve the resources needed to maintain the ward's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the ward. To determine the decision the ward would make if able, the conservator must consider the ward's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator.

(4) If a conservator cannot make a decision under subsection (3) because the conservator does not know and cannot reasonably determine the decision the ward probably would make if able, or the conservator reasonably believes the decision the individual would make would fail to preserve resources needed to maintain the ward's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the ward, the conservator shall act in accordance with the best interest of the ward. In determining the best interest of the ward, the conservator shall consider:

- (a) Information received from professionals and persons who demonstrate sufficient interest in the welfare of the ward;
- (b) Other information the conservator believes the ward would have considered if the ward were able to act; and
- (c) Other factors a reasonable person in the circumstances of the ward would consider, including consequences for others.

(5) Except when inconsistent with the conservator's duties under subsections (1) through (4), and where investments other than in FDIC-insured investments are permitted in the court's order approving the conservator's plan, a conservator must invest and manage the conservatorship estate as a prudent investor would, by considering:

- (a) The circumstances of the ward and the conservatorship estate;

- (b) General economic conditions;
- (c) The possible effect of inflation or deflation;
- (d) The expected tax consequences of an investment decision or strategy;
- (e) The role of each investment or course of action in relation to the conservatorship estate as a whole;
- (f) The expected total return from income and appreciation of capital;
- (g) The need for liquidity, regularity of income, and preservation or appreciation of capital; and
- (h) The special relationship or value, if any, of specific property to the ward.

(6) The propriety of a conservator's investment and management of the conservatorship estate is determined in light of the facts and circumstances existing when the conservator decides or acts and not by hindsight.

(7) A conservator must make a reasonable effort to verify facts relevant to the investment and management of the conservatorship estate.

(8) A conservator that has special skills or expertise, or is named conservator in reliance on the conservator's representation of special skills or expertise, has a duty to use the special skills or expertise in carrying out the conservator's duties.

(9) In investing, selecting specific property for distribution, and invoking a power of revocation or withdrawal for the use or benefit of the ward, a conservator must consider any estate plan of the ward known or reasonably ascertainable to the conservator and may examine the will or other donative, nominative, or appointive instrument of the individual.

(10) A conservator must maintain insurance on the insurable real and personal property of the ward, unless the conservatorship estate lacks sufficient funds to pay for insurance or the court finds:

- (a) The property lacks sufficient equity; or
- (b) Insuring the property would unreasonably dissipate the conservatorship estate or otherwise not be in the best interest of the ward.

(11) A conservator has access to and authority over a digital asset of the ward to the extent provided by the Revised Uniform Fiduciary Access to Digital Assets Act (Title 91, Chapter 23, Mississippi Code of 1972).

(12) A conservator for an adult must notify the court if the condition of the adult has changed so that the adult has become capable of autonomy in exercising rights previously delegated to the conservator. The notice must be given immediately on

learning of the change.

**Conservator's Powers**

**§ 93-20-414 Powers of conservator requiring court approval:**

(1) Except as otherwise ordered by the court, a conservator must give notice to persons entitled to notice under Section 93-20-411(5) and receive specific authorization by the court before the conservator may exercise with respect to the conservatorship the power to:

- (a) Make a gift;
- (b) Sell, encumber an interest in, or surrender a lease to the primary dwelling of the ward;
- (c) Convey, release, or disclaim a contingent or expectant interest in property, including marital property and any right of survivorship incident to joint tenancy or tenancy by the entireties;
- (d) Exercise or release a power of appointment;
- (e) Create a revocable or irrevocable trust of property of the conservatorship estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the ward;
- (f) Exercise a right to elect an option or change a beneficiary under an insurance policy or annuity or surrender the policy or annuity for its cash value;
- (g) Exercise a right to an elective share in the estate of a deceased spouse of the ward or renounce or disclaim a property interest;
- (h) Grant a creditor priority for payment over creditors of the same or higher class if the creditor is providing property or services used to meet the basic living and care needs of the ward and preferential treatment otherwise would be impermissible under Section 93-20-427(6);
- (i) Make, modify, amend, or revoke the will of the ward in compliance with Section 91-5-1 et seq.;
- (j) Pay premiums on any insurance policy issued on the life of the ward if the individual is a minor, the policy was issued during the lifetime of the individual's deceased parent, and the court finds the policy's continuance is warranted;
- (k) Acquire or dispose of real property, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon property;
- (l) Make repairs or alterations in a building or other structure, demolish any improvement, or raze an existing or erect a new wall or building if

costs exceed Two Thousand Five Hundred Dollars (\$2,500.00);

- (m) Subdivide or develop land, dedicate land to public use, make or obtain the vacation of a plat and adjust a boundary, adjust a difference in valuation of land, exchange or partition land by giving or receiving consideration, and dedicate an easement to public use without consideration;
- (n) Enter for any purpose into a lease of property as lessor or lessee, with or without an option to purchase or renew, for a term within or extending beyond the term of the conservatorship;
- (o) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or a pooling or unitization agreement;
- (p) Borrow funds, with or without security, to be repaid from the conservatorship estate or otherwise;
- (q) Pay or contest a claim, settle a claim by or against the conservatorship estate or the ward by compromise, arbitration, or otherwise, or release, in whole or in part, a claim belonging to the conservatorship estate to the extent the claim is uncollectible; or
- (r) Bring an action, claim, or proceeding in any jurisdiction for the protection of the conservatorship estate or the conservator in the performance of the conservator's duties;

(2) In approving a conservator's exercise of a power listed in subsection (1), the court must consider the ward's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator. The court also must consider:

- (a) The financial needs of the ward and individuals who are in fact dependent on the ward for support, and the interests of creditors of the individual;
- (b) Possible reduction of income, estate, inheritance, or other tax liabilities;
- (c) Eligibility for governmental assistance;
- (d) The previous pattern of giving or level of support provided by the individual;
- (e) Any existing estate plan or lack of estate plan of the individual;
- (f) The life expectancy of the individual and the probability the conservatorship will terminate before the ward's death; and
- (g) Any other relevant factor.

(3) A conservator may not revoke or amend a power of attorney for finances executed by the ward. If a power of attorney for finances is in effect, a decision of the conservator takes precedence over that of the attorney-in-fact only to the extent of the authorization granted to the conservator by court order.

**§ 93-20-419 Conservator's plan:**

(1) If required by the court, a conservator must file with the court a plan for investing, protecting, managing, expending, and distributing the assets of the conservatorship estate no later than ninety (90) days after the court's order of appointment or order to file a plan. If a plan is required and there is a significant change in circumstances, or if the conservator seeks to deviate significantly from the conservator's plan, a conservator must file with the court a revised plan no later than ninety (90) days after the change in circumstances or decision to deviate from the plan. Every plan must be based on the needs of the ward and take into account the best interest of the ward as well as the ward's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the conservator. Along with other items determined necessary by the court, the conservator's plan must include:

- (a) A budget containing projected expenses and resources, including an estimate of the total amount of fees the conservator anticipates charging per year and a statement or list of the amount the conservator proposes to charge for each service the conservator anticipates providing to the individual;
- (b) How the conservator will involve the individual in decisions about management of the conservatorship estate;
- (c) Any step the conservator plans to take to develop or restore the ability of the ward to manage the conservatorship estate; and
- (d) An estimate of the duration of the conservatorship.

(2) A conservator must give reasonable notice of the filing of the conservator's plan under subsection (1), together with a copy of the plan, to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than fourteen (14) days after the filing.

(3) A ward and any person entitled under subsection (2) to receive notice and a copy of the conservator's plan may object to the plan.

(4) The court must review the conservator's plan filed under subsection (1) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider objections made under subsection (3) and whether the plan is consistent with the conservator's duties and powers. The court may not approve the plan until thirty (30) days after its filing.

(5) After a conservator's plan under this section is approved by the court, the conservator must provide a copy of the plan to the ward, a person entitled to

notice under Section 93-20-411(5) or a court order, and any other person the court determines.

**§ 93-20-420 Inventory; records:**

(1) Unless the inventory requirement has been waived, not later than ninety (90) days after appointment, a conservator must prepare and file with the appointing court a detailed inventory of the conservatorship estate, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(2) A conservator must give reasonable notice of the filing of an inventory to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and any other person the court determines. The notice must be given not later than fourteen (14) days after the filing.

(3) A conservator must keep records of the administration of the conservatorship estate and make them available for examination on reasonable request of the ward, a guardian for the ward, or any other person the conservator or the court determines.

**§ 93-20-421 Administrative powers of conservator not requiring court approval:**

(1) Except as otherwise provided in Section 414 or qualified or limited in the court's order of appointment and stated in the letters of conservatorship, a conservator has all powers granted in this section and any additional power granted to a trustee by law of this state other than this act.

(2) The court may authorize the conservator in a court order to execute powers not listed in Section 414 without prior specific court authorization or confirmation, including by way of illustration, but not limited to, the following:

- (a) To collect, hold, and retain property, including property in which the conservator has a personal interest and real property in another state, until the conservator determines disposition of the property should be made;
- (b) To receive additions to the conservatorship estate;
- (c) To continue or participate in the operation of a business or other enterprise;
- (d) To acquire an undivided interest in property in which the conservator, in a fiduciary capacity, holds an undivided interest;
- (e) To acquire or dispose of personal property;
- (f) To continue to invest assets;
- (g) To deposit funds or other property in a financial institution, including



- one operated by the conservator;
- (h) To grant an option involving disposition of property or accept or exercise an option for the acquisition of property;
  - (i) To vote a security, in person or by general or limited proxy;
  - (j) To pay a call, assessment, or other sum chargeable or accruing against or on account of a security;
  - (k) To sell or exercise a stock subscription or conversion right;
  - (l) To consent, directly or through a committee or agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
  - (m) To hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;
  - (n) To insure:
    - (i) The conservatorship estate, in whole or in part, against damage or loss in accordance with Section 93-20-418(10); and
    - (ii) The conservator against liability with respect to a third person;
  - (o) Advance funds for the protection of the conservatorship estate or the ward and all expenses, losses, and liability sustained in the administration of the conservatorship estate or because of holding any property for which the conservator has a lien on the conservatorship estate;
  - (p) Pay a tax, assessment, compensation of the conservator or any guardian, and other expense incurred in the collection, care, administration, and protection of the conservatorship estate;
  - (q) Pay a sum distributable to the ward or an individual who is in fact dependent on the ward by paying the sum to the distributee or for the use of the distributee:
    - (i) To the guardian for the distributee;
    - (ii) To the custodian of the distributee under the Uniform Transfers to Minors Act, Section 91-20-1 et seq.; or
    - (iii) If there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;
  - (r) Defend an action, claim, or proceeding in any jurisdiction for the protection of the conservatorship estate or the conservator in the performance of the conservator's duties;
  - (s) Structure the finances of the ward to establish eligibility for a public benefit, including by making gifts consistent with the ward's preferences, values, and prior directions, if the conservator's action does not jeopardize the ward's welfare and otherwise is consistent with the conservator's duties; and
  - (t) Execute and deliver any instrument that will accomplish or facilitate the exercise of a power of the conservator.

**§ 93-20-422 Distribution from conservatorship estate:**

Except as otherwise provided in Section 93-20-414 or qualified or limited in the court's order of appointment and stated in the letters of conservatorship, and unless contrary to a conservator's plan under Section 93-20-419, the conservator may expend or distribute income or principal of the conservatorship estate for the support, care, education, health, or welfare of the ward or an individual who is in fact dependent on the ward, including the payment of child or spousal support, without specific court authorization or confirmation in accordance with the following rules:

- (a) The conservator shall consider a recommendation relating to the appropriate standard of support, care, education, health, or welfare for the ward or individual who is dependent on the ward, made by a guardian for the ward, if any, and, if the ward is a minor, a recommendation made by a parent of the minor. If the minor has a father or mother, the court shall determine whether the expense of maintaining and educating the minor shall be borne by the ward's estate.
- (b) The conservator acting in compliance with the conservator's duties under Section 418 is not liable for an expenditure or distribution made based on a recommendation under paragraph (a) unless the conservator knows the expenditure or distribution is not in the best interest of the ward.
- (c) In making an expenditure or distribution under this section, the conservator must consider:
  - (i) The size of the conservatorship estate, the estimated duration of the conservatorship, and the likelihood the ward, at some future time, may be fully self-sufficient and able to manage the individual's financial affairs and the conservatorship estate;
  - (ii) The accustomed standard of living of the ward and individual who is dependent on the ward;
  - (iii) Other funds or sources used for the support of the ward; and
  - (iv) The preferences, values, and prior directions of the ward.
- (d) Funds expended or distributed under this section may be paid by the conservator to any person, including the ward, as reimbursement for expenditures the conservator might have made, or in advance for services to be provided to the ward or individual who is dependent on the ward if it is reasonable to expect the services will be performed and advance payment is customary or reasonably necessary under the circumstances.

**§ 93-20-423 Conservator's report and accounting; monitoring:**

- (1) Except as otherwise provided under subsection (11), a conservator must file a

report in a record regarding the administration of the conservatorship estate with the court annually unless the court otherwise directs, if provided by will, or made necessary by resignation or removal, or termination of the conservatorship. A conservator must petition the court for approval of a report filed under this section. The court, after review, may approve the report.

(2) A report under subsection (1) must state or contain:

- (a) An accounting that lists property included in the conservatorship estate and the receipts, disbursements, liabilities, and distributions during the period for which the report is made;
- (b) A list of the services provided to the ward;
- (c) A statement whether the conservator has deviated from the plan and, if so, how the conservator has deviated and why;
- (d) A recommendation as to the need for continued conservatorship and any recommended change in the scope of the conservatorship;
- (e) Anything of more than de minimis value which the conservator, any individual who resides with the conservator, or the spouse, parent, child, or sibling of the conservator has received from a person providing goods or services to the ward; and
- (f) Any business relationship the conservator has with a person the conservator has paid or that has benefited from the property of the ward.

(3) The court, in its discretion, may request a copy of the most recent reasonably available financial statements evidencing the status of bank accounts, investment accounts, and mortgages or other debts of the ward with all but the last four (4) digits of the account numbers and social security number redacted;

(4) The court may appoint a guardian ad litem to review a report under this section or a conservator's plan under Section 93-20-419, to interview the ward or conservator, or to investigate any other matter involving the conservatorship. In connection with the report, the court may order the conservator to submit the conservatorship estate to appropriate examination in a manner the court directs.

(5) Reasonable notice of the filing under this section of a conservator's report, together with a copy of the report, must be provided to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and other persons the court determines. The notice and report must be given not later than fourteen (14) days after filing.

(6) The court may establish procedures for monitoring a report submitted under this section and review each report at least annually unless otherwise directed by the court. The court must consider whether:

- (a) The reports provide sufficient information to establish that the conservator has complied with the conservator's duties;
- (b) The conservatorship should continue; and
- (c) The conservator's requested fees, if any, should be approved.

(7) If the court determines there is reason to believe a conservator has not complied with the conservator's duties or the conservatorship should not continue, the court:

- (a) Shall notify the ward, the conservator, and any other person entitled to notice under Section 93-20-411(5) or a court order;
- (b) May require additional information from the conservator;
- (c) May appoint a guardian ad litem to interview the ward or conservator or investigate any matter involving the conservatorship; and
- (d) Consistent with Sections 429 and 430, may hold a hearing to consider removal of the conservator, termination of the conservatorship, or a change in the powers granted to the conservator or terms of the conservatorship.

(8) If the court has reason to believe fees requested by a conservator are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(9) An order may be entered, after notice and consideration by the court, approving a report of a conservator filed under this section.

(10) A conservator may seek an order, after notice and hearing, approving a report filed under this section that discharges the conservator from all liabilities, claims, and causes of action by a person given notice of the report and the hearing as to a matter adequately disclosed in the report.

(11) When the funds and personal property of the ward do not exceed the sum or value of Ten Thousand Dollars (\$10,000.00) and there is no foreseeable prospect of further receipt to come into the hands of the conservator other than interest thereon, or in conservatorships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by a government agency providing protective services to adults or children for the benefit of the ward, the chancery court or chancellor in vacation, for good cause shown, in the chancellor's discretion and upon being satisfied it is to the best interest and welfare of the ward, may authorize the guardian to dispense with further annual accounts, except for a final account.

## **Removal of Conservator**

### **§ 93-20-429 Removal of conservator; appointment of successor:**

(1) The court may remove a conservator for failure to perform the conservator's duties or other good cause and appoint a successor conservator to assume the duties of the conservator.

(2) The court must hold a hearing to determine whether to remove a conservator and appoint a successor on:

(a) A petition of the ward, conservator, or person interested in the welfare of the ward that contains allegations which, if true, would support a reasonable belief that removal of the conservator and appointment of a successor may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six (6) months;

(b) Communication from the ward, conservator, or person interested in the welfare of the ward which supports a reasonable belief that removal of the conservator and appointment of a successor may be appropriate; or

(c) Determination by the court that a hearing would be in the best interest of the ward.

(3) Notice of a petition under subsection (2)(a) must be given to the ward, the conservator, and any other person the court determines.

(4) A ward who seeks to remove the conservator and have a successor appointed has the right to choose an attorney to represent the ward in this matter. If the ward is not represented by an attorney, the court may appoint an attorney under the same conditions as in Section 93-20-406. The court may award reasonable attorney's fees to the attorney as provided in Section 93-20-118.

(5) In selecting a successor conservator, the court must follow the priorities under Section 93-20-410.

## **Termination of Conservatorship**

### **§ 93-20-430 Termination or modification of conservatorship:**

(1) A conservatorship must be terminated when the minor becomes an adult, becomes emancipated, or dies; the termination must comply with Section 93-20-423, but a conservatorship may continue into adulthood when the court finds the ward qualifies for conservatorship as an adult under the provisions of subsections (5) and (6).

(2) A ward, the conservator, or a person interested in the welfare of the individual may petition for:

(a) Termination of the conservatorship on the ground that a basis for appointment under Section 93-20-401 does not exist or termination would be in the best interest of the ward or for other good cause; or\

(b) Modification of the conservatorship on the ground that the extent of protection or assistance granted is not appropriate or for other good cause shown.

(3) The court must hold a hearing to determine whether termination or modification of a conservatorship is appropriate on:

(a) A petition that contains allegations which, if true, would support a reasonable belief that termination or modification of the conservatorship may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six (6) months;

(b) A communication from the ward, conservator, or person interested in the welfare of the ward which supports a reasonable belief that termination or modification of the conservatorship may be appropriate, including because the functional needs of the ward or supports or services available to the ward have changed;

(c) A report from a guardian or conservator which indicates that termination or modification may be appropriate because the functional needs or supports or services available to the ward have changed or other less restrictive alternative is available; or

(d) A determination by the court that a hearing would be in the best interest of the ward.

(4) Notice of a petition under this section must be given to the ward, the conservator, and any other person the court determines.

- (5) On presentation of prima facie evidence for termination of a conservatorship, the court must order termination unless it is proven that a basis for appointment of a conservator under Section 93-20-401 exists.
- (6) The court must modify the powers granted to a conservator if the powers are excessive or inadequate due to a change in the abilities or limitations of the ward, the ward's supports, or other circumstances.
- (7) Unless the court otherwise orders for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the ward which apply to a petition for conservatorship.
- (8) A ward who seeks to terminate or modify the terms of the conservatorship has the right to choose an attorney to represent the ward in this matter. If the ward is not represented by an attorney, the court may appoint an attorney under the same conditions as in Section 93-20-406. The court may award reasonable attorney's fees to the attorney as provided in Section 93-20-118.
- (9) On termination of a conservatorship other than by reason of the death of the ward, property of the conservatorship estate passes to the ward. The order of termination must direct the conservator to file a final report and petition for discharge on approval by the court of the final report.
- (10) If a ward dies testate, the conservator must deliver the will to the named representative and certify that delivery to the court. If the ward dies intestate, Section 91-7-68 governs.

## Conservatorship of Adult

### Petition is Filed

#### **§ 93-20-402 Petition for appointment of conservator; notice:**

- (1) A person interested in the estate, financial affairs, or welfare of the individual, including a person that would be adversely affected by lack of effective management of property or financial affairs of the individual, may petition for the appointment of a conservator for the individual.
- (2) The proceeding may be instituted by the chancellor or clerk of the chancery court, any relative or friend of the individual, or any other interested party, including the individual for whom the order is sought, by filing a sworn petition in the chancery court of the residence of the individual setting forth that the individual is alleged to be in need of a conservatorship.
- (3) The petition must state the name and address of an attorney representing the petitioner, if any, and must set forth under the style of the case and before the body of the petition the following language in bold or highlighted type:

THE RELIEF SOUGHT IN THIS PETITION MAY AFFECT YOUR  
LEGAL RIGHTS. YOU HAVE A RIGHT TO NOTICE OF ANY  
HEARING ON THIS PETITION, TO ATTEND ANY HEARING, AND  
TO BE REPRESENTED BY AN ATTORNEY.

### Notice of Hearing

#### **§ 93-20-403 Notice and hearing for appointment of conservator:**

- (1) On receipt of a petition under Section 93-20-402 for appointment of a conservator for a respondent, the court must set a date, time, and place for a hearing on the petition, and unless the court finds that the respondent for whom the conservator is to be appointed is competent and joins in the petition, the petitioner must cause summons to be served not less than seven (7) days before the hearing, together with a copy of the petition, on the person for whom the conservator is to be appointed. The court may, for good cause shown, direct that a shorter notice be given.
- (2) Unless the court finds that the respondent for whom the conservator is to be appointed is competent and joins in the petition, the summons must also issue to:
  - (a) Any guardian appointed to the respondent; and



- (b) At least one (1) adult relative of the respondent who resides in Mississippi from the following group in the listed order of preference: spouse, children, parents, siblings; but if none of those can be found:
- (i) To one (1) adult relative of the respondent and who is not the petitioner and who resides in Mississippi if that relative is within the third degree of kinship.
  - (ii) If no relative within the third degree of kinship to the respondent is found residing in the State of Mississippi, the court must either designate some other appropriate person to receive the summons or appoint a guardian ad litem to receive the summons.

(3) In a proceeding under this article, notice of the hearing also must be given to any other person interested in the respondent's welfare the court determines is entitled to notice. Failure to give notice under this subsection does not preclude the court from appointing a guardian.

(4) If the person for whom the conservator is to be appointed is entitled to any benefit, estate or income paid or payable by or through the Veterans' Administration of the United States government, such administration shall also be given summons.

(5) Notice of a hearing on a petition seeking an order under this article that is filed after the appointment of a conservator, together with a copy of the petition, must be given to the ward, the conservator, and any other person the court determines.

**§ 93-20-404 Order to preserve or apply property while proceeding pending:**

While a petition under Section 93-16-402 is pending, after preliminary hearing and without notice to others, the court may issue an order to preserve and apply property of the respondent as required for the support of the respondent or an individual who is in fact dependent on the respondent.

**§ 93-20-405 Appointment and role of guardian ad litem:**

The court may appoint a guardian ad litem to any respondent and allow suitable compensation payable out of the estate of the respondent, but the appointment shall not be made unless the court considers it necessary for the protection of the interest of the respondent; a judgment of any court is not void or erroneous because of the failure to have a guardian ad litem.

**§ 93-20-406 Appointment of attorney:**

If the respondent in a proceeding for appointment of a conservator is not

represented by an attorney, the court, in its discretion, may appoint an attorney to represent the respondent.

**§ 93-20-407 Professional evaluation:**

(1) The chancery court must conduct a hearing to determine whether a conservator is needed for the respondent. Before the hearing, the court, in its discretion, may appoint a guardian ad litem, and the guardian ad litem must be present at the hearing and present the interests of the respondent.

(2) The chancery judge shall be the judge of the number and character of the witnesses and proof to be presented, except that the proof must include certificates made after a personal examination of the respondent by the following professionals, each of whom must make in writing a certificate of the result of that examination to be filed with the clerk of the court and become a part of the record of the case.

- (a) Two (2) licensed physicians; or
- (b) One (1) licensed physician and either one (1) licensed psychologist, nurse practitioner, or physician's assistant.

(3) The personal examination may occur face-to-face or via telemedicine, but any telemedicine examination must be made using an audiovisual connection by a physician licensed in this state and as defined in Section 83-9-351. A nurse practitioner or physician assistant conducting an examination shall not also be in a collaborative or supervisory relationship, as the law may otherwise require, with the physician conducting the examination. A professional conducting an examination under this section may also be called to testify at the hearing.

(4) The personal examination requirement in subsections (2) and (3) does not apply if the respondent is:

- (a) Missing, detained or unable to return to the United States; or
- (b) A minor with no other disability or incapacity.

However, a personal examination is required to extend a conservatorship beyond the age of majority.

**Hearing**

**§ 93-20-408 Rights at hearing:**

(1) At a hearing under this article, the respondent may:

- (a) Present evidence and subpoena witnesses and documents;
- (b) Examine witnesses; and
- (c) Otherwise participate in the hearing.

(2) Unless excused by the court for good cause, a proposed conservator must attend a hearing under this article.

(3) A hearing under this article must be closed on request of the respondent and a showing of good cause.

(4) Any person may request to participate in a hearing under this article. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

**§ 93-20-409 Confidentiality of records:**

(1) An individual subject to a proceeding for a conservatorship, an attorney designated by the respondent or ward, and a person entitled to notice either under Section 411(5) or court order may access court records of the proceeding and resulting conservatorship, including the conservator's plan under Section 419 and the conservator's report under Section 423. A person not otherwise entitled to access to court records under this section for good cause may petition the court for access to court records of the conservatorship, including the conservator's plan and report. The court must grant access if access is in the best interest of the respondent or ward or furthers the public interest and does not endanger the welfare or financial interests of the respondent or individual.

(2) A report under Section 405 of a guardian ad litem or professional evaluation under Section 407 may be confidential and may be sealed on filing when determined necessary by the court. If the court finds the file should be sealed, the file shall remain available to:

- (a) The court;
- (b) The individual who is the subject of the report or evaluation, without limitation as to use;
- (c) The petitioner, guardian ad litem and petitioner's and respondent's attorneys, for purposes of the proceeding;
- (d) Unless the court directs otherwise, a person appointed under a power of attorney for finances in which the respondent is identified as the principal; and
- (e) Any other person if it is in the public interest or for a purpose the court orders for good cause.

**§ 93-20-410 Who may be conservator:**

(1) Appointment of a conservator is at the discretion of the court, and in the best interest of the respondent. If two (2) or more persons have requested responsibility as conservator, the court shall select as conservator the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent including any designation made in a will, durable power of attorney, or health-care directive, the extent to which the person and the respondent have similar values and preferences, and the likelihood the person will be able to perform the duties of a conservator successfully. The court, acting in the best interest of the respondent, may decline to appoint as conservator a person requesting the appointment.

(2) If a qualified conservator cannot be determined, the court, in its discretion, may appoint the chancery court clerk or probate administrator for the county in which the proceedings were filed to serve as the respondent's conservator. The chancery court clerk or the probate administrator shall serve in the capacity ordered by the court unless a conflict of interest arises or the clerk or the probate administrator presents circumstances where the court determines the clerk's recusal from appointment is permitted.

(3) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as conservator unless:

(a) The individual is related to the respondent by blood, marriage, or adoption; or

(b) The court finds by clear and convincing evidence that the person is the best qualified person available for appointment and the appointment is in the best interest of the respondent.

(4) An owner, operator, or employee of a long-term-care institution at which the respondent is receiving care may not be appointed as conservator unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

## *Appointment of Conservator*

### **§ 93-20-401 Basis for appointment of conservator:**

**(2) For an adult.** The court may appoint a conservator for the property or financial affairs of an adult if the court finds by clear and convincing evidence that:

- (a) The adult is unable to manage property or financial affairs because:
    - (i) Of a limitation in the adult's ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate supportive services or technological assistance;
    - (ii) The adult is missing, detained, incarcerated, or unable to return to the United States;
  - (b) Appointment is necessary to:
    - (i) Avoid harm to the adult or significant dissipation of the property of the adult; or
    - (ii) Obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or of an individual entitled to the adult's support; and
  - (c) The respondent's identified needs cannot be met by a less restrictive alternative.
- (3) The court shall grant a conservator only those powers necessitated by demonstrated limitations and needs of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full conservatorship if a limited conservatorship or other less restrictive alternative would meet the needs of the respondent.

### **§ 93-20-411 Order on appointment of conservator:**

- (2) A court order appointing a conservator for an adult must:
- (a) Include a specific finding that clear and convincing evidence has established that the identified needs of the respondent cannot be met by a less restrictive alternative, including use of appropriate supportive services or technological assistance; and
  - (b) Include a specific finding that clear and convincing evidence established that the respondent was given proper summons notifying the respondent of the hearing on the petition.
- (3) A court order establishing a full conservatorship for an adult must state the

basis for granting a full conservatorship and include specific findings to support the conclusion that a limited conservatorship would not meet the functional needs of the adult.

(4) A court order establishing a limited conservatorship must state the specific property placed under the control of the conservator and the powers granted to the conservator.

(5) The court, as part of an order establishing a conservatorship, must identify and include the contact information for any person that subsequently is entitled to:

- (a) Notice of the rights of the ward under Section 93-20-412(2);
- (b) Notice of a sale of or surrender of a lease to the primary dwelling of the individual;
- (c) Notice that the conservator has delegated a power that requires court approval under Section 93-20-414 or substantially all powers of the conservator;
- (d) Notice that the conservator will be unavailable to perform the conservator's duties for more than one (1) month;
- (e) A copy of the conservator's plan under Section 93-20-419 and the conservator's report under Section 93-20-423;
- (f) Access to court records relating to the conservatorship;
- (g) Notice of a transaction involving a substantial conflict between the conservator's fiduciary duties and personal interests;
- (h) Notice of the death or significant change in the condition of the individual;
- (i) Notice that the court has limited or modified the powers of the conservator; and
- (j) Notice of the removal of the conservator.

(6) If a ward is an adult, the spouse and adult children of the ward are entitled under subsection (5) to notice unless the court determines notice would be contrary to the preferences or prior directions of the ward or are not in the best interest of the ward. . . .

- (8)
- (a) If the chancellor finds from the evidence that the person is in need of a conservatorship, the chancellor must appoint a conservator over the person.
  - (b) The costs and expenses of the proceedings shall be paid out of the estate of the respondent if a conservator is appointed. If a conservator is not appointed, the costs and expenses shall be paid by the person instituting the proceedings.

**§ 93-20-412 Notice of order of appointment; rights:**

(1) A conservator appointed under Section 93-20-411 must give to the ward and to all other persons given notice under Section 93-20-403 a copy of the order of appointment. The order and notice must be given not later than fourteen (14) days after the appointment.

(2) Not later than fourteen (14) days after appointment of a conservator under Section 93-20- 411, the court must give to the ward, the conservator, and any other person entitled to notice under Section 93-20-411(5), a statement of the rights of the ward and procedures to seek relief if the ward is denied those rights. The statement must be in plain language, in at least sixteen-point font, and to the extent feasible, in a language in which the ward is proficient. The statement must notify the ward of the right to:

- (a) Seek termination or modification of the conservatorship, or removal of the conservator, and choose an attorney to represent the individual in these matters;
- (b) Participate in decision-making to the extent reasonably feasible;
- (c) Receive a copy of the conservator's plan under Section 93-20-419, the conservator's inventory under Section 93-20-420, and the conservator's report under Section 93-20-423; and
- (d) Object to the conservator's inventory, plan, or report.

(3) If a conservator is appointed for the reasons stated in Section 93-20-401(2)(a)(ii) and the ward is missing, notice under this section to the individual is not required.

**§ 93-20-416 Bond; oath; waiver; financial institutions; alternative asset-protection arrangement:**

(1) Except as otherwise provided in subsection (3), the court shall require a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement, conditioned on faithful discharge of all duties of the conservator. The court may waive or partially waive the requirement if:

- (a) The respondent is a minor and the minor's parent has waived the requirement in a valid holographic will or another instrument to take effect at the parent's death that is signed by the parent and attested by two (2) or more credible witnesses, not including the person nominated as conservator; or
- (b) Part of the assets of the ward's estate are deposited in one or more

banking corporations, building and loan associations or savings and loan associations ("financial institutions") in this state if the deposits are fully insured by the Federal Deposit Insurance Corporation (FDIC) and will remain on deposit in that institution until further order of the court, a certified copy or MEC-filed copy of the order for deposit having been furnished to the depository or depositories and its receipt acknowledged in a form that substantially complies with subsection (7); or

(c) The court finds that a bond or other asset-protection arrangement is not necessary to protect the interests of the individual subject to conservatorship. Except as otherwise provided in subsection (3), the court may not waive the requirement of bond or other asset-protection arrangement if the conservator is in the business of serving as a conservator and is being paid for the conservator's service.

(2) Unless the court directs otherwise, the bond required under this section must be in the amount of the aggregate capital value of the conservatorship estate, plus one (1) year's estimated income, less the value of property deposited under an arrangement requiring a court order for its removal and real property the conservator lacks power to sell or convey without specific court authorization. The court, in place of surety on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

(3) A banking institution insured by the FDIC qualified to do trust business in this state is not required to give a bond under this section.

(4) Every bond must be filed in the records of the chancery court and may be put in suit for any breach of the condition, whether the appointment be legal or not; and the condition shall be as follows:

The condition of the above obligation is that if the above bound, as conservator of \_\_\_\_\_ in \_\_\_\_\_ County shall faithfully discharge all the duties required of him by law, then the above obligation shall cease.

The conservator must also take and subscribe on oath, at or before the conservator's appointment, faithfully to discharge the duties of conservator of the ward according to law.

(5) A financial institution that substantially complies with the provisions of this article when acting as a depository of conservatorship funds is not liable to any person for so acting except for willful default, gross negligence or malfeasance.

(6) A financial institution that acts as a depository of the funds may charge a fee



for servicing the account.

(7)

ACKNOWLEDGMENT OF RECEIPT OF ORDER FOR DEPOSIT AND  
RECEIPT OF CASH FUNDS

The Chancery Court of \_\_\_\_\_ County, Mississippi, having rendered its order in the above-entitled and numbered cause on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, designating a banking institution insured by the Federal Deposit Insurance Corporation as the depository of the funds of \_\_\_\_\_, by and through \_\_\_\_\_, as conservator, and the conservator, having elected to use \_\_\_\_\_ (Name of Financial Institution) as the aforesaid depository, I, acting pursuant to my authority in and for said bank, do hereby acknowledge that I have received a copy of the order of the chancery court, duly certified as true and correct by the chancery clerk of \_\_\_\_\_ County, Mississippi, or a MEC-filed copy of the order of the chancery court. I further note that said order provides that all funds so deposited to the account shall remain on deposit until further order of the court.

Receipt is also hereby acknowledged of the funds in the amount of \$ \_\_\_\_\_ in this matter. \_\_\_\_\_ (Name of Financial Institution) hereby acknowledges that the funds, described above, shall not be disbursed without further order of this court.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.  
STATE OF MISSISSIPPI  
COUNTY OF \_\_\_\_\_

Personally came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named \_\_\_\_\_ (Name of Bank Officer), who is \_\_\_\_\_ (Job Title) of \_\_\_\_\_ (Name of Financial Institution) and who acknowledged to me that he/she signed and delivered the above and foregoing Acknowledgment of Receipt of Order for Deposit and Receipt of Cash Funds as the act and deed of said bank, he/she being first duly authorized so to do.

Given under my hand and official seal, this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Notary Public

My commission expires

**§ 93-20-417 Terms and requirements of bond:**

- (1) The following rules apply to the bond required under Section 93-20-416:
  - (a) Except as otherwise provided by the bond, the surety and the conservator are jointly and severally liable.
  - (b) By executing a bond provided by a conservator, the surety submits to the personal jurisdiction of the court that issued letters of office to the conservator in a proceeding relating to the duties of the conservator in which the surety is named as a party. Notice of the proceeding must be given to the surety at the address shown in the records of the court in which the bond is filed and any other address of the surety then known to the person required to provide the notice.
  - (c) On petition of a successor conservator or person affected by a breach of the obligation of the bond, a proceeding may be brought against the surety for breach of the obligation of the bond.
  - (d) A proceeding against the bond may be brought until liability under the bond is exhausted.
- (2) A proceeding may not be brought under this section against a surety of a bond on a matter as to which a proceeding against the conservator is barred.
- (3) If a bond under Section 93-20-416 is not renewed by the conservator, the surety or sureties immediately must give notice to the court and the attorney for the conservatorship.

**Conservator's Duties**

**§ 93-20-418 Duties of conservator:**

- (1) A conservator is a fiduciary and has duties of prudence and loyalty to the ward.
- (2) A conservator must promote the self-determination of the ward and, to the extent feasible, encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs.
- (3) In making a decision for a ward, the conservator must make the decision the conservator reasonably believes the ward would make if able, unless doing so would fail to preserve the resources needed to maintain the ward's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the ward. To determine the decision the ward would make if able, the conservator must consider the ward's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or

reasonably ascertainable by the conservator.

(4) If a conservator cannot make a decision under subsection (3) because the conservator does not know and cannot reasonably determine the decision the ward probably would make if able, or the conservator reasonably believes the decision the individual would make would fail to preserve resources needed to maintain the ward's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the ward, the conservator shall act in accordance with the best interest of the ward. In determining the best interest of the ward, the conservator shall consider:

- (a) Information received from professionals and persons who demonstrate sufficient interest in the welfare of the ward;
- (b) Other information the conservator believes the ward would have considered if the ward were able to act; and
- (c) Other factors a reasonable person in the circumstances of the ward would consider, including consequences for others.

(5) Except when inconsistent with the conservator's duties under subsections (1) through (4), and where investments other than in FDIC-insured investments are permitted in the court's order approving the conservator's plan, a conservator must invest and manage the conservatorship estate as a prudent investor would, by considering:

- (a) The circumstances of the ward and the conservatorship estate;
- (b) General economic conditions;
- (c) The possible effect of inflation or deflation;
- (d) The expected tax consequences of an investment decision or strategy;
- (e) The role of each investment or course of action in relation to the conservatorship estate as a whole;
- (f) The expected total return from income and appreciation of capital;
- (g) The need for liquidity, regularity of income, and preservation or appreciation of capital; and
- (h) The special relationship or value, if any, of specific property to the ward.

(6) The propriety of a conservator's investment and management of the conservatorship estate is determined in light of the facts and circumstances existing when the conservator decides or acts and not by hindsight.

(7) A conservator must make a reasonable effort to verify facts relevant to the investment and management of the conservatorship estate.

(8) A conservator that has special skills or expertise, or is named conservator in reliance on the conservator's representation of special skills or expertise, has a duty to use the special skills or expertise in carrying out the conservator's duties.

(9) In investing, selecting specific property for distribution, and invoking a power of revocation or withdrawal for the use or benefit of the ward, a conservator must consider any estate plan of the ward known or reasonably ascertainable to the conservator and may examine the will or other donative, nominative, or appointive instrument of the individual.

(10) A conservator must maintain insurance on the insurable real and personal property of the ward, unless the conservatorship estate lacks sufficient funds to pay for insurance or the court finds:

- (a) The property lacks sufficient equity; or
- (b) Insuring the property would unreasonably dissipate the conservatorship estate or otherwise not be in the best interest of the ward.

(11) A conservator has access to and authority over a digital asset of the ward to the extent provided by the Revised Uniform Fiduciary Access to Digital Assets Act (Title 91, Chapter 23, Mississippi Code of 1972).

(12) A conservator for an adult must notify the court if the condition of the adult has changed so that the adult has become capable of autonomy in exercising rights previously delegated to the conservator. The notice must be given immediately on learning of the change.

### **Conservator's Powers**

#### **§ 93-20-414 Powers of conservator requiring court approval:**

(1) Except as otherwise ordered by the court, a conservator must give notice to persons entitled to notice under Section 93-20-411(5) and receive specific authorization by the court before the conservator may exercise with respect to the conservatorship the power to:

- (a) Make a gift;
- (b) Sell, encumber an interest in, or surrender a lease to the primary dwelling of the ward;
- (c) Convey, release, or disclaim a contingent or expectant interest in property, including marital property and any right of survivorship incident to joint tenancy or tenancy by the entireties;
- (d) Exercise or release a power of appointment;

- (e) Create a revocable or irrevocable trust of property of the conservatorship estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the ward;
- (f) Exercise a right to elect an option or change a beneficiary under an insurance policy or annuity or surrender the policy or annuity for its cash value;
- (g) Exercise a right to an elective share in the estate of a deceased spouse of the ward or renounce or disclaim a property interest;
- (h) Grant a creditor priority for payment over creditors of the same or higher class if the creditor is providing property or services used to meet the basic living and care needs of the ward and preferential treatment otherwise would be impermissible under Section 93-20-427(6);
- (i) Make, modify, amend, or revoke the will of the ward in compliance with Section 91-5-1 et seq.;
- (j) Pay premiums on any insurance policy issued on the life of the ward if the individual is a minor, the policy was issued during the lifetime of the individual's deceased parent, and the court finds the policy's continuance is warranted;
- (k) Acquire or dispose of real property, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon property;
- (l) Make repairs or alterations in a building or other structure, demolish any improvement, or raze an existing or erect a new wall or building if costs exceed Two Thousand Five Hundred Dollars (\$2,500.00);
- (m) Subdivide or develop land, dedicate land to public use, make or obtain the vacation of a plat and adjust a boundary, adjust a difference in valuation of land, exchange or partition land by giving or receiving consideration, and dedicate an easement to public use without consideration;
- (n) Enter for any purpose into a lease of property as lessor or lessee, with or without an option to purchase or renew, for a term within or extending beyond the term of the conservatorship;
- (o) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or a pooling or unitization agreement;
- (p) Borrow funds, with or without security, to be repaid from the conservatorship estate or otherwise;
- (q) Pay or contest a claim, settle a claim by or against the conservatorship estate or the ward by compromise, arbitration, or otherwise, or release, in whole or in part, a claim belonging to the conservatorship estate to the extent the claim is uncollectible; or
- (r) Bring an action, claim, or proceeding in any jurisdiction for the

protection of the conservatorship estate or the conservator in the performance of the conservator's duties;

(2) In approving a conservator's exercise of a power listed in subsection (1), the court must consider the ward's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator. The court also must consider:

- (a) The financial needs of the ward and individuals who are in fact dependent on the ward for support, and the interests of creditors of the individual;
- (b) Possible reduction of income, estate, inheritance, or other tax liabilities;
- (c) Eligibility for governmental assistance;
- (d) The previous pattern of giving or level of support provided by the individual;
- (e) Any existing estate plan or lack of estate plan of the individual;
- (f) The life expectancy of the individual and the probability the conservatorship will terminate before the ward's death; and
- (g) Any other relevant factor.

(3) A conservator may not revoke or amend a power of attorney for finances executed by the ward. If a power of attorney for finances is in effect, a decision of the conservator takes precedence over that of the attorney-in-fact only to the extent of the authorization granted to the conservator by court order.

**§ 93-20-419 Conservator's plan:**

(1) If required by the court, a conservator must file with the court a plan for investing, protecting, managing, expending, and distributing the assets of the conservatorship estate no later than ninety (90) days after the court's order of appointment or order to file a plan. If a plan is required and there is a significant change in circumstances, or if the conservator seeks to deviate significantly from the conservator's plan, a conservator must file with the court a revised plan no later than ninety (90) days after the change in circumstances or decision to deviate from the plan. Every plan must be based on the needs of the ward and take into account the best interest of the ward as well as the ward's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the conservator. Along with other items determined necessary by the court, the conservator's plan must include:

- (a) A budget containing projected expenses and resources, including an estimate of the total amount of fees the conservator anticipates charging

per year and a statement or list of the amount the conservator proposes to charge for each service the conservator anticipates providing to the individual;

(b) How the conservator will involve the individual in decisions about management of the conservatorship estate;

(c) Any step the conservator plans to take to develop or restore the ability of the ward to manage the conservatorship estate; and

(d) An estimate of the duration of the conservatorship.

(2) A conservator must give reasonable notice of the filing of the conservator's plan under subsection (1), together with a copy of the plan, to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than fourteen (14) days after the filing.

(3) A ward and any person entitled under subsection (2) to receive notice and a copy of the conservator's plan may object to the plan.

(4) The court must review the conservator's plan filed under subsection (1) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider objections made under subsection (3) and whether the plan is consistent with the conservator's duties and powers. The court may not approve the plan until thirty (30) days after its filing.

(5) After a conservator's plan under this section is approved by the court, the conservator must provide a copy of the plan to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and any other person the court determines.

#### **§ 93-20-420 Inventory; records:**

(1) Unless the inventory requirement has been waived, not later than ninety (90) days after appointment, a conservator must prepare and file with the appointing court a detailed inventory of the conservatorship estate, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(2) A conservator must give reasonable notice of the filing of an inventory to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and any other person the court determines. The notice must be given not later than fourteen (14) days after the filing.

(3) A conservator must keep records of the administration of the conservatorship

estate and make them available for examination on reasonable request of the ward, a guardian for the ward, or any other person the conservator or the court determines.

**§ 93-20-421 Administrative powers of conservator not requiring court approval:**

(1) Except as otherwise provided in Section 414 or qualified or limited in the court's order of appointment and stated in the letters of conservatorship, a conservator has all powers granted in this section and any additional power granted to a trustee by law of this state other than this act.

(2) The court may authorize the conservator in a court order to execute powers not listed in Section 414 without prior specific court authorization or confirmation, including by way of illustration, but not limited to, the following:

- (a) To collect, hold, and retain property, including property in which the conservator has a personal interest and real property in another state, until the conservator determines disposition of the property should be made;
- (b) To receive additions to the conservatorship estate;
- (c) To continue or participate in the operation of a business or other enterprise;
- (d) To acquire an undivided interest in property in which the conservator, in a fiduciary capacity, holds an undivided interest;
- (e) To acquire or dispose of personal property;
- (f) To continue to invest assets;
- (g) To deposit funds or other property in a financial institution, including one operated by the conservator;
- (h) To grant an option involving disposition of property or accept or exercise an option for the acquisition of property;
- (i) To vote a security, in person or by general or limited proxy;
- (j) To pay a call, assessment, or other sum chargeable or accruing against or on account of a security;
- (k) To sell or exercise a stock subscription or conversion right;
- (l) To consent, directly or through a committee or agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (m) To hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;
- (n) To insure:
  - (i) The conservatorship estate, in whole or in part, against damage or loss in accordance with Section 93-20-418(10); and
  - (ii) The conservator against liability with respect to a third person;



- (o) Advance funds for the protection of the conservatorship estate or the ward and all expenses, losses, and liability sustained in the administration of the conservatorship estate or because of holding any property for which the conservator has a lien on the conservatorship estate;
- (p) Pay a tax, assessment, compensation of the conservator or any guardian, and other expense incurred in the collection, care, administration, and protection of the conservatorship estate;
- (q) Pay a sum distributable to the ward or an individual who is in fact dependent on the ward by paying the sum to the distributee or for the use of the distributee:
  - (i) To the guardian for the distributee;
  - (ii) To the custodian of the distributee under the Uniform Transfers to Minors Act, Section 91-20-1 et seq.; or
  - (iii) If there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;
- (r) Defend an action, claim, or proceeding in any jurisdiction for the protection of the conservatorship estate or the conservator in the performance of the conservator's duties;
- (s) Structure the finances of the ward to establish eligibility for a public benefit, including by making gifts consistent with the ward's preferences, values, and prior directions, if the conservator's action does not jeopardize the ward's welfare and otherwise is consistent with the conservator's duties; and
- (t) Execute and deliver any instrument that will accomplish or facilitate the exercise of a power of the conservator.

**§ 93-20-422 Distribution from conservatorship estate:**

Except as otherwise provided in Section 93-20-414 or qualified or limited in the court's order of appointment and stated in the letters of conservatorship, and unless contrary to a conservator's plan under Section 93-20-419, the conservator may expend or distribute income or principal of the conservatorship estate for the support, care, education, health, or welfare of the ward or an individual who is in fact dependent on the ward, including the payment of child or spousal support, without specific court authorization or confirmation in accordance with the following rules:

- (a) The conservator shall consider a recommendation relating to the appropriate standard of support, care, education, health, or welfare for the ward or individual who is dependent on the ward, made by a guardian for the ward, if any, and, if the ward is a minor, a recommendation made by a parent of the minor. If the minor has a father or mother, the court shall determine whether the expense of maintaining and educating the minor

shall be borne by the ward's estate.

(b) The conservator acting in compliance with the conservator's duties under Section 418 is not liable for an expenditure or distribution made based on a recommendation under paragraph (a) unless the conservator knows the expenditure or distribution is not in the best interest of the ward.

(c) In making an expenditure or distribution under this section, the conservator must consider:

(i) The size of the conservatorship estate, the estimated duration of the conservatorship, and the likelihood the ward, at some future time, may be fully self-sufficient and able to manage the individual's financial affairs and the conservatorship estate;

(ii) The accustomed standard of living of the ward and individual who is dependent on the ward;

(iii) Other funds or sources used for the support of the ward; and

(iv) The preferences, values, and prior directions of the ward.

(d) Funds expended or distributed under this section may be paid by the conservator to any person, including the ward, as reimbursement for expenditures the conservator might have made, or in advance for services to be provided to the ward or individual who is dependent on the ward if it is reasonable to expect the services will be performed and advance payment is customary or reasonably necessary under the circumstances.

#### **§ 93-20-423 Conservator's report and accounting; monitoring:**

(1) Except as otherwise provided under subsection (11), a conservator must file a report in a record regarding the administration of the conservatorship estate with the court annually unless the court otherwise directs, if provided by will, or made necessary by resignation or removal, or termination of the conservatorship. A conservator must petition the court for approval of a report filed under this section. The court, after review, may approve the report.

(2) A report under subsection (1) must state or contain:

(a) An accounting that lists property included in the conservatorship estate and the receipts, disbursements, liabilities, and distributions during the period for which the report is made;

(b) A list of the services provided to the ward;

(c) A statement whether the conservator has deviated from the plan and, if so, how the conservator has deviated and why;

(d) A recommendation as to the need for continued conservatorship and any recommended change in the scope of the conservatorship;

(e) Anything of more than de minimis value which the conservator, any

individual who resides with the conservator, or the spouse, parent, child, or sibling of the conservator has received from a person providing goods or services to the ward; and

(f) Any business relationship the conservator has with a person the conservator has paid or that has benefited from the property of the ward.

(3) The court, in its discretion, may request a copy of the most recent reasonably available financial statements evidencing the status of bank accounts, investment accounts, and mortgages or other debts of the ward with all but the last four (4) digits of the account numbers and social security number redacted;

(4) The court may appoint a guardian ad litem to review a report under this section or a conservator's plan under Section 93-20-419, to interview the ward or conservator, or to investigate any other matter involving the conservatorship. In connection with the report, the court may order the conservator to submit the conservatorship estate to appropriate examination in a manner the court directs.

(5) Reasonable notice of the filing under this section of a conservator's report, together with a copy of the report, must be provided to the ward, a person entitled to notice under Section 93-20-411(5) or a court order, and other persons the court determines. The notice and report must be given not later than fourteen (14) days after filing.

(6) The court may establish procedures for monitoring a report submitted under this section and review each report at least annually unless otherwise directed by the court. The court must consider whether:

- (a) The reports provide sufficient information to establish that the conservator has complied with the conservator's duties;
- (b) The conservatorship should continue; and
- (c) The conservator's requested fees, if any, should be approved.

(7) If the court determines there is reason to believe a conservator has not complied with the conservator's duties or the conservatorship should not continue, the court:

- (a) Shall notify the ward, the conservator, and any other person entitled to notice under Section 93-20-411(5) or a court order;
- (b) May require additional information from the conservator;
- (c) May appoint a guardian ad litem to interview the ward or conservator or investigate any matter involving the conservatorship; and
- (d) Consistent with Sections 429 and 430, may hold a hearing to consider removal of the conservator, termination of the conservatorship, or a change in the powers granted to the conservator or terms of the

conservatorship.

(8) If the court has reason to believe fees requested by a conservator are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(9) An order may be entered, after notice and consideration by the court, approving a report of a conservator filed under this section.

(10) A conservator may seek an order, after notice and hearing, approving a report filed under this section that discharges the conservator from all liabilities, claims, and causes of action by a person given notice of the report and the hearing as to a matter adequately disclosed in the report.

(11) When the funds and personal property of the ward do not exceed the sum or value of Ten Thousand Dollars (\$10,000.00) and there is no foreseeable prospect of further receipt to come into the hands of the conservator other than interest thereon, or in conservatorships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by a government agency providing protective services to adults or children for the benefit of the ward, the chancery court or chancellor in vacation, for good cause shown, in the chancellor's discretion and upon being satisfied it is to the best interest and welfare of the ward, may authorize the guardian to dispense with further annual accounts, except for a final account.

### **Removal of Conservator**

#### **§ 93-20-429 Removal of conservator; appointment of successor:**

(1) The court may remove a conservator for failure to perform the conservator's duties or other good cause and appoint a successor conservator to assume the duties of the conservator.

(2) The court must hold a hearing to determine whether to remove a conservator and appoint a successor on:

(a) A petition of the ward, conservator, or person interested in the welfare of the ward that contains allegations which, if true, would support a reasonable belief that removal of the conservator and appointment of a successor may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six (6) months;

(b) Communication from the ward, conservator, or person interested in the

welfare of the ward which supports a reasonable belief that removal of the conservator and appointment of a successor may be appropriate; or  
(c) Determination by the court that a hearing would be in the best interest of the ward.

(3) Notice of a petition under subsection (2)(a) must be given to the ward, the conservator, and any other person the court determines.

(4) A ward who seeks to remove the conservator and have a successor appointed has the right to choose an attorney to represent the ward in this matter. If the ward is not represented by an attorney, the court may appoint an attorney under the same conditions as in Section 93-20-406. The court may award reasonable attorney's fees to the attorney as provided in Section 93-20-118.

(5) In selecting a successor conservator, the court must follow the priorities under Section 93-20-410.

### **Termination of Conservatorship**

#### **§ 93-20-430 Termination or modification of conservatorship:**

(1) A conservatorship must be terminated when the minor becomes an adult, becomes emancipated, or dies; the termination must comply with Section 93-20-423, but a conservatorship may continue into adulthood when the court finds the ward qualifies for conservatorship as an adult under the provisions of subsections (5) and (6).

(2) A ward, the conservator, or a person interested in the welfare of the individual may petition for:

(a) Termination of the conservatorship on the ground that a basis for appointment under Section 93-20-401 does not exist or termination would be in the best interest of the ward or for other good cause; or

(b) Modification of the conservatorship on the ground that the extent of protection or assistance granted is not appropriate or for other good cause shown.

(3) The court must hold a hearing to determine whether termination or modification of a conservatorship is appropriate on:

(a) A petition that contains allegations which, if true, would support a reasonable belief that termination or modification of the conservatorship may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within

the preceding six (6) months;

(b) A communication from the ward, conservator, or person interested in the welfare of the ward which supports a reasonable belief that termination or modification of the conservatorship may be appropriate, including because the functional needs of the ward or supports or services available to the ward have changed;

(c) A report from a guardian or conservator which indicates that termination or modification may be appropriate because the functional needs or supports or services available to the ward have changed or other less restrictive alternative is available; or

(d) A determination by the court that a hearing would be in the best interest of the ward.

(4) Notice of a petition under this section must be given to the ward, the conservator, and any other person the court determines.

(5) On presentation of prima facie evidence for termination of a conservatorship, the court must order termination unless it is proven that a basis for appointment of a conservator under Section 93-20-401 exists.

(6) The court must modify the powers granted to a conservator if the powers are excessive or inadequate due to a change in the abilities or limitations of the ward, the ward's supports, or other circumstances.

(7) Unless the court otherwise orders for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the ward which apply to a petition for conservatorship.

(8) A ward who seeks to terminate or modify the terms of the conservatorship has the right to choose an attorney to represent the ward in this matter. If the ward is not represented by an attorney, the court may appoint an attorney under the same conditions as in Section 93-20-406. The court may award reasonable attorney's fees to the attorney as provided in Section 93-20-118.

(9) On termination of a conservatorship other than by reason of the death of the ward, property of the conservatorship estate passes to the ward. The order of termination must direct the conservator to file a final report and petition for discharge on approval by the court of the final report.

(10) If a ward dies testate, the conservator must deliver the will to the named representative and certify that delivery to the court. If the ward dies intestate, Section 91-7-68 governs.

**APPENDIX**

**TO**

**CHAPTER 24**

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**CHAPTER 24**

**CONSERVATORS**

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## **CHAPTER 24**

### **CONSERVATORS**

#### **Authority of Chancery Court**

Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution. It is not competent for the Legislature to abate the said powers and duties or for the said court to omit or neglect them. It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non compos mentis. The court will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. *Union Chevrolet Co. v. Arrington*, 138 So. 593, 595 (Miss. 1932).

#### **Difference Between a Guardian and Conservator**

Initially, it is appropriate to distinguish guardianships from conservatorships. Guardians may be appointed for minors; incompetent adults; a person of unsound mind; alcoholics or drug addicts; convicts in the penitentiary; persons in the armed forces or merchant seamen reported as missing; or for veterans; or minor wards of a veteran. The guardian is the legally recognized custodian of the person or property of another with prescribed fiduciary duties and responsibilities under court authority and direction. A ward under guardianship is under a legal disability or is adjudged incompetent. In recent decades there has been an increased number of older adults in our society who possess assets in need of protective services provided through guardianships. But modification of laws have broadened the definition of persons for whom assistance can be afforded by the courts, and such statutes do not restrict such protection only to the adult incompetent or insane. Noting that trend in our society, the Mississippi Legislature incorporated into law in 1962 the conservatorship procedure for persons who, by reason of advanced age, physical incapacity, or mental weakness, were incapable of managing their own estates. Thus the Legislature provided a new procedure through conservatorship for supervision of estates of older adults with physical incapacity or mental weakness, without the stigma of legally

declaring the person non compos mentis. This additional procedure was intended to encompass a broader class of people than just the incompetent. Therefore, the distinguishing feature of conservatorship from guardianships lies in part in the lack of necessity of an incompetency determination or the existence of a legal disability for its initiation. After establishment of such protective procedures, the duties, responsibilities and powers of a guardian or conservator are the same. However, the status of the ward in each arrangement is different. *Harvey v. Meador*, 459 So. 2d 288, 291-92 (Miss. 1984).

### **Venue & Grounds for Appointment of Conservator**

#### **§ 93-13-251    Grounds to appoint; powers:**

If a person is incapable of managing his own estate by reason of  
    advanced age,  
    physical incapacity or  
    mental weakness, or  
    because the person is missing or outside of the United States and unable to  
        return,  
the chancery court of the county wherein the person resides or,  
in the case of a missing or absent person, the chancery court of the county where  
    the person most recently resided,  
upon the petition of the person or of one or more of his friends or relatives, may  
appoint a conservator to have charge and management of the property of the  
person and, if the court deems it advisable, also to have charge and custody of the  
person subject to the direction of the appointing court.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

Pursuant to Section 93-13-251, the appropriate chancery court may appoint a conservator over the estate and . . . over the person of one who, by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate. A determination of legal incompetence or legal disability is unnecessary to establish a conservatorship. In determining the need for a conservatorship, a “management competency test” is applied by considering the following: “ability to manage, or improvident disposition, or dissipation of property, or susceptibility to influence or deception by others, or other similar factors.” *In re Conservatorship of Hester*, 989 So. 2d 986, 989 (Miss. Ct. App. 2008).

We note at the outset that our laws concerning conservatorships give no preference to an individual's next-of-kin to act as conservator.

Furthermore, the chancery court determined that it would be in [ward's] best interest if a non-relative served as conservator after hearing testimony regarding the contentious relationship between [petitioners]. Given these facts, the chancery court did not err in appointing [a non-relative] to serve as conservator. *Salter v. Johnston*, 98 So. 3d 1130, 1133 (Miss. Ct. App. 2012) (citations omitted).

### **Hearing**

#### **§ 93-13-253 Hearing; notice:**

Upon the filing of such petition, the clerk of the court shall set a time and place for hearing and shall cause not less than five (5) days' notice thereof to be given to the person for whom the conservator is to be appointed, except that the court may, for good cause shown, direct that a shorter notice be given. Such notice shall also be given to the husband or the wife, or a descendant or an ascendant, or next of kin of the person for whom the conservator is to be appointed, provided the person to whom notice is given is a resident of Mississippi, except where such person is himself the petitioner, it being the intention of the legislature to require personal service on the person for whom the conservator is to be appointed and one relative. If said person is entitled to any benefit, estate or income paid or payable by or through the Veterans' Administration of the United States Government, such administration shall also be given such notice. Notice may be by personal service by the sheriff as in service of other process but nothing herein shall be construed to prevent competent persons from accepting notice in person from the clerk or his deputy.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

This Court has found that Miss. Code Ann. § 93-13-253 requires notice to someone other than the petitioner. . . . In the case sub judice, King apparently gave notice to only Charles, who was the person for whom the conservator was to be appointed. There is no evidence of any other relative being noticed. Pursuant to *Butler*, we find that King's claim that she, as petitioner, satisfied the requirement of sending notice to next of kin must fail. Furthermore, this finding is consistent with the language "it being the intention of the legislature to require personal service on the person for whom the conservator is to be appointed and one relative" which indicates that at least three people - the petitioner, the person for whom the conservator is to be appointed, and one relative - will have knowledge of the proceeding. *Smith v. King*, 942 So. 2d 1290, 1292 (Miss. 2006) (citations omitted).

**Whether to Appoint a Conservator**

**§ 93-13-255 Conduct of hearing:**

The chancery court shall conduct a hearing to determine whether a conservator is needed for the person or the estate of the person. Before such hearing, the court may, in its discretion, appoint a guardian ad litem to look after the interest of the person in question, which guardian ad litem shall be present at the hearing and present the interests of the persons for whose property or person a conservator is to be appointed.

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.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

A conservator for the management of property may be appointed by the chancery court of the county of the residence of any person who by reason of advanced age, physical incapacity, or mental weakness is incapable of managing his own estate. Additionally, if the court deems it advisable, the conservator may have charge and custody of the person as well as the property. To make the determination of need for such an appointment, 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) reputable physicians. The physicians must be authorized to practice medicine in this state and shall have had at least three years actual practice and made a personal physical and mental examination of the party. The statute specifies that a conservator of the estate may be appointed by reason of

- (1) advanced age,
- (2) physical incapacity, or
- (3) mental weakness,

any of which three factors have rendered the person incapable of managing his own estate. ***Harvey v. Meador*, 459 So. 2d 288, 291-92 (Miss. 1984).**

In absence of a statutory definition of these three conditions, this Court first addresses the interpretation of the legal standard to be applied. . . . Thus the question presented to this Court is the appropriate legal standard to be applied in determining the criteria for appointment of a conservator, a question not previously addressed as applied to the conservatorship statute. At the outset it should be noted that the standard with which we are concerned is a legal judgment to be made by the trier of fact. . . . [C]ourts interpreting the various state statutes on this issue have recognized that a firm definition of the grounds named within a statute is difficult to enunciate. Rather, the courts generally have avoided prescribing the degree of acumen necessary to manage property, but left that determination to a factual analysis of the particular case based upon clear and convincing evidence. Regarding advanced age that renders a person incapable of property management, this Court is of the opinion that mere advanced age alone is insufficient. Advanced age will naturally bring about decrease in physical prowess and mental efficiency. However, advanced age which renders an inability to manage property or which advanced age exhibits a serious degree of deterioration is contemplated by the statute. The fact that physical incapacity exists is not in and of itself sufficient justification for the court taking jurisdiction of property involuntarily. . . . Mental weakness, as opposed to the more strict application of mental incompetency, is another statutory standard which also employs some vagueness. Mere lack of good business judgment, not amounting to some degree of wasted or dissipated property, is not a sufficient standard. Mental weakness which renders the subject incapable of understanding and acting within discretion in the ordinary affairs of life is sufficient. This Court adopts a management competency test as the standard to be applied under the conservatorship statute. 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
- other similar factors.

***Harvey v. Meador*, 459 So. 2d 288, 291-92 (Miss. 1984).**

**§ 93-13-257 Payment of costs:**

If the petition is sustained, the costs shall be paid out of the estate of the person for whom a conservator is requested, but if the petition be not sustained, the costs shall be paid by the party requesting the appointment of the conservator.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

[Section] 93-13-257 provides for attorneys fees to be awarded as part of the costs of establishing a conservatorship. ***Matter of Conservatorship of Mathews***, 633 So. 2d 1038, 1041 (Miss. 1994).

### **Responsibilities of a Conservator**

#### **§ 93-13-259 General functions of conservator:**

Should the court appoint the conservator of the property or person or property and person of the subject party, the said conservator shall have the same duties, powers and responsibilities as a guardian of a minor, and all laws relative to the guardianship of a minor shall be applicable to a conservator.

***See §§ 93-13-39 to -57 Guardian responsibilities.***

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

A conservator stands in the position of a trustee, has a fiduciary relationship with the ward and is charged with a duty of loyalty toward the ward. ***Bryan v. Holzer***, 589 So. 2d 648, 657 (Miss. 1991).

Co-Conservator Stewart assigns error in the Chancery Court's award to her of attorneys fees incident to the establishment of the conservatorship. . . . Stewart claims that the fee allowance is substantially inadequate. . . . Having in mind the broad discretion vested in the Chancery Court in determining the amount of attorney's fees to award as part of the costs of establishing a conservatorship, we can only affirm. ***In re Conservatorship of Stallings***, 523 So. 2d 49, 54 (Miss. 1988).

#### **§ 93-13-67 Annual accounts:**

(1) Except as herein provided, and as provided in Section 93-13-7, or 93-13-37 and 93-13-38, every guardian shall, at least once in each year, and oftener if required, exhibit his account, showing the receipts of money on account of his ward, and showing the annual product of the estate under his management, and the sale or other disposition thereof, and showing also each item of his expenditure in the maintenance and education of his ward and in the preservation and management of his estate, supported by legal vouchers. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the Department of Finance and Administration of the State of Mississippi or of the comptroller of the currency of the United States and such



account, or the petition for the approval of same, shall contain a statement under oath by an officer of said bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company; the court on its own motion or on the motion of any interested party may require that the vouchers be produced and inspected at any hearing of any objections to the annual account. The accounts shall be examined, approved, and allowed by the court in the same way that the accounts of executors and administrators are examined, approved, and allowed. Compliance with the duties required, in this section, of guardian shall be enforced by the same means and in the same manner as is provided in respect to the accounts of executors and administrators.

(a) However, when the funds and personal property of the ward do not exceed the sum or value of Three Thousand Dollars (\$3,000.00) and there is no prospect of further receipt to come into the hands of the guardian other than interest thereon, or in guardianships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by the Department of Human Services for the benefit of the ward, the chancery court or chancellor in vacation, may, for good cause shown, in his discretion and upon being satisfied it is to the best interest and welfare of the ward, authorize the guardian to dispense with further such annual accounts, except such as may be a final account. Furthermore, the chancery court or chancellor in vacation may dispense with annual accounts if the ward's assets consist solely of funds on deposit at any banking corporation, building and loan association or savings and loan association in this state; have been so deposited under order of the court to remain until otherwise ordered; are fully insured; and a certified copy of the order to deposit, properly receipted, furnished the depository. If the court, or chancellor in vacation, authorizes the discontinuance of annual accounts, the guardian may, without further order of the court, from time to time pay the court costs and bond premiums owing by the estate or him as guardian, and, as well, he may likewise pay emergency obligations as he may have been empowered and allowed to do by necessity except for this section; but, he shall not pay from guardianship funds any other sums without further order of such court or chancellor without having first obtained order of the court or chancellor to do so. If emergency expenditure is needed for the immediate and necessary welfare of the ward, it shall at once be reported to the court, or chancellor in vacation, for approval. Furthermore, the court on its own motion or on the motion of any interested party may require the resumption and continuance of annual

accounts.

(b) At the time of any annual account, the court, or a judge thereof in vacation, in its discretion, may allow to the guardian a minimum commission of One Hundred Dollars (\$100.00) per annum for its services, anything in the statutes of this state to the contrary notwithstanding.

(2) If the ward was a minor and the guardianship terminates by any means upon the ward obtaining majority, if a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

Mississippi Code Annotated Section 93-13-67 does require a conservator to file an annual accounting, and the failure to file such annual accountings is a breach of the conservator's duties. However, neither the statute nor case law indicates that the failure to file accountings is fatal to the approval of a final accounting. In *Chambers*, the Mississippi Supreme Court held that the failure to file annual accountings impacted only the amount of fees payable to the executor and attorneys. ***In re Appointment of a Conservator for Vinson*, 972 So. 2d 694, 701 (Miss. Ct. App. 2007) (citations omitted).**

A minor under guardianship is a ward of the Chancery Court. All receipts and disbursements of his estate are required to be under the authority and direction of the Chancery Court or the Chancellor in vacation. The expenses for the maintenance and support of the ward cannot be proved in any other way. The object of the law is to guard against dishonesty and mismanagement of the estate by the guardian. The result is that the court erred in permitting the guardian to prove in the manner adopted by him his expenditures in the maintenance and support of the ward. The law does not leave the amount of the expenditures by the guardian for the maintenance, support and education to his discretion. "The sum must be fixed by the court." If the guardian contracts therefor without the sanction of the Chancery Court or Chancellor, the liability therefor is personal to him, and he cannot be allowed for it in his accounts for the ward. The guardian has no power to bind the estate of his ward without the sanction of the Chancery Court or the Chancellor. . . . ***Welch v. Childers*, 195 Miss. 415, 15 So. 2d 690, 691 (1943).**

### Other Conservator Statutes

#### **§ 93-13-261 Limits on person protected:**

So long as there is a duly appointed conservator, the person whose property or person is in the charge of such conservator shall be limited in his or her contractual powers and contractual obligations and conveyance powers to the same extent as a minor.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

Once a person becomes a ward of a conservatorship, he has the same legal disabilities as a minor with respect to the power to contract or convey property. A minor may not convey land except through a court order. Neither may a person under a conservatorship. Saunders never sought approval of the court for the conveyance of Thomas' land to herself, even after being told by counsel that she would need to do so. The deeds were void. *In re Estate of Thomas*, 853 So. 2d 134, 135-36 (Miss. Ct. App. 2003).

#### **§ 93-13-263 Support and maintenance of dependents:**

If there be any persons dependent upon the person for whom the conservator has been appointed, the court shall provide for their support and maintenance from the assets of said estate and the conservator shall be directed to make the necessary support and maintenance available from the assets of said estate.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

#### **§ 93-13-265 Restoration:**

When any person for whom a conservator has been appointed, as set out above, is afterwards restored in mind or body, the procedure for his restoration shall be on petition for appropriate hearing by the court and decree thereof.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

#### **§ 93-13-267 Resignation or discharge:**

A conservator may resign or be discharged in the same manner as a guardian of a minor and may also be discharged by the appointing court when it appears that the conservatorship is no longer necessary.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

***Selected Statutes Authorizing Guardianship Based on Mental Status***

***Person in Need of Mental Treatment***

**§ 93-13-111    Guardians of person and/or estate:**

The chancellor may appoint guardians of the person and estate, or either, of persons found to be in need of mental treatment as defined in Section 41-21-61 et seq. and incapable of taking care of his person and property, upon the motion of the chancellor or clerk of the chancery court, or upon the application of relatives or friends of such persons or upon the application of any other interested party. Such proceeding may be instituted by any relative or friend of such person or any other interested party by the filing of a sworn petition in the chancery court of the county of the residence of such person, setting forth that such person is in need of mental treatment and incapable of taking care of his person and estate, or either. Upon the filing of such petition, the chancellor of said court shall, by order, fix the day, time and place for the hearing thereof, either in termtime or in vacation, and the person who is alleged to be in need of mental treatment and incapable of taking care of his person or property shall be summoned to be and appear before said court at the time and place fixed, which said summons shall be served upon such person not less than five (5) days prior to the date fixed for such hearing. At such hearing all interested parties may appear and present evidence as to the truth and correctness of the allegations of the said petition. If the chancellor should find from the evidence that such person is in need of mental treatment and incapable of taking care of his estate and person, or either, the chancellor shall appoint a guardian of such person's estate and person, or either, as the case may be. In such cases, the costs and expenses of the proceedings shall be paid out of the estate of such person if a guardian is appointed. If a guardian is appointed and such person has no estate, or if no guardian is appointed, then such costs and expenses shall be paid by the person instituting the proceedings.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

***Incompetent Adult***

**§ 93-13-121    Incompetent resident adults, guardian appointed:**

In any case where a guardian has been appointed for an adult person by a court of competent jurisdiction of any state, and the adult thereafter, at the time of filing the petition provided for in this section, is a resident of this state and is incompetent to manage his or her estate, the chancery court of the county of the

domicile of the adult shall have jurisdiction and authority to appoint a guardian for the incompetent adult upon the conditions specified in this section; however, infirmities of old age shall not be considered elements of infirmities. The petition for the appointment of a guardian under the provisions of this section shall be filed by the incompetent person or his guardian in the office of the clerk of the chancery court in the county of the residence of the incompetent person and process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section. Upon the return day of the process, the chancellor, if in vacation, or the court, if in termtime, shall cause the applicant to appear in person and then and there examine the applicant and all interested parties, and if, after the examination, the chancellor in vacation or the court in termtime is of the opinion that the applicant is incompetent to manage his or her estate, then it shall be the duty of the court to appoint a guardian of the estate of the applicant; however, in no instance shall the court have authority to appoint a guardian under the provisions of this section unless it examines the applicant in person and finds after the examination that the applicant is incompetent to manage his or her estate. A guardian appointed under the provisions of this section shall be required to make and file annual accounts of his acts and doings as in case of guardians for persons with mental illness.

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

Section 93-13-121 allows for the appointment of a guardian when the chancellor is satisfied “that the applicant is incompetent to manage his or her estate.” But the petition for appointment of a guardian under section 93-13-121 must abide by the provisions of section 93-13-281. Section 93-13-281 generally provides that “[i]n all proceedings involving a ward the proceedings shall join as defendants two of his adult kin within the third degree. When such petition shall be filed, the clerk shall issue process.” *In re Guardianship of Estate of Lewis*, 45 So. 3d 313, 317 (Miss. Ct. App. 2010).

Moreover, the establishment of a guardianship requires a showing of incompetence that is not required to establish a conservatorship. *Wilson v. Nance*, 4 So. 3d 336, 342 (Miss. 2009) (citations omitted).

### **Person of Unsound Mind**

#### **§ 93-13-125 Certain mentally incapable residents, appointment:**

The chancery court of any county in which may be situated the property or any part thereof, or debt due to, or right of action of any citizens of this state who have not been adjudged to be of unsound mind, or may have been so adjudged in

proceedings which did not fully comply with the law in effect at the time of such adjudication, may appoint guardians of the estates of such persons, provided such persons:

- (1) have been continuously confined in a mental hospital operated by the State of Mississippi or by the United States government within the State of Mississippi for a period of more than one year and are still so confined,
- (2) are of unsound mind,
- (3) are mentally incapable of taking care of their estates, and
- (4) are incapable of responding to process.

Such appointment may be made upon the sworn petition of a relative or friend of such person or upon the petition of any other interested party and if there is attached to such petition a certificate of the director of the hospital in which such person is confined showing the existence of the conditions hereinabove prescribed, no process upon such person or further proof of incompetency shall be required. If at any time it be made to appear to the satisfaction of the court that such person has been restored to sanity, such guardianship may be terminated and ended as now provided by law.

***See § 93-13-123 Nonresidents of unsound mind, appointment.***

***See 2019 Miss. Laws S.B. 2828 (effective January 1, 2020).***

## **CHAPTER 25**

### **ADVERSE POSSESSION**

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## **CHAPTER 25**

### **ADVERSE POSSESSION**

#### **§ 15-1-13      Adverse possession; exception:**

(1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.

(2) For claims of adverse possession not matured as of July 1, 1998, the provisions of subsection (1) shall not apply to a landowner upon whose property a fence or driveway has been built who files with the chancery clerk within the ten (10) years required by this section a written notice that such fence or driveway is built without the permission of the landowner. Failure to file such notice shall not create any inference that property has been adversely possessed. The notice shall be filed in the land records by the chancery clerk and shall describe the property where said fence or driveway is constructed.

#### **Elements of Adverse Possession**

We apply a six-part test for determining whether adverse possession has occurred: “for possession to be adverse it must be

- (1) under claim of ownership;
- (2) actual or hostile;
- (3) open, notorious, and visible;
- (4) continuous and uninterrupted for a period of ten years;
- (5) exclusive; and
- (6) peaceful.”

The burden was on [landowner] to prove each element by clear and convincing evidence. *Powell v. Meyer*, 203 So. 3d 648, 652 (Miss. Ct. App. 2016).

The claimant must prove that his possession or occupancy of the property was:

- (1) under claim of ownership;
- (2) actual or hostile;
- (3) open, notorious, and visible;
- (4) continuous and uninterrupted for a period of ten years;
- (5) exclusive; and
- (6) peaceful.

***West v. Brewer*, 579 So. 2d 1261, 1262 (Miss. 1991) (citations omitted).**

### **Actual or Hostile Use**

In regard to the actual or hostile element, “[t]he actual or hostile occupation of land necessary to constitute adverse possession requires a corporeal occupation, accompanied by a manifest intention to hold and continue to hold the property against the claim of all other persons, and adverse to the rights of the true owner.” Possession is hostile when the adverse possessor intends to claim title notwithstanding that the claim is made under a mistaken belief that the land is within the calls of the possessor's deed. ***Powell v. Meyer*, 203 So. 3d 648, 652 (Miss. Ct. App. 2016).**

### **Open, Notorious & Visible Use**

In regard to the open, notorious, and visible element, “[t]he mere possession of land is not sufficient to satisfy the requirement that the adverse possessor's use be open, notorious, and visible.” An adverse-possession claim will not begin “unless the landowner has actual or constructive knowledge that there is an adverse claim against his property.” ***Powell v. Meyer*, 203 So. 3d 648, 652-53 (Miss. Ct. App. 2016).**

### **Continuous Use**

Powell also claims Meyer's use of the land was not continuous and uninterrupted for ten years as required by section 15-1-13(1). To reiterate, even if a party is mistaken as to the calls of his deed, “if he has occupied the land for the statutory period under the claim that it was his own and was embraced within the calls of his deed, he is entitled to recover on the ground of adverse possession.” ***Powell v. Meyer*, 203 So. 3d 648, 653 (Miss. Ct. App. 2016).**

### **Burden of Proof**

One who asserts a claim of adverse possession must establish six elements by clear and convincing evidence. ***West v. Brewer*, 579 So. 2d 1261, 1262 (Miss. 1991).**

## Issues Relevant to Adverse Possession

### Permissive Use

Mississippi cases hold that possession with the permission of the record owner can never ripen into adverse possession until there is a positive assertion of a right hostile to the record owner which is made known to him. ***Rice v. Pritchard*, 611 So. 2d 869, 872 (Miss. 1992).**

If possession is permitted by the owner, it cannot be adverse. Adverse possession is totally inconsistent with that of permissive use. ***Stringer v. Robinson*, 760 So. 2d 6, 10 (Miss. Ct. App. 1999).**

For a case explaining the computation of the ten-year time period required by the statute, see ***Meyer v. Sea Food Co.*, 101 So. 702, 703 (Miss. 1925).**

### Color of Title

Color of title, coupled with actual possession of a part of the land, constitutes constructive possession of the whole, and the adverse possession runs to the whole tract. ***Page v. O'Neal*, 42 So. 2d 391, 392 (Miss. 1949).**

Adverse possession under color of title ordinarily extends to the entire tract described, although the actual possession may have existed only as to part of it. ***Wentworth v. Forne*, 137 So. 2d 166, 168 (Miss. 1962).**

### No Color of Title

Appellant, however, has no color of title, and his title by adverse possession, if any, runs only to such part of the land as was actually held by him in possession or enclosed or otherwise actually and continuously occupied by him for the statutory period of ten years. ***Page v. O'Neal*, 42 So. 2d 391, 392 (Miss. 1949).**

### Payment of Taxes

While it is true that paying the taxes on a parcel of land is evidence of whether or not a claim of ownership exists, it is not conclusive. Payment of taxes alone will not ripen a defective possession into title. The payment of taxes is one factor as to possession and whether an adverse possessor has paid property taxes on the land in controversy is not conclusive of the claim of ownership. ***Buford v. Logue*, 832 So. 2d 594, 602 (Miss. Ct. App. 2002).**

### **Acts Necessary to Establish Adverse Possession Vary with the Land**

The principle is also accepted that both the quality and quantity of possessory acts necessary to establish a claim of adverse possession may vary with the characteristics of the land. Adverse possession of "wild" or unimproved lands may be established by evidence of acts that would be wholly insufficient in the case of improved or developed lands. The question in the end is whether the possessory acts relied upon by the would be adverse possessor are sufficient to fly his flag over the lands and to put the record title holder upon notice that the lands are held under an adverse claim of ownership. ***Johnson v. Black*, 469 So. 2d 88, 90-91 (Miss. 1985).**

### **Possession Alone Is Insufficient to Establish Adverse Possession**

This is another one of those cases based upon the misconception that possession of property is sufficient to sustain a claim of ownership by adverse possession. The claim of ownership must have existed at the beginning of the statutory period of possession and not possession with the intent to claim as soon as the statutory period has passed. Moreover, claim of title is incompatible with recognition of title in the true owner. ***Coleman v. French*, 233 So. 2d 796, 796-97 (Miss. 1970).**

### **Tacking**

The adverse possession of successive occupants in privity with each other may be combined to reach the statutory period, a concept generally known as "tacking." The chancellor obviously found that the time periods of the predecessors were tacked onto the time period of the [parties claiming adverse possession]. Mississippi law allows tacking of one adverse possession to another as long as there is privity of possession existing between the predecessor and the claimant. Privity may be established or created by conveyance, agreement, or understanding which in fact transfers possession. ***Buford v. Logue*, 832 So. 2d 594, 606 (Miss. Ct. App. 2002) (citations omitted).**

The appellee was entitled to tack his possession onto that of his predecessors in title. ***Walters v. Rogers*, 75 So. 2d 461, 462 (Miss. 1954).**

## *Adverse Possession by Certain Persons*

### *Adverse Possession by Grantor against Grantee*

We therefore hold that when a grantor of real property conveyed by warranty deed a completely and adequately described parcel of property, and confirmed that property conveyed by a plat conforming to the deed, as was done here, in order for the grantor to retain part of that property and acquire it by ten years adverse possession, he has the burden of proving beyond a reasonable doubt that the grantee had notice that the grantor was saying in effect, "Yes, I conveyed it to you, but I did not mean it. I am keeping a part." No doubt should exist. *Skelton v. Lewis*, 453 So. 2d 703, 707 (Miss. 1984).

### *Adverse Possession by a Co-Tenant*

Because of the mutuality of their interests, possession and obligations, the relationship between cotenants is confidential and fiduciary in nature. Each has a duty to sustain, or at least not to assail, the common interest, and to sustain and protect the common title. It is a relationship of trust and confidence between co-owners of property. An ouster is the wrongful dispossession or exclusion by one tenant in common of his cotenants from the common property of which they are entitled to possession. An ouster cannot be proved merely by acts which are consistent with an honest intent to acknowledge the rights of the cotenant. It does not necessarily imply an act accompanied by force. Because of the relationship between tenants in common, possession which in ordinary cases would constitute adverse possession is not sufficient where entry was made as a tenant in common. In order to establish ouster of cotenants by a tenant in common in possession, the cotenants out of possession must have notice of his adverse claim either from actual knowledge or as is sometimes vaguely expressed, by acts equivalent thereto, as by conduct so unequivocal that knowledge on the part of the cotenant out of possession must be necessarily presumed. The testimony of such knowledge by the other tenants in common must be clear and convincing. It is not enough that the possession to convey title should be apparently adverse but must be such with actual notice to the co-tenants or shown by such acts of repudiation of their claim as are equivalent to actual notice to them. *Nichols v. Gaddis & McLaurin, Inc.*, 75 So. 2d 625, 629 (Miss. 1954).

### Easement by Prescription

This Court has held that the standard burden of proof needed to establish a prescriptive easement is the same as for a claim of adverse possession of land. To acquire property by adverse possession or by prescriptive easement the claimant must show that the possession was:

- (1) open, notorious, and visible;
- (2) hostile;
- (3) under claim of ownership;
- (4) exclusive;
- (5) peaceful; and
- (6) continuous and uninterrupted for ten years.

The person claiming the possession has the burden of proving each of these elements by clear and convincing evidence. ***Biddix v. McConnell*, 911 So. 2d 468, 475 (Miss. 2005) (citations omitted).**

[A] prescriptive right to an easement is equivalent to a deed conveying such right, and that proper acquisition of the right is presumed from adverse and continuous enjoyment of a right-of-way for the ten year statutory period. If an easement by prescription is equivalent to the conveyance of such right by deed, then it follows that such an easement will run with the land. ***Logan v. McGee*, 320 So. 2d 792, 793 (Miss. 1975) (citations omitted).**

**CHAPTER 26**

**ACTIONS TO QUIET AND CONFIRM TITLE**

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## **CHAPTER 26**

### **ACTIONS TO QUIET AND CONFIRM TITLE**

#### **General Statutes**

##### **§ 11-17-29      Application to other sources of title; decree and preclusive effect:**

The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof, may file a bill in the chancery court to have his title confirmed and quieted. The law for notice, process, proceedings, and practice, as provided for confirming and quieting tax titles shall apply, no matter by what tenure the complainant may hold. Unknown and nonresident parties may be made defendants as they are made defendants to proceedings to confirm tax titles. If on the final hearing of any such suit, the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant.

As to section 11-17-29, APF contends that the statute requires Smith to continually “update and check the land records after filing the lawsuit.” Section 11-17-29 simply states that an action to confirm and quiet title is conclusive evidence of title “as determined from the date of the decree as against all parties defendant.” Nothing in the statute places a burden on the plaintiff to continually research other claims to the property until the date of the final decree. . . . We decline to go beyond the simple language of the statute; therefore, we find no error in the chancery court's finding that Smith was not required to continually research and check the land records after the filing of his suit to quiet and confirm title. *American Pub. Fin., Inc. v. Smith*, 45 So. 3d 307, 313 (Miss. Ct. App. 2010).

In suits to confirm title, or to remove clouds, it is the duty of claimant to deraign title. To have title confirmed, the claimant must either be in possession or the property must be unoccupied. To remove a cloud on title, the claimant may properly bring suit against someone in possession. *Dixon v. Parker*, 831 So. 2d 1202, 1204 (Miss. Ct. App. 2002).

##### **§ 11-17-1      Confirming and quieting tax title:**

Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes, when the period of redemption has expired, may proceed by sworn complaint in the chancery court to have such title confirmed and quieted, and shall set forth in his complaint his claim under the tax sale, and the names and places of

residence of all persons interested in the land, so far as known to plaintiff, or as he can ascertain by diligent inquiry.

Where the names of persons in interest or their places of residence are unknown and have not been ascertained by diligent inquiry, the complaint shall so state. Where the name and places of residence of persons in interest are given they shall be made parties defendant.

Specifically, the chancery court found that Smith had complied with the requirement of Mississippi Code Annotated section 11-17-1, which requires that a complaint acknowledge every party with an interest in the subject property. *American Pub. Fin., Inc. v. Smith*, 45 So. 3d 307, 309 (Miss. Ct. App. 2010).

Where the complaint shall show that the persons interested are unknown to plaintiff and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed:

To all persons having or claiming any interest in the following described land, sold for taxes on (inserting date of sale), viz: (Describing land as described in the tax collector's conveyance).

The notice shall state the nature of the suit and it shall be published in accordance with the requirements of the Mississippi Rules of Civil Procedure. It shall be lawful in all cases to set forth in the complaint the names of all persons interested, as far as ascertained, and make them parties and also to join and make defendants "all persons having or claiming any legal or equitable interest in" the lands described in the complaint.

Such suits shall be proceeded with as other cases; and if the complaints be taken for confessed, or if it appear that plaintiff is entitled to a judgment, it shall be rendered, confirming the tax title against all persons claiming to hold the land by title existing at the time of the sale for taxes.

Such judgment shall vest in the plaintiff, without any conveyance by a master or commissioner, a good and sufficient title to said land; and such judgment shall, in all courts of this state, be held as conclusive evidence that the title to said land was vested in the plaintiff, as against all persons claiming the same under the title existing prior to the sale for taxes.

***See § 15-1-15 Actual occupation under tax title.***

**§ 11-17-31      Clearing titles, generally:**

When a person not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right of title thereto, which may cast doubt, or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not. Any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner. Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes may proceed hereunder in like manner and may include, as a defendant, any political subdivision of the state, having or asserting any evidence or claim of title adverse to such tax title.

**§ 11-17-35      Proving title; final decrees:**

In bills to confirm title to real estate, and to cancel and remove clouds therefrom, the complainant must set forth in plain and concise language the deraignment of his title. If title has passed out of the sovereign more than seventy-five (75) years prior to the filing of the bill, then the deraignment shall be sufficient if it show title out of the sovereign and a deraignment of title for not less than sixty (60) years prior to the filing of the bill. A mere statement therein that complainant is the real owner of the land shall be insufficient, unless good and valid reason be given why he does not deraign his title. In all such cases, final decrees in the complainant's favor shall be recorded in the record of deeds, and shall be indexed as if a conveyance of the land from the defendant or each of them, if more than one, to the complainant or complainants, if more than one.

**§ 11-17-21      Rules of procedure; default judgments:**

All proceedings in said suit shall be governed by the Mississippi Rules of Civil Procedure. However, no default judgment shall be entered against the defendants unless the court determines the truth of the averments after a hearing pursuant to the Mississippi Rules of Civil Procedure.

Partition actions are governed by the special procedures of Rule 81(d). For Rule 81 matters, complaints and petitions may not be taken as confessed, and no answer is required unless ordered by the court. ***Brown v. Tate*, 95 So. 3d 745, 749 (Miss. Ct. App. 2012).**

**§ 11-17-37 Remedies available:**

In suits to try title, to cancel deeds and other clouds upon title, and to confirm title to real estate, the chancery court shall have jurisdiction to decree possession and to displace possession, to decree rents and compensation for improvements and taxes. In all cases where said courts heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law.

**§ 11-17-23 Decree and effect:**

In all such proceedings the court shall find whether the sale, conveyance or lease of such real property was lawful and valid. Upon the hearing of such case, the chancery court shall enter a decree validating and confirming the complainant's title to or leasehold or other interest in such real property as against the defendants in said suit, unless it shall appear to the court and the court shall find that the title thereto or leasehold or other interest therein was not lawfully and validly acquired by virtue of the sale, conveyance or lease under which such complainant claims, in which latter case the chancery court shall enter a decree annulling and cancelling such sale, conveyance or lease, or such other decree as the court may find to be lawful, just and equitable in such case. When any sale, conveyance or lease of any such property shall be confirmed and validated under the provisions of Sections 11-17-19 to 11-17-27 by decree of the chancery court, such decree shall forever estop and preclude the defendants and all other parties from thereafter questioning the validity of the sale, conveyance or lease involved in such proceedings.

**§ 11-17-11 Review:**

Any of the parties to the suit may appeal as in other proceedings in chancery, provided any interlocutory appeal is taken within ten days after the rendition of the decree from which the appeal is desired, and provided that any final appeal is taken within sixty days from the date of the rendition of the final decree.

**Standard of Review**

This Court employs a limited standard of review on appeals from the chancery court. We will not disturb a chancellor's findings unless those findings were manifestly wrong, clearly erroneous, or if the chancellor employed an erroneous legal standard. *Scarborough v. Rollins*, 44 So. 3d 381, 385 (Miss. Ct. App. 2010) (citations omitted).

## **Land Patents**

### **§ 11-17-7      Jurisdiction over land patents:**

The court is hereby granted large discretion and far reaching powers in the matter of establishing and fixing the validity of land patents issued by the state and title conveyed thereunder, and the sound discretion of the court in deciding all such cases shall be the controlling factor in settling the issues where only state interests are involved. No decree pro confesso shall be taken against the state, but on failure of the attorney general to answer within the time required by law, the cause shall be heard on the bill and proof thereon.

### **§ 11-17-3      Confirming and quieting land patent titles:**

Any patentee, or any person, firm or corporation, claiming title or other interest in land under or through any patentee by virtue of any patent issued by the state for lands forfeited to the state for nonpayment of taxes, whether such claimant be in possession or not, or be threatened to be disturbed in his possession or not, may proceed as party plaintiff against the state, as a party defendant, by sworn complaint in the chancery court of the county where the land, or some part thereof, is situated, to have such title or interest confirmed and quieted. No deraignment of plaintiff's title in such cases shall be required.

### **§ 11-17-17      Construction:**

Sections 11-17-3 to 11-17-17 shall be liberally construed to validate and quiet title to lands heretofore passing under patent from the state and shall in no way be construed as repealing or limiting any other statutes now existing in aid of such titles under patents from the state.

### **§ 11-17-9      Decrees:**

Upon the hearing of such cases, it shall be the duty of the chancery court to enter a decree validating and perfecting the title of said land from the state of Mississippi, unless it shall appear to the court and the court shall find as a fact that the state has not acquired title to said land by virtue of said tax sale, or that the title to the said land involved in the suit was divested out of the state of Mississippi without payment of purchase price or by reason of actual fraud on the part of the patentee, or his representatives. In such cases of fraud and failure to pay purchase price, the chancery court shall enter a decree forever annulling and cancelling the said patent; but no patent heretofore issued shall be cancelled in such proceeding because of loss of the application papers to purchase said land, or because of errors or omissions or incorrect statements in said application, or other papers in

connection with the sale of said land, such matters not constituting fraud as above defined.

**§ 11-17-13 Preclusive effect:**

Any land patent and title perfected by a decree in a suit under Sections 11-17-3 to 11-17-17 shall forever estop and preclude the state and other parties from thereafter questioning the validity of the patent involved in such proceeding.

**§ 11-17-11 Review:**

Any of the parties to the suit may appeal as in other proceedings in chancery, provided any interlocutory appeal is taken within ten days after the rendition of the decree from which the appeal is desired, and provided that any final appeal is taken within sixty days from the date of the rendition of the final decree.

**Standard of Review**

This Court employs a limited standard of review on appeals from the chancery court. We will not disturb a chancellor's findings unless those findings were manifestly wrong, clearly erroneous, or if the chancellor employed an erroneous legal standard. *Scarborough v. Rollins*, 44 So. 3d 381, 385 (Miss. Ct. App. 2010) (citations omitted).

## Political Subdivisions

### **§ 11-17-19 Grants by political subdivisions; confirming:**

Any person, firm or corporation which claims title to or a leasehold or other interest in any real property, other than sixteenth section school lands or lands granted in lieu thereof, under or by virtue of a sale, conveyance or lease of such property by any county, municipality, supervisor's district, or other political subdivision of the State of Mississippi, acting either separately or jointly, may proceed by sworn complaint in the chancery court of the county in which such real property, or some part thereof, is located, to have the title to or leasehold or other interest in such real property quieted and confirmed. Such action may be brought whether or not such person, firm or corporation be in possession of such real property, or whether he or it be threatened to be disturbed in such possession or not. In such complaint, the person, firm or corporation claiming such title or leasehold or other interest shall be the party plaintiff and there shall be made defendants thereto the county, municipality or other political subdivision which sold, conveyed or leased said property, the Attorney General of the state and the district attorney of the county in which said suit is filed. In any such suit, it shall not be necessary that the plaintiff therein deraign his title to said property.

### **§ 11-17-25 Review, grants by political subdivisions:**

Any of the parties to a confirmation suit filed under the provisions of Sections 11-17-19 to 11-17-27 may appeal from the decree of the chancery court in the manner and within the time provided by law, and such appeals shall be heard as are other cases of appeals from the decrees of the chancery court.

#### **Standard of Review**

This Court employs a limited standard of review on appeals from the chancery court. We will not disturb a chancellor's findings unless those findings were manifestly wrong, clearly erroneous, or if the chancellor employed an erroneous legal standard. *Scarborough v. Rollins*, 44 So. 3d 381, 385 (Miss. Ct. App. 2010) (citations omitted).

### **Property Disputes Between Churches**

To understand the constitutional boundaries of the inquiry necessitated by this appeal, this Court's authority in adjudicating church property disputes must be described. Civil courts have the general authority to resolve the question of church property ownership. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership and control of church property can be determined conclusively. The first amendment to the United States constitution however, severely circumscribes the role that civil courts may play in resolving church property disputes. The first amendment, therefore, forbids civil courts from resolving church property disputes by inquiring into and resolving disputed issues of religious doctrine and practice. Accordingly, courts may not support the tenets of any one religion and must respect the right of all persons to choose their own course with reference to religious observance. States are free to adopt any approach to adjudicate church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith. ***Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So. 2d 200, 204-05 (Miss. 1998) (citations omitted).**

In *Church of God Pentecostal, Inc.*, this Court adopted the neutral approach in solving church property disputes. The “neutral principles of law” method relies on objective concepts of trust and property law in determining property disputes. There must be a secular examination of deeds to the church property, state statutes and existing local and general church constitutions, by-laws, canons, Books of Discipline and the like to determine whether any basis for a trust in favor of the general church exists. This Court went on to note that if the congregation holding the property is a subordinate member of a larger organization in which there are superior ecclesiastical tribunals with the general and ultimate control over the subordinate congregations, a court must enforce the decision of the highest tribunal of the church ruling on a question of discipline. ***Shirley v. Christian Episcopal Methodist Church*, 748 So. 2d 672, 675 (Miss. 1999) (citations omitted).**



**CHAPTER 27**

**PARTITION OF REAL PROPERTY**

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## **CHAPTER 27**

### **PARTITION OF REAL PROPERTY**

#### **Partition by Agreement**

##### **§ 11-21-1      Partition by agreement and by arbitration; partition of homestead property:**

(1) Partition of land held by adult joint tenants, tenants in common, and coparceners, may be made by agreement, which shall be evidenced by a writing, signed by the parties, and containing a description of the particular part allotted to each, and recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be binding and conclusive on the parties. They may also bind themselves by written agreement to submit the partition to the arbitrament of one or more persons to be chosen by them, and to abide the partition made by the arbitrators and the articles of submission; and the written award shall be recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be final and conclusive between the parties, unless made or procured by fraud.

(2) Homestead property exempted from execution that is owned by spouses shall be subject to partition pursuant to the provisions of this section only, and not otherwise.

However, Mississippi Code Annotated section 11-21-1 states that a partition of land shall be final “unless made or procured by fraud.”  
***Dunaway v. Morgan*, 918 So. 2d 872, 876 (Miss. Ct. App. 2006).**

#### **Partition by Court Order**

#### **Venue**

##### **§ 11-21-3      Partition by decree of chancery court:**

Partition of land held by joint tenants, tenants in common, or coparceners, having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five (5), may be made by judgment of the chancery court of that county in which the lands or some part thereof, are situated; or, if the lands be held by devise or descent, the division may be ordered by the chancery court of the county in which the will was probated or letters of administration granted, although none of the lands be in that county.

However, any person owning an indefeasible fee simple title to an undivided interest in land may procure a partition of said land and have the interest of such person set apart in fee simple free from the claims of life or other tenants, remaindermen or reversioners, provided the life or other tenants, and other known living persons having an interest in the lands, are made defendants if they do not join in the proceeding as plaintiffs.

Partition is a statutory right in Mississippi. . . . With one statutory exception, cotenants have an absolute right to partition of property. Possession, or the right of possession, in the tenants in common gives an absolute and unconditional right to partition however inconvenient it may be to make. The statutory exception prevents a forced partition of the homestead property of a surviving spouse who is using and occupying the property. *Mosby v. Mosby*, 962 So. 2d 119, 121-22 (Miss. Ct. App. 2007) (citations omitted).

### **Parties to the Partition**

#### **§ 11-21-5      Parties to proceedings for partition:**

Any of the parties in interest, whether infants or adults, may institute proceedings for the partition of lands or for a partition sale thereof, by judgment of court as herein provided. All persons in interest must be made parties except (a) in cases where a part of the freehold is owned by persons owning a life estate therein or a life tenancy therein subject to the rights of remaindermen or reversioners, then, in such event, it shall only be necessary that the person or persons owning or claiming a life estate or life tenancy therein be made parties; and (b) in cases where the partition is for the surface of the land only, it shall not be necessary that persons owning divided or undivided interests in the minerals in the land be made parties unless such persons also have an interest in the surface of the land. An infant, or person of unsound mind, may sue by next friend as in other cases; but if the infant, or non compos mentis, have a guardian, the guardian must appear as next friend, unless good cause to the contrary be shown. Where an infant or non compos is made a party defendant, the guardian, if any, of such infant or non compos shall also be made a party, whether the infant or non compos be resident or nonresident and whether the guardian be a resident or a nonresident; and the said guardian may appear and answer the complaint. The summons to the defendants, including the guardian aforesaid, shall be made pursuant to the Mississippi Rules of Civil Procedure. The word "guardian," where used in this section, shall be held to apply also to all persons who, under the laws of any other state or country, stand in that relation whether known as curator, tutor, committee or conservator, or by whatever other name or title such person may be known.

**§ 11-21-7 Proceedings same as in other cases; when ex parte petitions may be heard:**

Except as otherwise provided herein, the proceedings for partition shall be instituted and conducted as other suits in chancery; and all ex parte petitions may be heard and determined by the chancellor in term time or in vacation.

**§ 11-21-9 Controverted title and all equities disposed of:**

If the title of the plaintiffs seeking partition or sale of land for a division shall be controverted, it shall not be necessary for the court to dismiss the complaint, but the question of title shall be tried and determined in the suit and the court shall have power to determine all questions of title, and to remove all clouds upon the title, if any, of the lands whereof partition is sought and to apportion encumbrances, if partition be made of land encumbered and it be deemed proper to do so. The court may adjust the equities between and determine all claims of the several cotenants, as well as the equities and claims of encumbrancers.

Mississippi Code Annotated section 11-21-9 allows the chancellor to determine all questions concerning title. Mississippi's statutes "in reference to the partition of real estate . . . give the right of partition by decree of the chancery court upon the application of any tenant in common or joint tenant." *Coleman v. Coleman*, 196 So. 3d 1050, 1052 (Miss. Ct. App.), *cert. denied*, 202 So. 3d 614 (Miss. 2016).

## Partition by Sale

### **§ 11-21-11 Court may order sale in first instance:**

If, upon hearing, the court be of the opinion that a sale of the lands, or any part thereof, will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made, it shall order a sale of the lands, or such part thereof as may be deemed proper, and a division of the proceeds among the cotenants according to their respective interests. The court may appoint a master to make the sale, and may make all proper orders to protect the rights of the parties interested. The court may order the sale of a part of the land and the partition in kind of the residue.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the land for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

Mississippi Code Annotated section 11-21-11 permits a judicial partition by sale only where: “[A] sale of the lands, or any part thereof, will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made.” At the hearing to confirm the judicial sale, the Quinns asserted that Jessie had to illustrate that the omission of his name as a respondent resulted in prejudice. The trial court afforded him with an opportunity to testify as to any prejudice that he may have incurred. Jessie declined to testify but asserted that he was prejudiced by the sale since he preferred a partition in kind. Moreover, the record shows that Jessie lived on the property, and that the sale would directly affect the location of his patio and other fixtures. Since the disposition of the land directly impacted Jessie's rights to the subject property, the judicial sale should have been vacated. . . . The supreme court has noted that “parties whose rights are to be affected are entitled to be heard. . . . Furthermore, they must be notified in a manner and at a time that is meaningful.” Jessie was not properly noticed or added as a respondent until a year after the matter was initiated. . . . Since Jessie was not notified of the judicial sale and he did not participate in the agreement for sale, we reverse and remand the judgment granting the partition sale to allow Jessie to proceed to facilitate an in-kind partition of his interest in the property. *Morton v. Quinn*, 206 So. 3d 1265, 1267-68 (Miss. Ct. App. 2016).

[In] Section 11-21-11, we find that the following two-prong inquiry should be conducted as to the propriety of a partition sale:

A partition sale can be had if it will (1) better promote the interest of all parties than a partition in kind or (2) if the court be satisfied that an equal division of the land cannot be made. Affirmative proof of at least one of these statutory requirements must affirmatively appear in the record in order for the court to decree a partition by sale. Further, the chancellor has no authority to decree a sale unless the statutory requisites are clearly met and a substantial reason exists for choosing partition by sale over partition in kind. The joint owner seeking a partition sale has the burden of proving that the land is not susceptible to partition in kind and that a sale is the only feasible method of division.

This Court reviews the appropriateness of a partition by sale on a case-by-case basis. . . . After A.J. and Martha filed a complaint to have the land partitioned, the chancellor ordered a commissioner appointed and the property to be sold at a public sale after notice to Frank, A.J., and Martha, and thereafter, the proceeds were to be distributed equally. . . . It should be noted that, Frank's claim notwithstanding, the issue before the chancellor was not whether the testator's intent was being carried out, but the issue was how to separate the interests of Frank, Jacqueline, and Martha in the real property. . . . We find that the chancellor did not abuse his discretion to take whatever action was necessary to bring this action to a close. ***Polk v. Jones*, 20 So. 3d 710, 716-17 (Miss. Ct. App. 2009).**

The instant case involves a partition by sale. These judicial sales are conducted pursuant to section 11-21-11, which provides that if the court be of the opinion that a sale of the lands . . . will better promote the interest of all parties than a partition in kind . . . it shall order a sale of the lands [and] [t]he court may appoint a master to make the sale. . . . In the case of a partition in kind, section 11-21-15 mandates that three masters or commissioners be appointed to accomplish the partition, whereas only one master is required by section 11-21-11 to perform the judicial sale.

***Dunaway v. Morgan*, 918 So. 2d 872, 874-75 (Miss. Ct. App. 2006) (discussing prior version of § 11-21-15).**

The only recent case which considers an “inequitably low” sale price in the context of a partition sale is *Necaise v. Ladner*, 910 So. 2d 699 (Miss. Ct. App. 2005), where this Court held that “inadequacy of price at the time of sale will not alone justify the court in setting it aside ... although such inadequacy ... in connection with unfairness, injustice or inequity in making the sale would be sufficient.” ***Dunaway v. Morgan*, 918 So. 2d 872, 874-75 (Miss. Ct. App. 2006).**

### **Publication of Sale**

The statutes pertaining to the partition of land, Mississippi Code Annotation Sections 11-21-1 to 45 fail to state any specific publication requirements when property is to be sold. According to Mississippi Code Annotated Section 11-5-93:

Every sale of real estate ordered by a decree of any court of chancery shall be made for cash, unless otherwise ordered by the court, and at such place and on such notice as may be directed in the decree; and if direction be not given, at such place and on such notice as is required in case of sales of land under execution at law.

Furthermore, Mississippi Code Annotated Section 11-5-95 states that “[a]ll property may be sold on such terms and at such time and place as the court may direct.” Neither of these statutes states with particularity any publication requirements; they merely give the chancellor discretion in determining where the sale will occur and other conduct pertaining to the sale, including publication requirements. Here the chancellor ordered notice of the sale to be published in three newspapers. As sections 11-5-93 and 11-5-95 specifically give the chancellor the authority to set the terms of the sale, including publication requirements, we cannot find any error on the chancellor's part. However, if the chancellor had not given any specific instructions as to the notice and publication requirements, then Mississippi Code Annotated Section 13-3-163 would then apply. Section 13-3-163 states that sales of land “shall be advertised by the plaintiff in a newspaper published in the county, once in each week for three (3) successive weeks, or, if no newspaper is so published, in some newspaper having a general circulation therein once in each week for three (3) successive weeks.” *Necaise v. Ladner*, 910 So. 2d 699, 702 (Miss. Ct. App. 2005).



## Partition in Kind

### § 11-21-15 Judgment appointing masters:

If the judgment is for a partition of the land, it shall state the number of shares into which the land is to be divided, and shall appoint not more than three (3) discreet freeholders, not related to the parties by consanguinity or affinity, to make partition according to the judgment. Either party may object to any master for cause, and, in case the objection is sustained, the place shall be filled by another appointment. If any vacancy occurs among the masters, the chancellor may fill the vacancy at any time by written appointment.

A partition in kind is the preferred method of partition of property under Mississippi law. The propriety of a partition sale or partition in kind is determined on a case-by-case basis. *Georgian v. Harrington*, 990 So. 2d 813, 816 (Miss. Ct. App. 2008) (citations omitted).

Section 11-21-15 governs partitions in kind, stating that if the judgment be for a partition of the land, it shall state the number of shares into which the land is to be divided, and shall appoint three (3) discreet freeholders ... to make partition according to the judgment. Thus, section 11-21-15 refers to partition of property in kind, while section 11-21-11 refers to judicial sale of the property. . . . In the case of a partition in kind, section 11-21-15 mandates that three masters or commissioners be appointed to accomplish the partition, whereas only one master is required by section 11-21-11 to perform the judicial sale. *Dunaway v. Morgan*, 918 So. 2d 872, 874-75 (Miss. Ct. App. 2006) (discussing prior version of § 11-21-15).

We further find that the appointment of the special master to conduct a partition sale is governed by Mississippi Rule of Civil Procedure 53. Pursuant to its inherent rulemaking authority stated in *Newell v. State*, 308 So. 2d 71 (Miss. 1975), the Mississippi Supreme Court adopted the Mississippi Rules of Civil Procedure which became effective on January 1, 1982. These rules govern all procedure in Mississippi circuit, chancery, and county courts. In the event of a conflict between the rules and any statute or court rule previously adopted, the “rules shall control.” Rule 53 governs masters, referees, and commissioners. The rule makes clear that appointment of masters, referees, commissioners, and other judicial assistants will be governed by the rule, and that the rule applies to, inter alia, chancery court practice. Thus, to the extent that Mississippi statutes dealing with appointment of a special master conflict with Rule 53, the rule will control. Rule 53 contains no reference to an oath as required by section 11-21-17. The rule is, however, comprehensive, containing

sections on appointment and compensation of a master, qualifications of the master, when an issue may be referred to a master, powers of a master, proceedings before a master, taking of an accounting, the master's report, and requirement of a master's bond. The rule states that a court “may appoint one or more persons in each county to be masters of the court,” and an issue may be referred to a master with the written consent of the parties. The master must be an attorney, however, in the case of “judicially-ordered sales and partitions of real or personal property,” the court may appoint persons other than attorneys. The order appointing the master may fix his powers, but subject to the order “the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order.” Furthermore, the order appointing the master “shall constitute sufficient certification of his authority.” Following the master's performance of the acts required of him by the order, he shall prepare a report containing his findings of fact and conclusions of law. Upon hearing, the court may accept this report, modify it, reject it in whole or in part, or recommit the report with instructions. ***Dunaway v. Morgan*, 918 So. 2d 872, 875 (Miss. Ct. App. 2006) (discussing prior version of § 11-21-15) (citations omitted).**

Alternatively, § 11-21-11 provides that a partition sale may be ordered states “if the court be satisfied that an equal division cannot be made.” Given the configuration of the buildings and the odd shape of the property, an equal division based on acreage into two parcels of equal value cannot be made without the property line splitting one or more of the seven buildings. Fuller asserts that the property should be partited in kind based on the conclusion of the appraisers that the buildings contribute no value to the property. The buildings would contribute nothing to the overall value of the property to a potential purchaser. However, the buildings are indeed quite usable and have been utilized in Fuller's business since the property was purchased. As such, an equal division of the land by acreage without regard to the buildings as proposed by the appraisers cannot be achieved in this case. Other Mississippi cases ordering a partition by sale are fact specific and occur where, as here, it is not practical to partite in kind. *See Daughtrey v. Daughtrey*, 474 So. 2d 598 (Miss.1985) (ordering sale of marital home); *Jefcoat v. Powell*, 235 Miss. 291, 108 So. 2d 868 (1959) (ordering sale because if the property were partited in kind, former owner's widow would receive one-eighth of each of several small parcels). *See also Dunn v. BL Dev. Corp.*, 747 So. 2d 284 (Miss. Ct. App.1999) (ordering sale because of the number of fractional interests, location of the property, and shape of the property). As in these cases, the facts of this particular case determine whether the property will be divided in kind or by sale. ***Fuller v. Chimento*, 824 So. 2d 599, 603 (Miss. 2002).**

**§ 11-21-13 Partition without masters; owelty:**

If, at the hearing, it appear that the intervention of masters is unnecessary to secure an equal partition in kind, or that the same can be effected by providing owelty, and that it would best promote the interest of the parties, the court may order the partition and fix the amount to be paid by one (1) or several cotenants to another or others; or this may be done on hearing the report of the master.

**§ 11-21-17 Oath of special commissioners:**

Before the special commissioners enter upon the discharge of their duties, they shall take and subscribe an oath before some competent officer, that they will honestly, faithfully and impartially make the partition decreed, and perform the duties required of them to the best of their skill, knowledge and judgment.

First, it appears that the oath provided in section 11-21-17 is required when three commissioners are appointed to divide the property in kind, rather than when a special master is appointed to conduct a judicial sale. Second, appointment of special masters is now governed by Rule 53 of the Mississippi Rules of Civil Procedure, which contains no requirement that the special master subscribe an oath. Accordingly, we affirm the judgment of the chancellor approving the report of the special master. *Dunaway v. Morgan*, 918 So. 2d 872, 874 (Miss. Ct. App. 2006).

It appears that the oath of section 11-21-17 must be read in context with section 11-21-15, because section 11-21-17 refers to commissioners in the plural and their oath to “make the partition decreed.” For this reason, section 11-21-17 appears to have no application or relation to section 11-21-11, which provides for judicial sale. We determine, therefore, that it was unnecessary for the special master appointed pursuant to section 11-21-11 to take the oath prescribed in section 11-21-17 which applies only to the three masters appointed to conduct a partition in kind pursuant to section 11-21-15. *Dunaway v. Morgan*, 918 So. 2d 872, 874 (Miss. Ct. App. 2006) (discussing prior version of § 11-21-15).

**§ 11-21-19 Survey made and division into shares:**

The special commissioners shall, if deemed advisable, cause a survey to be made of the lands to be divided, in their presence, and shall divide the same into the number of parts or shares directed in the order containing their appointment, each part or share to contain one or more lots, as the special commissioners may think proper, having regard to the situation, quantity, quality and advantages of each part or share, so that they may be equal in value as nearly as may be, or according

to the respective rights of the parties. If the bounds or title of any tract be controverted and the controverted part be valuable, the special commissioners shall separate it from the part not controverted, and make a partition of the tract or tracts in such manner that a portion of the controverted part may be allotted to each share, as well as a portion of the part not controverted. The special commissioners, or any one of them, previous to the survey, if any, shall administer an oath to the surveyors and chain bearers that they will honestly and impartially perform their respective duties.

**§ 11-21-21 Allotment of shares by ballot:**

The special commissioners, if the same have not been done by the surveyor, shall make a plat of land to be divided; shall make true field notes, specifying the metes and bounds of the several shares, and of each parcel of each share which contains more than one parcel; and the several shares and parcels of shares shall be distinctly designated on the plat and numbered from one progressively, and the same number shall designate the several parcels of one share; and they shall allot the several shares in the following manner: The special commissioners shall publicly number as many tickets as there are shares marked on the plat, and put the tickets into a hat or box, and the names of the persons entitled to shares shall be written on separate tickets and put into another hat or box, when a person appointed for that purpose by the special commissioners shall proceed to draw a ticket of those containing the names, and then a ticket of the numbers, and so proceed until the whole are drawn; and the number which shall be drawn to the name of any cotenant shall be his separate share in the land so divided. The special commissioners shall make certificate of the balloting, signed by them, specifying the time, place and manner thereof, and the allotment of shares.

**§ 11-21-23 Assignment of shares and owelty:**

Instead of making an allotment of shares by ballot, the special commissioners may assign shares to the parties entitled, if so directed by the court or chancellor, or if they find it desirable, and in any case, if an equal partition in kind cannot be made otherwise, or so advantageously, the special commissioners may assess the amount of money to be paid by one or more of the cotenants to another or others, so as to equalize their respective shares.

**§ 11-21-25 Report of special commissioners:**

The special commissioners shall make to the court, at the first term held after they have acted, or else as the court shall direct, a full report, in writing, of their proceedings, which, on exceptions filed at any time before its confirmation, for good cause shown may be set aside by the court, and other special commissioners

appointed, or the same special commissioners may be directed to make a new partition; or the partition may be modified by the court in any particular, and be confirmed as thus modified.

**§ 11-21-27 Land sold when not capable of division:**

If, after a judgment for partition and the appointment of masters, it shall appear from the report of the masters, or on exceptions to their report, that a just and equal division of the land cannot be made, or that a sale will better promote the interest of all the cotenants, the court shall order a sale of the land, or such part thereof as may be deemed proper, and a division of the proceeds among those interested, as provided for.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the land for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

**§ 11-21-45 New partition; when:**

Where the partition was in kind, any joint tenant, tenant in common, or coparcener shall be entitled to a new partition at any time within one year after the first partition, provided, he shall present his sworn petition for that purpose to the chancery court which decreed the partition and shall show thereby

- (a) that at the time of the partition he was absent from, or a nonresident of the state, and
- (b) that neither he nor any agent of his received any notice or knowledge whatever of the pendency of the bill for partition, and
- (c) that the first partition was unfair or unjust or fraudulent as to him, and
- (d) shall exhibit with said petition the affidavit of at least one credible person to the same effect.

Whereupon, if satisfied with the truth of all the grounds aforesaid, the court may proceed to award a new partition; but one who has made improvements on the share first assigned him shall not be evicted from such share; nor shall the improvements be estimated by the second commissioners in fixing its value, but it shall be valued as though the improvements had not been made. If the premises have been sold, and purchased by any of the joint tenants, tenants in common, or coparceners, the nonresident or absent joint tenant, tenant in common or coparcener shall be entitled to set aside such sale at any time within one year

thereafter, if it can be shown to have been unfairly made, and fraudulent as to him. In proceedings under this section, all persons interested shall be summoned to appear and contest the application.

**§ 11-21-29 Compensation of masters:**

The court in which the cause is pending, or the chancellor or judge thereof in vacation, shall fix and allow reasonable compensation for each of the masters, and such compensation shall be taxed and collected as costs in the suit.

**§ 11-21-31 Attorney's fees:**

In all cases of the partition or sale of property for division of proceeds, the court may allow a reasonable attorney's fee to the attorney or the plaintiff, to be taxed as a common charge on all the interests, and to be paid out of the proceeds in case of a sale, and to be a lien on the several parts in case of partition.

The general rule is that the application of Section 11-21-31 is discretionary, not mandatory, and that “where a defendant employs his own attorney in good faith to represent his interest or to assert his position in a controversy during a partition proceeding he should not be required to contribute to the fee of complainants' attorney.” *Necaise v. Ladner*, 910 So. 2d 699, 703 (Miss. Ct. App. 2005).

**§ 11-21-33 Owelty a lien:**

In all cases where owelty is allowed, it shall be a lien upon the share of the party charged therewith, which shall be superior to all other liens made or suffered by such party.

Mississippi Code Annotated section 11-21-3 . . . allows the chancellor to use owelty in a partition action. . . . *Jones v. Graphia*, 95 So. 3d 751, 753 (Miss. Ct. App. 2012).

## **Final Judgment**

### **§ 11-21-35 Final judgment and judgment confirming partition:**

The final judgment of the chancery court in partition proceedings shall ascertain and settle the rights of all parties; and it, and the judgment confirming the partition, shall constitute an instrument of evidence in all questions as to the title of the lands which may be the subject of the judgment, in all courts, and shall be conclusive as to the rights of all parties to the suit, and subject to motions and other post trial review, as in other suits, and to a repartition as provided.

### **§ 11-21-37 Recording of judgments:**

Judgments making partition shall be recorded in the record book of conveyances of the county or district in which any of the lands are situated, within three (3) months after the partition is confirmed; and a partition, the judgment making which is not so deposited with the clerk for record, shall not be valid as against purchasers without notice, or against creditors.

### **§ 11-21-39 Lien created by party binding on his share:**

Any mortgage or other lien executed by any joint tenant, tenant in common, or coparcener, shall remain in force on the share of such cotenant after partition, and on his share only; but this shall not prevent the holder of such mortgage or other lien from asserting claim to owelty awarded to such cotenant.

### **§ 11-21-41 Paramount rights not affected:**

Nothing herein contained shall be construed so as to injure, prejudice, defeat or destroy the estate, right, or title of any person claiming a tract of land, or any part thereof, or any piece or lot of land by title under any other person, or title paramount to the title of the joint tenants, tenants in common, or coparceners, among whom partition may have been made.

### **§ 11-21-43 Party evicted to have partition of residue:**

If any person who has received a share of land partitioned, shall be evicted therefrom, or from any portion thereof, by a paramount title existing at the time of the partition, and there be a residue of land left not subject to such paramount title, the party so evicted shall be entitled to a new partition of the residue.

**Standard of Review**

The standard of review for property partition cases is whether this Court finds manifest error in the decision of the chancellor, only then will this Court reverse the findings of the chancellor. ***Georgian v. Harrington*, 990 So. 2d 813, 815 (Miss. Ct. App. 2008) (citations omitted).**

This Court will not disturb findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous or applied an erroneous legal standard. ***Necaise v. Ladner*, 910 So. 2d 699, 701 (Miss. Ct. App. 2005).**



**CHAPTER 28**

**ANNEXATION & INCLUSION**

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## **CHAPTER 28**

### **ANNEXATION & INCLUSION**

**Mississippi Constitution, Art. 4, § 88, Content of general laws, states:**

The legislature shall pass general laws, under which local and private interest shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment.

#### **Extension or Contraction of Corporate Boundaries**

##### **§ 21-1-27 Ordinance required to expand or contract boundaries:**

(1) The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory proposed to be included in or excluded from the corporate limits, and also defining the entire boundary as changed.

In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory, the manner and extent of such improvements, and the approximate time within which such improvements are to be made; such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby.

[T]he only requirements of § 21-1-27 which are mandatory and must be set forth in the annexation ordinance are those “concerning improvements, public services, and the extent and time within which they are to be made. . . .” *In re Extension of Boundaries of City of Hattiesburg*, 840 So. 2d 69, 80 (Miss. 2003) (citation omitted).

## Petition

### § 21-1-29      **Petition, filing and contents:**

When any such ordinance shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located; however, when a municipality wishes to annex or extend its boundaries across and into an adjoining county such municipal authorities shall file a petition in the chancery court of the county in which such territory is located.

The petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement or contraction of the municipal boundaries, as the case may be, shall be ratified, approved and confirmed by the court. There shall be attached to such petition, as exhibits thereto, a certified copy of the ordinance adopted by the municipal authorities and a map or plat of the municipal boundaries as they will exist in event such enlargement or contraction becomes effective.

The annexation process is governed by statute. First, if a city desires to annex property, “the governing authorities of such municipality shall pass an ordinance defining with certainty the territory proposed to be included in or excluded from the corporate limits, and also defining the entire boundary as changed.” After the ordinance is passed, the city must “file a petition in the chancery court of the county in which such municipality is located. . . . The petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement . . . of the municipal boundaries . . . shall be ratified, approved and confirmed by the court.”

When the petition is filed, the chancellor sets a hearing date, and notice of the hearing must be provided. *Pearson's Fireworks, Inc. v. City of Hattiesburg*, 212 So. 3d 778, 781 (Miss. 2014) (citations omitted).

## Notice of Hearing

### **§ 21-1-31 Notice of hearing; other municipalities:**

Upon the filing of such petition and upon application therefor by the petitioner, the chancellor shall fix a date certain, either in term time or in vacation, when a hearing on said petition will be held, and notice thereof shall be given in the same manner and for the same length of time as is provided in Section 21-1-15 with regard to the creation of municipal corporations, and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction. However, in all cases of the enlargement of municipalities where any of the territory proposed to be incorporated is located within three miles of another existing municipality, then such other existing municipality shall be made a party defendant to said petition and shall be served with process in the manner provided by law, which process shall be served at least thirty days prior to the date set for the hearing.

### **§ 21-1-15 Notice of hearing:**

After the filing of said petition, and upon request therefor by the petitioners, the chancellor shall set a day certain, either in term time or in vacation, for the hearing of such petition and notice shall be given to all persons interested in, affected by, or having objections to the proposed incorporation, that the hearing on the petition will be held on the day fixed by the chancellor and that all such persons will have the right to appear and enter their objections, if any, to the proposed incorporation. The said notice shall be given by publication thereof in some newspaper published or having a general circulation in the territory proposed to be incorporated once each week for three consecutive weeks, and by posting a copy of such notice in three or more public places in such territory. The first publication of such notice and the posted notice shall be made at least thirty days prior to the day fixed for the hearing of said petition, and such notice shall contain a full description of the territory proposed to be incorporated. However, if any of the territory proposed to be incorporated is located within three miles of the boundaries of an existing municipality, then such existing municipality shall be made a party defendant to such petition and shall be served with process in the manner provided by law, which process shall be served at least thirty days prior to the date set for the hearing.

The notice required by Section 21-1-15 is in lieu of personal service and must be strictly complied with. Failure to give proper notice in annexation cases renders a chancery court without jurisdiction to hear the case. The record must contain proof that posting and publication were accomplished

in compliance with Section 21-1-15. The petitioner bears the burden of proving that it met all the statutory notice requirements. ***Extension of Boundaries of City of Tupelo v. City of Tupelo*, 94 So. 3d 256, 262 (Miss. 2012) (citations omitted).**

### **Hearing & Burden of Proof**

#### **§ 21-1-33 Decree; burden of proof:**

(1) If the chancellor finds from the evidence presented at the hearing that the proposed enlargement or contraction is reasonable and is required by the public convenience and necessity and, in the event of an enlargement of a municipality, that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time and that the governing authority of the municipality complied with the provisions of Section 21-1-27, the chancellor shall enter a decree approving, ratifying and confirming the proposed enlargement or contraction, and describing the boundaries of the municipality as altered. In so doing the chancellor shall have the right and the power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from the municipality, as the case may be.

(2) If the chancellor shall find from the evidence that the proposed enlargement or contraction, as the case may be, is unreasonable and is not required by the public convenience and necessity, or in the event of an enlargement of a municipality, that the governing authority of the municipality failed to comply with the provisions of Section 21-1-27, then he shall enter a decree denying the enlargement or contraction.

(3) In any event, the decree of the chancellor shall become effective after the passage of ten (10) days from the date thereof or, in the event an appeal is taken therefrom, within ten (10) days from the final determination of the appeal. In any proceeding under this section the burden shall be upon the municipal authorities to show that the proposed enlargement or contraction is reasonable.

The outcome determinative question of ultimate fact before the chancery court is the reasonableness of the proposed annexation. ***In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 277 (Miss. 1999) (discussing prior version of statute).**

***See Miss. R. Civ. Pro. 81(a)(11).***

**§ 21-1-35      Assessment of costs:**

In the event no objection is made to the petition for the enlargement or contraction of the municipal boundaries, the municipality shall be taxed with all costs of the proceedings. In the event objection is made, such costs may be taxed in such manner as the chancellor shall determine to be equitable pursuant to the Mississippi Rules of Civil Procedure. In the event of an appeal from the judgment of the chancellor, the costs incurred in the appeal shall be taxed against the appellant if the judgment be affirmed, and against the appellee if the judgment be reversed.

**§ 21-1-39      Copy to secretary of state:**

Whenever the corporate limits of any municipality shall be enlarged or contracted, as herein provided, the chancery clerk shall, after the expiration of ten days from the date of such decree if no appeal be taken therefrom, forward to the secretary of state a certified copy of such decree, which shall be filed in the office of the secretary of state and shall remain a permanent record thereof. In the event an appeal be taken from such decree and such decree is affirmed, then the certified copy thereof shall be forwarded to the secretary of state within ten days after receipt of the mandate from the supreme court notifying the clerk of such affirmance.

### **Indicia of Reasonableness**

While annexation is a legislative affair, confirmation of annexations is within the purview of the Chancery courts. To facilitate the review of annexation proceedings, this Court has adopted and utilized twelve indicia of reasonableness to analyze a chancellor's decision. These indicia are:

- (1) the municipality's need to expand;
- (2) whether the area sought to be annexed is reasonably within the path of growth of the city;
- (3) the potential health hazards from sewage and waste disposal in the annexed areas;
- (4) the municipality's financial ability to make improvements and furnish municipal services promised;
- (5) the need for zoning and overall planning in the area;
- (6) the need for municipal services in the area sought to be annexed;
- (7) whether there are natural barriers between the city and the proposed annexed area;
- (8) the past performance and time element involved in the city's provision of services to its present residents;
- (9) the impact (economic or otherwise) of the annexation upon those who live or own property in the area proposed for annexation;
- (10) the impact of the annexation upon the voting strength of protected minority groups;
- (11) whether the property owners and other inhabitants of the area sought to be annexed have in the past, and will in the future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy economic and social benefits of the municipality without paying their fair share of taxes; and
- (12) any other factors that may suggest reasonableness.

***Enlargement and Extension of Mun. Boundaries of City of Meridian v. City of Meridian*, 662 So. 2d 597, 608 (Miss. 1995) (citations omitted).**

Rather than being separate, independent tests, these indicia must be considered collectively to determine whether, under the totality of the circumstances, annexation was reasonable. ***Enlargement & Extension of Mun. Boundaries of Town of Terry v. Town of Terry*, 227 So. 3d 917, 919 (Miss. 2017).**



## **1. The municipality's need to expand**

This Court has enumerated many factors to consider when determining whether a City seeking an extension and enlargement has a reasonable need for expansion. These factors may or may not include:

- (1) spillover development into the proposed annexation area;
- (2) the City's internal growth;
- (3) the City's population growth;
- (4) the City's need for development land;
- (5) the need for planning in the annexation area;
- (6) increased traffic counts;
- (7) the need to maintain and expand the City's tax base;
- (8) limitations due to geography and surrounding cities;
- (9) remaining vacant land within the municipality;
- (10) environmental influences;
- (11) the city's need to exercise control over the proposed annexation area; and
- (12) increased new building permit activity.

***In re Enlargement and Extension of Mun. Boundaries of City of D'Iberville*, 867 So. 2d 241, 252 (Miss. 2004) (citations omitted).**

The chancellor found that the town of Mantachie is experiencing population growth and has a need to expand. ***In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 727 (Miss. 1996).**

The need to expand is further evidenced by the fact that the town had to locate its new water tank and sewer lagoon outside of the municipal limits due to a lack of suitable land. Additional evidence shows that in the last 5 ½ years that the Town's sales tax revenue has doubled. This factor is well supported by credible evidence. ***In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 727 (Miss. 1996).**

The chancellor found that because of the growth of the gaming industry Biloxi has increased in population. Also, due to environmental concerns, Biloxi is 85 to 95% "built out" and thus lacks develop-able land to support its growing numbers. ***In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 278 (Miss. 1999).**

Ridgeland contends several factors support its definite and present need to expand: population growth, increased new building permit activity, lack of availability of land to meet increasing development, rate of consumption of available land by development, and need to expand the city's borders to exercise control over development and to provide comprehensive planning for growth. . . . The chancellor found that Ridgeland certainly demonstrated a clear need to expand. ***In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 553 (Miss. 1995).**

**2. Whether the area sought to be annexed is reasonably within the path of growth of the city**

This Court has established factors for consideration when evaluating reasonableness as it relates to the path of growth which may or may not include:

- (1) spillover development in annexation area;
- (2) annexation area immediately adjacent to City;
- (3) limited areas available for expansion;
- (4) interconnection by transportation corridors;
- (5) increased urban development in annexation area;
- (6) geography; and
- (7) subdivision development.

***In re Enlargement and Extension of Mun. Boundaries of City of D'Iberville*, 867 So. 2d 241, 253 (Miss. 2004) (citations omitted).**

The chancellor found that the area designated as Plat 4 is reasonably within the path of growth. ***In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 727 (Miss. 1996).**

After hearing testimony from Biloxi's witnesses and reviewing exhibits showing growth of subdivisions from 1978 to 1996 in Biloxi and the PAA, the chancellor found that parcel A of the PAA was in the path of growth of Biloxi because Biloxi is limited in the directions it can expand. ***In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 278 (Miss. 1999).**

Ridgeland submits the proposed areas of annexation are certainly within its natural path of growth as evidenced by their locations, accessibility, a spillover of urban development from Jackson, and the fact that it has invested in infrastructures to extend utilities and transportation systems to the annexed areas. As can be seen from a map depicting Ridgeland as it exists and the areas to be annexed, there is no question that the proposed areas are directly adjacent to Ridgeland to its east and west borders. ***In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 553 (Miss. 1995).**

**3. The potential health hazards from sewage and waste disposal in the annexed areas**

The chancellor found there is a need for availability of adequate sewer facilities in such area. . . . The chancellor's finding that there existed a health problem which would be improved by annexation is supported by substantial, credible evidence on these facts. ***In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 727-28 (Miss. 1996).**

The chancellor found that this indicium supported the reasonableness of the annexation because the large number of septic tanks in use in the PAA pose a threat to the health of PAA residents. . . . Over 85% of the people in the PAA are now without public water or sewer. This Court has held that the use of septic tanks in the PAA may indicate possible health risks. However, we have also said that this factor is rather insignificant in the overall test of reasonableness. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 280 (Miss. 1999).

**4. The municipality's financial ability to make improvements and furnish municipal services promised**

The chancellor found that the Town of Mantachie does not presently levy any ad valorem taxes nor does it plan to do so in the future. The Town is in sound financial condition and has the present ability to provide services in the area designated as Plat 4. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 728 (Miss. 1996).

After examining the city's most recent financial report and budget, hearing the testimony of Biloxi officials, and reviewing the Comprehensive Plan for the PAA, the chancellor found that this indicium was reasonable because Biloxi has the financial ability to make the improvements, to fund them, and also to pay the necessary increase in operating expenses caused by the annexation. Biloxi reiterates that it is in excellent financial condition and expects to increase with the addition of new casinos and gaming activity. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 280 (Miss. 1999).

The chancellor found there was no doubt of the city's financial ability to make any improvements needed and furnish municipal services in these areas. *In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 558-59 (Miss. 1995).

**5. The need for zoning and overall planning in the area**

Mayor testified that the Town presently has no zoning ordinance. There was no evidence offered that the Town participates in any form of urban planning. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 728 (Miss. 1996).

The chancellor found that the evidence strongly suggested the need for overall planning and zoning because the PAA would benefit from such. The Objectors have failed to show evidence to the contrary. We find that Biloxi is better equipped to meet the need for zoning in the PAA. This indicium of reasonableness has been met. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 281 (Miss. 1999).

Again, the chancellor simply found: The areas will benefit from municipal zoning and

planning, and municipal services in these areas. *In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 558-59 (Miss. 1995).

**6. The need for municipal services in the are sought to be annexed**

The chancellor found that reasonable public services will be rendered in the annexed territory within a reasonable time. The record supports this finding with testimony that Mantachie plans to extend several services to Plat 4 if annexation is approved. First, sewer service will be extended when economically feasible. Second, garbage collection would be assumed by the town for less money to the residents. Third, police protection supplied by the county would be supplemented by Mantachie's police force. The facts are supportive of the chancellor's finding. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 728 (Miss. 1996).

The chancellor found that the PAA is in need of municipal services and that the Biloxi annexation would provide parcel A with three new fire stations in the first five years, a lower fire rating, enhanced police patrols, and the installation of several park facilities. The evidence presented in this indicium and throughout this litigation shows that parcel A will receive enhanced municipal services. Thus, we find that this indicium weighs in favor of the reasonableness of annexation. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 281 (Miss. 1999).

**7. Whether there are natural barriers between the city and the proposed annexed area**

The chancellor did not make a finding as to the presence or absence of natural barriers, nor was there any testimony given to this factor. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 728 (Miss. 1996).

The chancellor found that the natural barriers are not sufficient to prohibit the annexation of the PAA. Other natural barriers have not prevented annexation in other cases. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 281 (Miss. 1999).

*See In re Extension of Boundaries of City of Columbus*, 644 So. 2d 1168, 1174 (Miss. 1994)(flood plains).

*See In re City of Horn Lake*, 630 So. 2d 10, 23 (Miss. 1993) (interstate highway).

*See In re Enlargement of Corporate Boundaries of City of Booneville*, 551 So. 2d 890, 893 (Miss. 1989) (flood hazard areas).

**8. The past performance and time element involved in the city's provision of services to its present residents**

The chancellor made no findings for this factor and no evidence was offered as to any prior annexations by the Town and its subsequent extension of municipal services. The Town, however, does have an exemplary record of improvement of municipal services without the imposition of ad valorem taxes as shown by the factors enumerated in Factor (4) herein, to which reference is made. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 728 (Miss. 1996).

The chancellor found that Biloxi had provided in a timely fashion the capital improvements and municipal services to the area as provided in the 1978 annexation. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 282 (Miss. 1999).

The chancellor determined that Ridgeland's performance in past annexations clearly cannot be said to be unreasonable. . . . Ridgeland submits it has a good record of keeping its promises to its residents and adds that Jackson introduced no evidence to the contrary. This being supported in the record, there was no manifest error in the chancellor's finding. *In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 560 (Miss. 1995).

**9. The impact (economic or otherwise) of the annexation upon those who live or own property in the area proposed for annexation**

The chancellor found that Plat 4 was currently served with water by Mantachie, with fire protection by the Greater Mantachie Fire Protection District and such service would continue if annexation were approved. The chancellor found that Plat 4 was currently served with water by Mantachie, with fire protection by the Greater Mantachie Fire Protection District and such service would continue if annexation were approved. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 728 (Miss. 1996).

The chancellor found that when the equities are balanced, the residents of the PAA will receive capital improvements and municipal services that will outweigh the impact of additional taxes. *In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 282 (Miss. 1999).

We have offered the following explanation of this indicator: Here the Court is required to balance the equities by comparing the City's need to expand and any benefits accruing to residents from the annexation with any adverse impact, economic or otherwise, which will probably be experienced by those who live in and own property in the annexation area. The mere fact that residents and landowners will have to start paying city property taxes is not sufficient to show unreasonableness. *In re Matter of Extension of*

***Boundaries of City of Columbus*, 644 So. 2d 1168, 1179 (Miss. 1994).**

Ridgeland asserts no evidence of adverse impact to taxpayers or residents of the areas was put before the chancellor. The most significant point for consideration of this factor, however, would be the undeniable fact that there was not a single resident of either area of proposed annexation who appeared to object to Ridgeland's proposal. ***In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 560 (Miss. 1995).**

**10. The impact of the annexation upon the voting strength of protected minority groups**

The chancellor made no finding on the impact of annexation on minority voting strength, nor was any proof offered. ***In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 729 (Miss. 1996).**

The chancellor held that the annexation would not cause any dilution of minority voting strength. ***In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 284 (Miss. 1999).**

The chancellor noted: No change. It was 12 percent before and 12 percent if the annexation is granted. However, the fact that in the entire original proposed annexation area there were only slightly more than 1,000 residents would explain the lack of change in minority voting strength. ***In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 559 (Miss. 1995).**

**11. Whether the property owners and other inhabitants of the area sought to be annexed have in the past, and will in the future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy economic and social benefits of the municipality without paying their fair share of taxes**

The chancellor found that Mantachie does not levy any ad valorem taxes and has no plans to levy any in the future. There is evidence in the record that residents of Plat 4 are receiving benefits from Mantachie for which they are paying, such as the water system. ***In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 729 (Miss. 1996).**

The chancellor held that this indicium was reasonable because many of the PAA residents work in Biloxi and use Biloxi facilities. [T]rial testimony established that numerous people living in the PAA work or own businesses in Biloxi. The development of the PAA has grown in large part due to its proximity to Biloxi. Citizens of the PAA have enjoyed economic benefits due to the availability of jobs, increased commercial activity as a result of the gaming industry, and the use of other Biloxi facilities. ***In re Enlargement and Extension of Municipal Boundaries of City of Biloxi*, 744 So. 2d 270, 284 (Miss. 1999).**

The chancellor found that the property owners in the area sought to be annexed do not object and already are using and enjoying the benefits of the proximity to Ridgeland. Ridgeland provides the community services, parks and recreation, shopping facilities, etc., for these residents, outside the city. Some services have been provided since 1951. *In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 561 (Miss. 1995).

**12. Any other factors that may suggest reasonableness**

The chancellor did not make a finding for this indicia, but the record supports the fact that industrial development could be a possibility with expansion of a water line into the annexed area. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 729 (Miss. 1996).

The chancellor here discussed the effect of the D'Iberville Water and Sewer District and its purported annexation of the area of parcel A north of the City of D'Iberville. Further, he determined that Biloxi did not need all of parcel A of the PAA to accommodate its projected growth. Thus, he reduced the size of parcel A awarded to Biloxi. *In re Extension of Corporate Boundaries of the Town of Mantachie*, 685 So. 2d 724, 729 (Miss. 1996).

As Ridgeland correctly acknowledges, here lies the heart of Jackson's argument against this annexation. Coupled with its argument that this Court's *City of Jackson* decision involving these same cities changed the standard to be applied, Jackson argues that reasonableness must consider the adverse impact upon Jackson and any plans for Jackson's future expansion. . . . The chancellor clearly addressed the effect on Jackson and considered Jackson's path of growth. *City of Jackson* did not appear to elevate this indicium to a "super-factor," since this Court has continued in the more recent annexation decisions to consider all of the reasonableness factors under the totality of the circumstances of each particular case. *In re Extension of Boundaries of City of Ridgeland*, 651 So. 2d 548, 561-62 (Miss. 1995) (citations omitted).

## Appellate Review

### § 21-1-37      **Review:**

If the municipality or any other interested person who was a party to the proceedings in the chancery court be aggrieved by the decree of the chancellor, then such municipality or other person may prosecute an appeal therefrom within the time and in the manner and with like effect as is provided in § 21-1-21 in the case of appeals from the decree of the chancellor with regard to the creation of a municipal corporation.

The role of the judiciary in annexations is limited to one question: whether the annexation is reasonable.” This Court will not reverse a chancellor's finding of reasonableness unless that finding is manifestly wrong and/or not supported by substantial and credible evidence. *Enlargement & Extension of Mun. Boundaries of Town of Terry v. Town of Terry*, 227 So. 3d 917, 919 (Miss. 2017).

We may reverse a Chancellor's determination that an annexation is either reasonable or unreasonable only if that decision is manifestly erroneous or is unsupported by substantial credible evidence. *In re Extension of the Boundaries of the City of Batesville*, 760 So. 2d 697, 699 (Miss. 2000).



## *Inclusion or Exclusion from Existing Municipality*

### *Petition*

#### **§ 21-1-45      Procedure by qualified electors:**

The qualified electors of any territory contiguous to and adjoining any existing municipality and the qualified electors of any territory which is a part of an existing municipality, may be included in or excluded from such municipality, as the case may be, in the manner hereinafter provided. Whenever the inhabitants of any incorporated territory adjacent to any municipality shall desire to be included therein, and whenever the inhabitants of any territory which is a part of an existing municipality shall desire to be excluded therefrom, they shall prepare a petition and file same in the chancery court of the county in which such municipality is located, which said petition shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be included in or excluded from such municipality. Said petition shall describe accurately the metes and bounds of the territory proposed to be included in or excluded from such municipality, shall set forth the reasons why the public convenience and necessity would be served by such territory being included in or excluded from such municipality, as the case may be, and shall be sworn to by one or more of the petitioners. In all cases, there shall be attached to such petition a plat of the municipal boundaries as same will exist in the event the territory in question is included in or excluded from such municipality. No territory may be so excluded from a municipality within two years from the time that such territory was incorporated into such municipality, and no territory may be so excluded if it would wholly separate any territory not so excluded from the remainder of the municipality. No petition for the inclusion or exclusion of any territory under this section shall be filed within two years from the date of any adverse determination of any proceedings originated hereinafter under this chapter for the inclusion or exclusion of the same territory.

The applicable statute requires that a petition for inclusion be signed by two-thirds of the “qualified electors residing in” a PIA; however, it does not state whether this requirement is met at the time of filing the petition or at trial. Mississippi Code Section 21-1-45 states in pertinent part:

The qualified electors of any territory contiguous to and adjoining any existing municipality and the qualified electors of any territory which is a part of an existing municipality, may be included in or excluded from such municipality, as the case may be, in the manner hereinafter provided. Whenever the inhabitants of any incorporated territory adjacent to any municipality shall desire to be included therein, and whenever the inhabitants of any territory which is a part of an existing municipality shall desire to be

excluded therefrom, they shall prepare a petition and file same in the chancery court of the county in which such municipality is located, which said petition shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be included in or excluded from such municipality. Said petition shall describe accurately the metes and bounds of the territory proposed to be included in or excluded from such municipality, shall set forth the reasons why the public convenience and necessity would be served by such territory being included in or excluded from such municipality, as the case may be, and shall be sworn to by one or more of the petitioners. In all cases, there shall be attached to such petition a plat of the municipal boundaries as same will exist in the event the territory in question is included in or excluded from such municipality.

The Objectors initially argue that “the statute clearly contemplates the inclusion procedure as being available only to inhabitants” of a PIA. . . . We find the date of filing is the proper date to determine whether the two-thirds requirement is met. . . . Indeed, several cases support the conclusion that the time of filing should be the date for determining whether the two-thirds requirement of the statute is met. . . . [T]he chancellor was correct in finding the two-thirds requirement for qualified electors of any area adjacent to an existing municipality to file a petition for inclusion, as set out in Mississippi Code Section 21-1-45, was met. Therefore, we affirm the judgment of the . . . Chancery Court. ***In re City of Oxford*, 142 So. 3d 401, 404-07 (Miss. 2014) (citations omitted).**

It is a general rule that one can withdraw from a petition at any time prior to the determination of the hearing. . . . The legislature in its wisdom provided that two-thirds of the qualified electors of the territory sought to be incorporated must favor the incorporation before it can be incorporated. We held in *Bridges v. City of Biloxi*, that provisions of the petition that it be signed by at least two-thirds of the qualified electors was mandatory, it must be fulfilled at the time the petition was filed and if the petition was not signed by two-thirds of the qualified electors at the time it was filed, it could not thereafter be amended to include the names of additional petitioners. Appellees contend that if the petitions were signed by two-thirds of the qualified electors at the time it was filed, the court had jurisdiction and none of the signers could thereafter withdraw from the petition so as to deny the court jurisdiction. With this contention we do not agree. It is our opinion that the legislature did not intend for a municipality to be created unless at least two-thirds of the qualified electors were in favor of its creation. The individual signers of the petition had a right to apply their best judgment and mature consideration to the matter and after

such consideration had a right to advise the court that they had changed their opinion and no longer favored the incorporation. We hold that the chancellor should have, in making his determination as to whether there were two-thirds of the qualified electors as required by the statute, considered the fact that thirty-one of the original signers of the original petition had requested that their names be withdrawn from the petition. For the reasons stated, we hold that the trial court was without jurisdiction to enter the decree appealed from and the same is void. For that reason the case is reversed and the petition dismissed. *Myrick v. Incorporation of a Designated Area into a Mun. Corp. to be Named Stringer*, 336 So. 2d 209, 211 (Miss. 1976).

**§ 21-1-47      Procedures followed by court:**

Upon the filing of such a petition, all of the proceedings of this chapter with regard to proceedings in the chancery court upon petitions for the creation, enlargement, and contraction of municipalities shall apply in like manner thereto. Notice of the filing of such petition and the time for the hearing shall be given in the manner and for the length of time as is required in cases of proceedings for the creation, enlargement, or contraction of a municipality. Any parties to the proceedings aggrieved by the decree of the chancellor may appeal therefrom in the same manner and within the same time as is provided in cases of decrees on petitions involving the creation, enlargement or contraction of a municipal corporation. In all proceedings under this section, however, the municipal corporation involved shall be made a party to such proceedings and shall be served with process in the manner provided by law at least thirty days prior to the date of the hearing. If the chancellor finds from the evidence that the proposed inclusion or exclusion is reasonable and is required by the public convenience and necessity, then he shall enter a decree declaring the territory in question to be included in or excluded from the municipality, as the case may be, which decree shall contain an adjudication of the boundaries of the municipality as altered. In so doing, the chancellor shall have the right and power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from the municipality, as the case may be. If the chancellor shall find from the evidence that the proposed inclusion or exclusion, as the case may be, is unreasonable and is not required by the public convenience and necessity, then he shall enter a decree denying same. In any event, the decree of the chancellor shall become effective after the passage of ten days from the date thereof or, in the event an appeal is taken therefrom, within ten days from the final determination of such appeal. In all cases where territory is included in or excluded from a municipality under the provisions hereof, a certified copy of the decree of the chancellor shall be sent to the Secretary of State and a map or plat of the boundaries of the municipality as altered shall be filed with the chancery clerk, all as provided in Sections 21-1-39 and 21-1-41.

## Notice

### **§ 21-1-15      Notice of hearing:**

After the filing of said petition, and upon request therefor by the petitioners, the chancellor shall set a day certain, either in term time or in vacation, for the hearing of such petition and notice shall be given to all persons interested in, affected by, or having objections to the proposed incorporation, that the hearing on the petition will be held on the day fixed by the chancellor and that all such persons will have the right to appear and enter their objections, if any, to the proposed incorporation. The said notice shall be given by publication thereof in some newspaper published or having a general circulation in the territory proposed to be incorporated once each week for three consecutive weeks, and by posting a copy of such notice in three or more public places in such territory. The first publication of such notice and the posted notice shall be made at least thirty days prior to the day fixed for the hearing of said petition, and such notice shall contain a full description of the territory proposed to be incorporated. However, if any of the territory proposed to be incorporated is located within three miles of the boundaries of an existing municipality, then such existing municipality shall be made a party defendant to such petition and shall be served with process in the manner provided by law, which process shall be served at least thirty days prior to the date set for the hearing.

The petitioners have the burden to prove that they met all statutory notice requirements. The record must contain proof that posting and publication were accomplished in compliance with Section 21-1-15. Because notice is in lieu of personal service, strict compliance with Section 21-1-15 is required. *Fletcher v. Diamondhead Inc.*, 77 So. 3d 92, 97-98 (Miss. 2011).

## Appellate Review

### **§ 21-1-37      Review:**

If the municipality or any other interested person who was a party to the proceedings in the chancery court be aggrieved by the decree of the chancellor, then such municipality or other person may prosecute an appeal therefrom within the time and in the manner and with like effect as is provided in § 21-1-21 in the case of appeals from the decree of the chancellor with regard to the creation of a municipal corporation.

This Court reviews a chancellor's findings as to whether a petition for inclusion is legally sufficient under a manifest-error standard. *In re City of Oxford*, 142 So. 3d 401, 404 (Miss. 2014) (citations omitted).

**CHAPTER 29**

**BOND VALIDATION**

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## **CHAPTER 29**

### **BOND VALIDATION**

#### **Statutes**

#### **§ 31-13-3      Definition of "bonds":**

The word "bond" or "bonds," when used in this chapter, shall be deemed to include every form of written obligation that may be now or hereafter legally issued by any county, municipality, school district, road district, drainage district, levee district, sea wall district, and of any other district or subdivision whatsoever, as now existing or as may be hereafter created.

Mississippi Code Section 31-13-3 defines "bond" as "every form of written obligation that may be now or hereafter legally issued by any county." *In re Validation of Tax Anticipation Note, Series 2014, 187 So. 3d 1025, 1038 (Miss. 2016).*

Mississippi Code Annotated Section 31-13-1, *et. seq.*, applies to notes, bonds, and any written obligations of public bodies. *Cox v. Jackson Mun. Separate Sch. Dist.*, 503 So. 2d 265, 268 (Miss. 1987).

This definition of the word "bond," as used in the validation act, was brought forward into chapter 10 of the Code of 1930 as section 315 of said Code, and its language is broad enough to, and necessarily does, include bonds of the character involved in this proceeding. The bonds that may be validated under the provisions of the chapter are not limited to those that might be then legally issued; but it was thereby expressly provided that the bonds that may be validated shall include every form of written obligation that might be thereafter issued by any district or subdivision of the state. *Street v. Town of Ripley*, 173 Miss. 225, 161 So. 855, 858-59 (1935).

#### **§ 31-13-5      Validity of bonds issued:**

When any county, municipality, school district, road district, drainage district, levee district, sea wall district, or any other district or subdivision authorized to issue bonds shall take steps to issue bonds for any purpose whatever, the officer or officers of such county, municipality, or district charged by law with the custody of the records of same shall, if the board issuing same so determine by order entered on its minutes, transmit to said bond attorney a certified copy of all legal papers pertaining to the issuance of said bonds, including transcripts of records and ordinances, proof of publication, and tabulation of vote, if any, and any other

facts pertaining to said issuance. Said bond attorney shall thereupon as expeditiously as possible examine said legal papers, pass upon the sufficiency thereof, and render an opinion in writing, addressed to the board proposing to issue said bonds, as to the validity of same; and if any further action on the part of said board is necessary or any further data is desired, he shall indicate what is necessary to be done in the premises in order to make said bonds legal, valid, and binding.

When in his opinion all necessary legal steps have been taken to make the said bond issue legal, valid, and binding, he shall render a written opinion to that effect and shall transmit all legal papers, together with his opinion, to the clerk of the chancery court of the county in which the district or municipality proposing to issue said bonds is situated, or if said district embraces more than one county or parts of more than one county, then to the chancery clerk of any one of said counties.

The chancery clerk shall file the same, enter the same on the docket of the chancery court, and shall promptly notify the chancellor of the district in writing that said papers are on file and the cause has been docketed.

The chancellor shall then notify the chancery clerk to set the matter for hearing at some future date, not less than ten days thereafter, and the clerk shall give not less than five days' notice by making at least one publication in some paper published in the county where the case is docketed, addressed to the taxpayers of the county, municipality, or district proposing to issue said bonds, advising that the matter will be heard on the day named.

If on the day set for hearing there is no written objection filed by any taxpayer to the issuance of said bonds, a decree approving the validity of same shall be entered by the chancellor; and if the chancellor be not present the clerk shall forward him the decree prepared by the state's bond attorney for his signature, and shall enter the said decree upon his minutes in vacation.

If no written objection is filed to the validation of the bonds, certificates of indebtedness, or other written obligations which are being validated, by any taxpayer to the issuance of same, then the validation decree shall be final and forever conclusive from its date, and no appeal whatever shall lie therefrom.

Section 31-13-5 provides that “[i]f no written objection is filed to the validation of the bonds, . . . or other written obligations that are being validated, by any taxpayer to the issuance of the same, then the validation decree shall be final and forever conclusive from its date, and no appeal whatever shall lie therefrom.” So, if the chancellor were correct that no



written objections had been filed, it would be proper for this Court to dismiss the appeal because, under Section 31-13-5, this Court has no jurisdiction to hear an appeal where no written objection had been filed in the chancery court. *In re Validation of Tax Anticipation Note, Series 2014*, 187 So. 3d 1025, 1040 (Miss. 2016).

If at the hearing any taxpayer of the county, municipality, or district issuing said bonds appears and files, or has filed written objection to the issuance of said bonds, then the chancellor, or the chancery clerk if the chancellor be not present, shall set the case over for another day convenient to the chancellor, not less than ten days thereafter, and shall notify the bond attorney to appear and attend the hearing. On the hearing the chancellor may hear additional competent, relevant and material evidence under the rules applicable to such evidence in the chancery court, so as to inquire into the validity of the bonds or other obligations proposed to be issued, and enter a decree in accordance with his finding.

Where written objections have been filed to the validation but not otherwise, if either party shall be dissatisfied with the decree of the chancellor, an appeal shall be granted as in other cases, provided such appeal be prosecuted and bond filed within twenty days after the chancellor enters his decree. However, no appeal shall lie in any case unless written objection has been filed to the validation of the bonds or other obligations by the time set for the validation hearing. The chancery clerk shall certify the record to the supreme court as in other cases, and the supreme court shall hear the case as a preference case.

The “COPS” issued in connection with each project were validated by the Chancery Court pursuant to Miss. Code Ann. § 31-13-5 which applies to every form of written obligation that may be now or hereafter legally issued by any municipality. *McBride v. Meridian Pub. Imp. Corp.*, 730 So. 2d 548, 552 (Miss. 1998) (citations omitted).

**§ 31-13-7      Decree validating bonds:**

If the chancellor shall enter a decree confirming and validating said bonds and there shall be no appeal by either party from said decree, or if on appeal the supreme court enters its decree confirming and validating said bonds or other written obligations, the validity of said bonds or other written obligations so issued shall be forever conclusive against the county, municipality, or district issuing same; and the validity of said bonds or other written obligations shall never be called in question in any court in this state.

**§ 31-13-9      Stamped or written entry; evidence of validation; facsimile signature and seal:**

Whenever any bonds are validated under the provisions of this chapter, the clerk or other proper officer of the county, municipality, or district issuing same shall stamp or write on each of said bonds over his signature and the seal of the issuer the words "validated and confirmed by decree of the chancery (or supreme) court," together with the date of the rendition of the final decree validating same, which entry shall be taken as evidence of the validation of said bonds in any court in this state. If the resolution authorizing the issuance of the bonds shall so provide, such signature and seal under this section may be a facsimile.

**§ 31-13-11      Court costs and fee of bond attorney:**

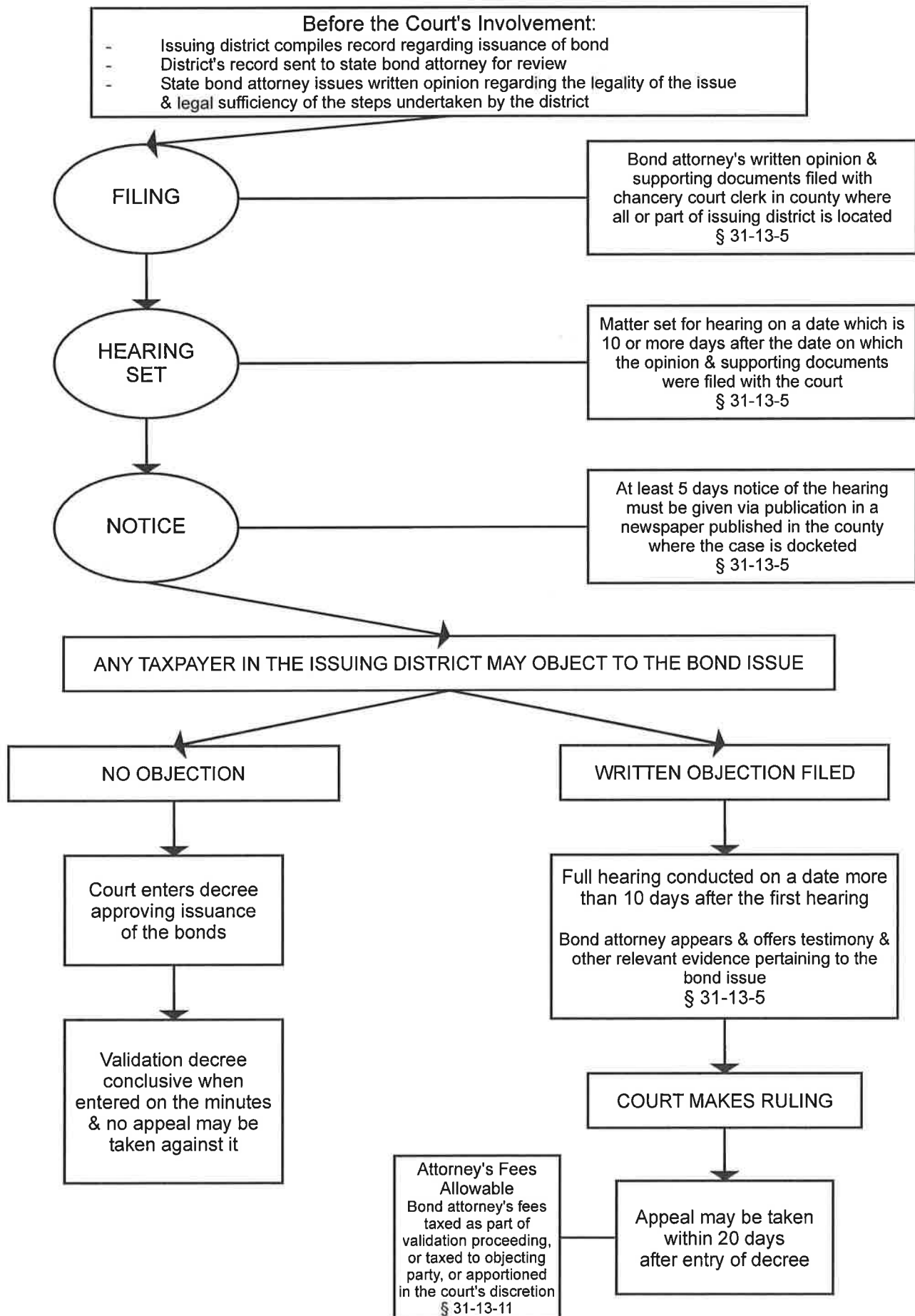
The court costs in all such cases shall be paid by the county, municipality, or district proposing to issue said bonds or other written obligations, and in addition to such costs it shall also pay to the bond attorney a fee of not more than one-tenth of one percent (1/10 of 1%), provided said fee shall not be less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), of the amount of the bonds or other obligations issued or proposed to be issued. The payment of this fee shall be full compensation for all legal services rendered in connection with the issuance of said bonds, except that when the state's bond attorney attends a hearing of objection to the validation of said bonds, his actual and necessary expenses and a reasonable rate of compensation for attending the said hearing as required by this chapter shall be taxed as a part of the costs of the validation proceedings, upon approval by the clerk or chancellor of an itemized account of such expenses and time expended. If objection is filed to the validation of said bonds, then in that event the taxation of court costs, including expenses and a reasonable rate of compensation for the bond attorney, shall be discretionary with the chancellor, as in other cases in the chancery court, against the issuing board or district, or the objector or objectors, or apportioned as the chancellor may deem proper.

Section 31-13-11 governs court costs and bond attorney's fees. *In re Validation of Tax Anticipation Note, Series 2014*, 187 So. 3d 1025, 1039 (Miss. 2016).

### **Finality of Bond Validation Decree**

First, we have a bond validation proceeding instituted in accordance with §§ 31-13-5 *et seq.* The purpose of such hearing is to consider all juridical questions of law or fact, or both, touching the legality and validity of the bonds. Legislative questions preceding the issuance of the bonds are beyond judicial review, either in the validation action or otherwise. . . . The chancery court is charged with considering "all legal papers pertaining to the issuance of said bonds" emanating from the issuing district, together with the written opinion of the State's bond attorney. Beyond that the chancery court may hear additional competent, relevant and material evidence under the rules applicable to such evidence in the chancery court, so as to inquire into the validity of the bonds or other obligations proposed to be issued. The statute contemplates that any "valid objection" to the issuance of the bonds may be considered. . . . The purpose of the hearing is to lay at rest all questions regarding the legality of the bonds. All matters which, if litigated with results adverse to the issuing district, could upset the bonds must as a matter of common prudence be resolved before the bonds are validated. On this assumption, the significance of the hearing has been legislatively declared in §31-13-7, which provides that a decree validating bonds shall be forever conclusive against the county, municipality, or district issuing same; and the validity of said bonds or other written obligations shall never be called in question in any court in this state. . . . The effectiveness of this statute in achieving its avowed end turns on the conclusive effect of the decree. A decree may not foreclose litigation of questions which as a matter of law were beyond the scope of the hearing. Therefore, the scope of the hearing must be sufficiently broad to consider all questions that need to be resolved before the bonds are sold. By statute or otherwise this state has no power to cut off from litigation secured due process rights merely by restricting the scope of the bond validation proceeding. . . . [S]ubsequent to the bond validation decree becoming final, taxpayers may not be heard to complain of the legality or constitutionality of any facet of the bond issue or the project to be funded. Section 31-13-7 coupled with common law notions of *res judicata* and collateral estoppel preclude such "re-litigation." . . . That which could not have been presented (because of the limited scope of the hearing or whatever) certainly may not be precluded from subsequent litigation consistent with due process. ***In re Validation of \$7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County***, 465 So. 2d 1003, 1011-14 (Miss. 1985).

## **BOND VALIDATION**



**CHAPTER 30**

**PROTECTION FROM DOMESTIC ABUSE**

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## **CHAPTER 30**

### **PROTECTION FROM DOMESTIC ABUSE**

#### **Jurisdiction**

##### **§ 93-21-5      Jurisdiction; right to relief:**

- (1) The municipal, justice, county or chancery court . . . shall have jurisdiction over proceedings under this chapter as provided in this chapter. The petitioner's right to relief under this chapter shall not be affected by his leaving the residence or household to avoid further abuse. . . .
- (4) A record shall be made of any proceeding in justice or municipal court that involves domestic abuse.

#### **Venue**

##### **§ 93-21-5      Jurisdiction; right to relief:**

- (2) Venue shall be proper in any county or municipality where the respondent resides or in any county or municipality where the alleged abusive act or acts occurred. . . .
- (3) If a petition for an order for protection from domestic abuse is filed in a court lacking proper venue, the court, upon objection of the respondent, shall transfer the action to the appropriate venue pursuant to other applicable law. . . .

#### **Petition**

##### **§ 93-21-7      Filing of petitions; persons authorized; domestic abuse cases:**

- (1) Any person may seek a domestic abuse protection order for himself by filing a petition alleging abuse by the respondent. Any parent, adult household member, or next friend of the abused person may seek a domestic abuse protection order on behalf of any minor children or any person alleged to be incompetent by filing a petition with the court alleging abuse by the respondent. Cases seeking relief under this chapter shall be priority cases on the court's docket and the judge shall be immediately notified when a case is filed in order to provide for expedited proceedings.

In order to obtain a restraining order in Mississippi, an individual may seek a domestic abuse protection order by filing a petition alleging abuse by the respondent. The Mississippi Code contains a specific definition of what constitutes “abuse”:

Abuse means the occurrence of one or more of the following acts between spouses, former spouses, persons living as spouses or who formerly lived as spouses, persons having a child or children in common, other individuals related by consanguinity or affinity who reside together or who formerly resided together, or between individuals who have a current or former dating relationship:

- (i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;
- (ii) Placing, by physical menace or threat, another in fear of imminent serious bodily injury;
- (iii) Criminal sexual conduct committed against a minor within the meaning of Section 97-5-23;
- (iv) Stalking within the meaning of Section 97-3-107;
- (v) Cyberstalking within the meaning of Section 97-45-15;
- or
- (vi) Sexual offenses within the meaning of Section 97-3-65 or 97-3-95.

When all of the events testified to by Kimberly are reviewed, it is clear that there was insufficient evidence for a protective order. Kimberly essentially testified that: (1) Craig had touched her stomach when she did not want him to, (2) Craig had made her feel “pinned” near her car, and (3) Craig had threatened to keep custody of Nathanael. None of these events involved Craig causing Kimberly any form of bodily injury, nor did they constitute criminal sexual conduct. Furthermore, none of the incidents related by Kimberly constitute stalking or cyberstalking. Kimberly never testified that she feared “imminent serious bodily injury.” Although Kimberly testified to an alleged sexual assault by Craig in Ohio, the chancellor apparently did not find Kimberly credible as to the assault, as he specifically declined to find that Kimberly had shown evidence of sexual battery or rape. Therefore, there was no ground to issue the protective order under Mississippi law. Consequently, we reverse and render the chancery court's entry of a Mississippi protective order. ***Wolfe v. Wolfe*, 49 So. 3d 650, 652-53 (Miss. Ct. App. 2010) (citations omitted).**

(2) A petition seeking a domestic abuse protection order may be filed in any of the following courts: municipal, justice, county or chancery. . . . A chancery court shall not prohibit the filing of a petition which does not seek emergency relief on the basis that the petitioner did not first seek or obtain temporary relief in another court. A petition requesting emergency relief pending a hearing shall not be filed in chancery court unless specifically permitted by the chancellor under the circumstances or as a separate pleading in an ongoing chancery action between the parties. Nothing in this section shall:



- (a) Be construed to require consideration of emergency relief by a chancery court; or
- (b) Preclude a chancery court from entering an order of emergency relief.

(3) The petitioner in any action brought pursuant to this chapter shall not bear the costs associated with its filing or the costs associated with the issuance or service of any notice of a hearing to the respondent, issuance or service of an order of protection on the respondent, or issuance or service of a warrant or witness subpoena. If the court finds that the petitioner is entitled to an order protecting the petitioner from abuse, the court shall be authorized to assess all costs including attorney's fees of the proceedings to the respondent. The court may assess costs including attorney's fees to the petitioner only if the allegations of abuse are determined to be without merit and the court finds that the petitioner is not a victim of abuse as defined by Section 93-21-3.

Pratt argues that Nelson only requested relief under the [Protection from Domestic Abuse] Act, not under Rule 65. Nelson agrees that she did not request relief under Rule 65, claiming she only requested a “Domestic Violence Order of Protection,” and filed pleadings under the Act on forms created by the Attorney General's Office. Both Nelson and Pratt also agree that since relief was not originally requested under Rule 65, the requirements of Rule 65(d)(2) have not been met regarding Nelson's petition for a domestic violence protection order filed on November 2011. Nor did Nelson file a complaint or affidavit requesting relief under Rule 65. It appears the chancellor was continuing the temporary restraining order put in place at the beginning of the trial on August 1 permanently under Rule 65, instead of granting protection under the requested relief of the Act. However, Rule 65 is not the proper vehicle for imposing a permanent restraining order; it is designed to afford temporary relief when irreparable harm occurs. As Nelson notes, there is no precedent for converting a domestic violence protection order into a Rule 65 injunction; neither the statute nor the rule contemplates this action. Under this case's procedural posture, Nelson was either entitled to relief under the Act or not. We therefore find the chancellor's ruling in error regarding the Rule 65 injunction/restraining order. ***Pratt v. Nelson*, 170 So. 3d 620, 624-25 (Miss. Ct. App. 2015).**

**§ 93-21-9      Petition contents:**

(1) A petition filed under the provisions of this chapter shall state:

- (a) Except as otherwise provided in this section, the  
name,  
address and  
county of residence of each petitioner and  
name,  
address and  
county of residence of each individual alleged to have committed abuse;
- (b) The facts and circumstances concerning the alleged abuse;
- (c) The relationships between the petitioners and the individuals alleged to have committed abuse; and
- (d) A request for one or more domestic abuse protection orders.

**When Spouse Requests Protective Order**

(2) If a petition requests a domestic abuse protection order for a spouse and alleges that the other spouse has committed abuse, the petition shall state whether or not a suit for divorce of the spouses is pending and, if so, in what jurisdiction.

**When Petitioner and Respondent are in a Divorce Proceeding**

(3) Any temporary or permanent decree issued in a divorce proceeding subsequent to an order issued pursuant to this chapter may, in the discretion of the chancellor hearing the divorce proceeding, supersede in whole or in part the order issued pursuant to this chapter.

**When Petitioner is Divorced from Respondent**

(4) If a petitioner is a former spouse of an individual alleged to have committed abuse:

- (a) A copy of the decree of divorce shall be attached to the petition; or
- (b) The petition shall state the decree is currently unavailable to the petitioner and that a copy of the decree will be filed with the court before the time for the hearing on the petition.

**For Protection Order for a Child Under the Jurisdiction of a Court**

(5) If a petition requests a domestic abuse protection order for a child who is

subject to the continuing jurisdiction of a youth court, family court or a chancery court, or alleges that a child who is subject to the continuing jurisdiction of a youth court, family court or chancery court has committed abuse:

- (a) A copy of the court orders affecting the custody or guardianship, possession and support of or access to the child shall be filed with the petition; or
- (b) The petition shall state that the orders affecting the child are currently unavailable to the petitioner and that a copy of the orders will be filed with the court before the hearing on the petition.

**Emergency Relief**

(6) If the petition includes a request for emergency relief pending a hearing, the petition shall contain a general description of the facts and circumstances concerning the abuse and the need for immediate protection.

**Petitioner's Address May be Omitted from Petition**

(7) If the petition states that the disclosure of the petitioner's address would risk abuse of the petitioner or any member of the petitioner's family or household, or would reveal the confidential address of a shelter for domestic violence victims, the petitioner's address may be omitted from the petition. If a petitioner's address has been omitted from the petition pursuant to this subsection and the address of the petitioner is necessary to determine jurisdiction or venue, the disclosure of such address shall be made orally and in camera. A nonpublic record containing the address and contact information of a petitioner shall be maintained by the court to be utilized for court purposes only.

**Petition Signed Under Oath**

(8) Every petition shall be signed by the petitioner under oath that the facts and circumstances contained in the petition are true to the best knowledge and belief of the petitioner. . . .

## **Emergency Domestic Abuse Protection Order**

### **§ 93-21-13     Emergency domestic abuse protection orders:**

(1)(a) The court in which a petition seeking emergency relief pending a hearing is filed must consider all such requests in an expedited manner and shall not refer or direct the matter to be sent to another court. The court may issue an emergency domestic abuse protection order without prior notice to the respondent upon good cause shown by the petitioner. Immediate and present danger of abuse to the petitioner, any minor children or any person alleged to be incompetent shall constitute good cause for issuance of an emergency domestic abuse protection order. The respondent shall be provided with notice of the entry of any emergency domestic abuse protection order issued by the court by personal service of process.

(b) A court granting an emergency domestic abuse protection order may grant relief as provided in Section 93-21-15(1)(a).

(c) An emergency domestic abuse protection order shall be effective for ten (10) days, or until a hearing may be held, whichever occurs first. If a hearing under this subsection (1) is continued, the court may grant or extend the emergency order as it deems necessary for the protection of the abused person. A continuance under this subsection (1)(c) shall be valid for no longer than twenty (20) days.

(2) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for emergency domestic abuse protection orders. Use of the standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

(3) Upon issuance of any protection order by the court, the order shall be entered into the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93-21-25, and a copy provided to the sheriff's department in the county of the court of issuance.

(4) An emergency domestic abuse protection order issued under this section is effective in this state, in all other states, and in United States territories and tribal lands. A court shall not limit the scope of a protection order to the boundaries of the State of Mississippi or to the boundaries of a municipality or county within the State of Mississippi.

## Hearing

### **§ 93-21-11 Notice and Hearing:**

(1) Within ten (10) days of the filing of a petition under the provisions of this chapter, the court shall hold a hearing, at which time the petitioner must prove the allegation of abuse by a preponderance of the evidence.

(2) The respondent shall be given notice of the filing of any petition and of the date, time and place set for the hearing by personal service of process. A court may conduct a hearing in the absence of the respondent after first ascertaining that the respondent was properly noticed of the hearing date, time and place.

Section 93-21-11, which provides that “[w]ithin ten (10) days of the filing of a petition under the provisions of this chapter [Protection from Domestic Abuse], the court shall hold a hearing, at which time the petitioner must prove the allegations of abuse by a preponderance of the evidence. . . .” *Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).

### **§ 93-21-19 Testimony by spouses not to be restricted:**

There shall be no restrictions concerning a spouse testifying against his spouse in any hearing under the provisions of this chapter.

## Protective Order

### **§ 93-21-15 Protective orders; consent agreements:**

(1)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the municipal and justice courts shall be empowered to grant a temporary domestic abuse protection order to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. The relief the court may provide includes, but is not limited to, the following:

- (i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;
- (ii) Prohibiting or limiting respondent's physical proximity to the abused or other household members as designated by the court, including residence and place of work;
- (iii) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court, whether in person, by

telephone or by other electronic communication;

(iv) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both; or

(v) Prohibiting the transferring, encumbering or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business.

(b) The duration of any temporary domestic abuse protection order issued by a municipal or justice court shall not exceed thirty (30) days. However, if the party to be protected and the respondent do not have minor children in common, the duration of the temporary domestic abuse protection order may exceed thirty (30) days but shall not exceed one (1) year.

(c) Procedures for an appeal of the issuance of a temporary domestic abuse protection order are set forth in Section 93-21-15.1.

(2)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the chancery or county court shall be empowered to grant a final domestic abuse protection order or approve any consent agreement to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. In granting a final domestic abuse protection order, the chancery or county court may provide for relief that includes, but is not limited to, the following:

(i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;

(ii) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both;

(iii) When the respondent has a duty to support the petitioner, any minor children, or any person alleged to be incompetent living in the residence or household and the respondent is the sole owner or lessee, granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both, or by consent agreement allowing the respondent to provide suitable, alternate housing;

(iv) Awarding temporary custody of or establishing temporary visitation rights with regard to any minor children or any person alleged to be incompetent, or both;

(v) If the respondent is legally obligated to support the petitioner, any

minor children, or any person alleged to be incompetent, ordering the respondent to pay temporary support for the petitioner, any minor children, or any person alleged to be incompetent;

(vi) Ordering the respondent to pay to the abused person monetary compensation for losses suffered as a direct result of the abuse, including, but not limited to, medical expenses resulting from such abuse, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses, a reasonable attorney's fee, or any combination of the above;

(vii) Prohibiting the transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business;

(viii) Prohibiting or limiting respondent's physical proximity to the abused or other household members designated by the court, including residence, school and place of work;

(ix) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court whether in person, by telephone or by electronic communication; and

(x) Ordering counseling or professional medical treatment for the respondent, including counseling or treatment designed to bring about the cessation of domestic abuse.

(b) Except as provided below, a final domestic abuse protection order issued by a chancery or county court under the provisions of this chapter shall be effective for such time period as the court deems appropriate. The expiration date of the order shall be clearly stated in the order.

(c) Temporary provisions addressing temporary custody, visitation or support of minor children contained in a final domestic abuse protection order issued by a chancery or county court shall be effective for one hundred eighty (180) days. A party seeking relief beyond that period must initiate appropriate proceedings in the chancery court of appropriate jurisdiction. If at the end of the one-hundred-eighty-day period, neither party has initiated such proceedings, the custody, visitation or support of minor children will revert to the chancery court order addressing such terms that was in effect at the time the domestic abuse protection order was granted. The chancery court in which custody, visitation or support proceedings have been initiated may provide for any temporary provisions addressing custody, visitation or support as the court deems appropriate.

(3) Every domestic abuse protection order issued pursuant to this section shall set forth the reasons for its issuance, shall contain specific findings of fact regarding the existence of abuse, shall be specific in its terms and shall describe in reasonable detail the act or acts to be prohibited. No mutual protection order shall be issued unless that order is supported by an independent petition by each party

requesting relief pursuant to this chapter, and the order contains specific findings of fact regarding the existence of abuse by each party as principal aggressor, and a finding that neither party acted in self-defense.

(4) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for temporary and final domestic abuse protection orders. The use of standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

(5) Upon issuance of any protection order by the court, the order shall be entered in the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93-21-25, and a copy shall be provided to the sheriff's department in the county of the court of issuance.

(6) Upon subsequent petition by either party and following a hearing of which both parties have received notice and an opportunity to be heard, the court may modify, amend, or dissolve a domestic abuse protection order previously issued by that court.

(7) A domestic abuse protection order issued under this section is effective in this state, in all other states, and in United States territories and tribal lands. A court shall not limit the scope of a protection order to the boundaries of the State of Mississippi or to the boundaries of a municipality or county within the State of Mississippi.

(8) Procedures for an appeal of the issuance or denial of a final domestic abuse protection order are set forth in Section 93-21-15.1.

**§ 93-21-17      Grant of relief not to affect property titles or availability of other remedies; court approval required to amend orders:**

(1) The granting of any relief authorized under this chapter shall not preclude any other relief provided by law.

(2) The court may amend its order or agreement at any time upon subsequent petition filed by either party. Protective orders issued under the provisions of this chapter may only be amended by approval of the court.

(3) No order or agreement under this chapter shall in any manner affect title to any real property.



**§ 93-21-29 Proceedings to be in addition to other civil or criminal remedies:**

Any proceeding under this chapter shall be in addition to other available civil or criminal remedies.

**Appeals**

**§ 93-21-15.1 [Appeals]:**

**(1)(a) De novo appeal.** Any party aggrieved by the decision of a municipal or justice court judge to issue a temporary domestic abuse protection order has the right of a trial de novo on appeal in the chancery court having jurisdiction. The trial de novo shall be held within ten (10) days of the filing of a notice of appeal. All such appeals shall be priority cases and the judge must be immediately notified when an appeal is filed in order to provide for expedited proceedings. The appeal will proceed as if a petition for an order of protection from domestic abuse had been filed in the chancery court. Following the trial de novo, if the petitioner has proved the existence of abuse by a preponderance of the evidence, the chancery court may grant a final domestic abuse protection order. In granting a final domestic abuse protection order, the chancery court may provide for relief that includes, but is not limited to, the relief set out in Section 93-21-15(2).

**(b) Notice of appeal.** The party desiring to appeal a decision from municipal or justice court must file a written notice of appeal with the chancery court clerk within ten (10) days of the issuance of a domestic abuse protection order. In all de novo appeals, the notice of appeal and payment of costs must be simultaneously filed and paid with the chancery clerk. Costs for an appeal by trial de novo shall be calculated as specified in subsection (4) of this section. The written notice of appeal must specify the party or parties taking the appeal and must designate the judgment or order from which the appeal is taken. A copy of the notice of appeal must be provided to all parties or their attorneys of record and to the clerk of the court from which the appeal is taken. A certificate of service must accompany the written notice of appeal. Upon receipt by the municipal or justice court of the notice of appeal, the clerk of the lower court shall immediately provide the entire court file to the chancery clerk.

**(2)(a) Appeals on the record.** Any party aggrieved by the decision of a county court to issue a final domestic abuse protection order or to deny such an order shall be entitled to an appeal on the record in the chancery court having jurisdiction. If the county court has issued a domestic abuse protection order as a temporary order instead of a final order as contemplated by Section 93-21-15(2), the chancery court shall permit the appeal on the record and shall treat the temporary order issued by the county court as a final order on the matter. The

chancery court shall treat the appeal as a priority matter and render a decision as expeditiously as possible.

**(b) Notice of appeal and filing the record.** The party desiring to appeal a decision from county court must file a written notice of appeal with the chancery court clerk within ten (10) days of the issuance of a domestic abuse protection order. In all appeals, the notice of appeal and payment of costs, where costs are applicable, shall be simultaneously filed and paid with the chancery clerk. Costs shall be calculated as specified in subsection (4) of this section. The written notice of appeal must specify the party or parties taking the appeal and must designate the judgment or order from which the appeal is taken. A copy of the notice of appeal must be provided to all parties or their attorneys of record and to the clerk of the court from which the appeal is taken. A certificate of service must accompany the written notice of appeal. In all appeals in which the appeal is solely on the record, the record from the county court must be filed with the chancery clerk within thirty (30) days of filing of the notice of appeal. However, in cases involving a transcript, the court reporter or county court may request an extension of time. The court, on its own motion or on application of any party, may compel the compilation and transmission of the record of proceedings. Failure to file the record with the court clerk or to request the assistance of the court in compelling the same within thirty (30) days of the filing of the written notice of appeal may be deemed an abandonment of the appeal and the court may dismiss the same with costs to the appealing party or parties, unless a party or parties is exempt from costs as specified in subsection (4) of this section.

**(c) Briefs on appeal on the record.** Briefs, if any, filed in an appeal on the record must conform to the practice in the Supreme Court as to form and time of filing and service, except that the parties should file only an original and one (1) copy of each brief. The consequences of failure to timely file a brief will be the same as in the Supreme Court.

**(3) Supersedeas.** The perfecting of an appeal, whether on the record or by trial de novo, does not act as a supersedeas. Any domestic abuse protection order issued by a municipal, justice or county court shall remain in full force and effect for the duration of the appeal, unless the domestic abuse protection order otherwise expires due to the passage of time.

**(4) Cost bond.** In all appeals under this section, unless the court allows an appeal in forma pauperis or the appellant otherwise qualifies for exemption as specified in this subsection (4), the appellant shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the chancery clerk. In all cases

where the appellant is appealing the denial of an order of protection from domestic abuse by a county court, the appellant shall not be required to pay any costs associated with the appeal, including service of process fees, nor shall the appellant be required to appeal in forma pauperis. In such circumstances, the court may assess costs of the appeal to the appellant if the court finds that the allegations of abuse are without merit and the appellant is not a victim of abuse. Where the issuance of a mutual protection order is the basis of the appeal, the appellant may be entitled to reimbursement of appellate costs paid to the court as a matter of equity if the chancery court finds that the mutual order was issued by the lower court without regard to the requirements of Section 93-21-15(3).

(5) The appellate procedures set forth in this section for appeals from justice, municipal and county courts shall control if there is a conflict with another statute or rule.

(6) Any party aggrieved by the issuance or denial of a final order of protection by a chancery court shall be entitled to appeal the decision. The appeal shall be governed by the Mississippi Rules of Appellate Procedure and any other applicable rules or statutes.

### **Violation of Protective Order**

#### **§ 93-21-21 Violation of order or agreement:**

(1) Upon a knowing violation of (a) a protection order or court-approved consent agreement issued pursuant to this chapter, (b) a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse . . . , or (c) a bond condition imposed pursuant to Section 99-5-37, the person violating the order or condition commits a misdemeanor punishable by imprisonment in the county jail for not more than six (6) months or a fine of not more than One Thousand Dollars (\$ 1,000.00), or both.

(2) Alternatively, upon a knowing violation of a protection order or court-approved consent agreement issued pursuant to this chapter or a bond condition issued pursuant to Section 99-5-37, the issuing court may hold the person violating the order or bond condition in contempt, the contempt to be punishable as otherwise provided by applicable law. A person shall not be both convicted of a misdemeanor and held in contempt for the same violation of an order or bond condition.

(3) When investigating allegations of a violation under subsection (1) of this section, law enforcement officers shall utilize the uniform offense report prescribed for this purpose by the Office of the Attorney General in consultation with the sheriff's and police chief's associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under subsection (1) of this section.

(4) In any conviction for a violation of a domestic abuse protection order as described in subsection (1) of this section, the court shall enter the disposition of the matter into the corresponding uniform offense report.

(5) Nothing in this section shall be construed to interfere with the court's authority, if any, to address bond condition violations in a more restrictive manner.

### **Protective Orders Issued in Foreign Jurisdictions**

#### **§ 93-21-16 Full faith and credit for certain protective orders issued in other jurisdictions:**

- (1) A protective order from another jurisdiction issued to protect the applicant from abuse as defined in Section 93-21-3, or a protection order as defined in Section 93-22-3, issued by a tribunal of another state . . . shall be accorded full faith and credit by the courts of this state and enforced in this state as provided for in the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.
- (2) For purposes of enforcement by Mississippi law enforcement officers, a protective order from another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, is presumed to be valid if it meets the requirements of Section 93-22-7.
- (3) For purposes of judicial enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, an order is presumed valid if it meets the requirements of Section 93-22-5(4). It is an affirmative defense in any action seeking enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, that any criteria for the validity of the order is absent.

### **Mississippi Protective Order Registry**

#### **§ 93-21-25 Mississippi Protective Order Registry:**

- (1) In order to provide a statewide registry for protection orders and to aid law enforcement, prosecutors and courts in handling such matters, the Attorney General is authorized to create and administer a Mississippi Protection Order Registry. The Attorney General's office shall implement policies and procedures governing access to the registry by authorized users, which shall include provisions addressing the confidentiality of any information which may tend to reveal the location or identity of a victim of domestic abuse.
- (2) All orders issued pursuant to Sections 93-21-1 through 93-21-29, 97-3-7(11), 97-3-65(6) or 97-3-101(5) will be maintained in the Mississippi Protection Order Registry. It shall be the duty of the clerk of the issuing court to enter all civil and criminal domestic abuse protection orders and all criminal sexual assault protection orders, including any modifications, amendments or dismissals of such orders, into the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays. . . .

**THE  
DOMESTIC VIOLENCE FORMS  
DRAFTED BY  
THE ATTORNEY GENERAL'S OFFICE  
ARE AVAILABLE  
ON THE ATTORNEY GENERAL'S  
WEB SITE:**

<http://www.ago.state.ms.us/divisions/domestic-violence/>

**CHAPTER 31**

**RESTRAINING ORDERS & INJUNCTIVE RELIEF**

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## **CHAPTER 31**

### **RESTRAINING ORDERS & INJUNCTIVE RELIEF**

#### **Authority to Grant Injunctions**

**Mississippi Rule of Civil Procedure 65, Injunctions** states:

**(e) Jurisdiction Unaffected.** Injunctive powers heretofore vested in the chancery courts remain unchanged by this rule.

While it is true that Rule 65(e) of the Mississippi Rules of Civil Procedure provides that the previously bestowed injunctive powers of the circuit and chancery courts are unchanged by Rule 65, it is a historical fact that the basis for equity jurisdiction of a suit for an injunction is the inadequacy of a remedy in circuit court. *Union National Life Ins. Co. v. Crosby*, 870 So. 2d 1175, 1181 (Miss. 2004) (citations omitted).

#### **§ 11-13-1 Complainant's equity, truthful allegations required:**

An injunction shall not be granted unless the judge or chancellor shall be satisfied of the complainant's equity and of the truth of the allegations of the bill, by oath or other means.

#### **Preliminary Injunction**

**Mississippi Rule of Civil Procedure 65, Injunctions** states:

##### **(a) Preliminary Injunction.**

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing on application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon a trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

Rule 65 authorizes parties to seek temporary restraining orders (TROs) and preliminary injunctions in civil cases in which permanent injunctive relief or other relief is being sought. A party may move for, and in appropriate circumstances, obtain a TRO and/or a preliminary injunction before the merits of the case are resolved. Generally, the purpose of a TRO is to provide temporary short term relief until further action can be taken in the case. To obtain a TRO without notice to the adverse party, the party seeking relief must show, by affidavit or verified complaint, that it will suffer immediate and irreparable injury before the adverse party can be heard in opposition. In addition, the attorney for the party seeking the TRO must certify to the court in writing the efforts made to give the adverse party notice and the reasons why the notice to the adverse party should not be required. If a TRO is granted without notice, it must contain the information required by Rule 65(b) and it must expire by its terms, not more than 10 days after its entry, except in domestic relations cases. Before its expiration, a TRO may be extended by the court for a like period if the restrained party consents or the court extends the TRO for good cause shown. The purpose of a preliminary injunction is to provide injunctive relief until the merits of the case are resolved. Preliminary injunctions cannot be granted without notice. A party moving for preliminary injunctive relief pursuant to Rule 65(a) must demonstrate that “(i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest.” Motions for preliminary injunctions are within the trial court's discretion. *Advisory Committee Notes (citations omitted).*

An application for a preliminary injunction is a matter committed to the Chancery Court's sound discretion. Following other jurisdictions, we have accepted that the court considering such an application must weigh and balance an assortment of equities and, in the end, make at least four findings, to wit:

- (1) There exists a substantial likelihood that plaintiff will prevail on the merits;
- (2) The injunction is necessary to prevent irreparable injury;
- (3) Threatened injury to the plaintiffs outweighs the harm an injunction might do to the defendants; and
- (4) Entry of a preliminary injunction is consistent with the public interest.

*City of Durant v. Humphreys County Memorial Hosp.*, 587 So. 2d 244, 250 (Miss. 1991) (citations omitted).

Under the traditional practice, plaintiff bears the burden of showing the prerequisites for obtaining the extraordinary relief of preliminary injunction. Inadequacy of the remedy at law is the basis upon which the power of injunction is exercised. Injunction will not issue when the complainants have a complete and adequate remedy by appeal. *Moore v. Sanders*, 558 So. 2d 1383, 1385 (Miss. 1990).

### **Security**

**Mississippi Rule of Civil Procedure 65, Injunctions** states:

**(c) Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

**Mississippi Rule of Civil Procedure 65.1, Security: Proceedings Against Sureties** states:

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting the liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

### **Permanent Injunction**

The general rule controlling the form of an injunction has been stated as follows: A decree should be complete within itself, - containing no extraneous references, and leaving open no matter or description out of which contention may arise as to the meaning. Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference . . . the act or acts sought to be restrained. . . . Trial courts are to balance four factors:

- (1) there exists a substantial likelihood that plaintiff will prevail on the merits;
- (2) the injunction is necessary to prevent irreparable harm;
- (3) the threatened harm to the applicant outweighs the harm the injunction might do to the respondents; and
- (4) the injunction is consistent with the public interest.

***Favre v. Jourdan River Estates*, 148 So. 3d 361, 371 (Miss. 2014) (citations omitted).**

The party requesting an injunction must show a threat of imminent harm, rather than mere fear or apprehension alone. To obtain a permanent injunction, a party must show an imminent threat of irreparable harm for which there is no adequate remedy at law. It is likewise true, however, that the remedy by injunction is preventive in its nature, and that it is not necessary to wait for the actual occurrence of the injury, since, if this were required, the purpose for which the relief is sought would, in most cases, be defeated. ***Heidkamper v. Odom*, 880 So. 2d 362, 365-66 (Miss. Ct. App. 2004) (citations omitted).**

We emphasize that an injunction is an equitable remedy. It must be tailored to meet the exigencies of the situation. It must be clear in that the party enjoined is entitled to know what he is expected to do or to refrain from doing. It must be practical in that it must be susceptible of compliance without undue hardship and reasonably likely to achieve the desired end. ***Hall v. Wood*, 443 So. 2d 834, 841 (Miss. 1983).**

Appellee immediately filed the bill in this cause seeking temporary and permanent injunctions prohibiting the Commissioner from enforcing the ruling set out in his letters to appellee. A temporary injunction was granted and, upon a hearing on the merits, the injunction was made permanent. ***White v. National Old Line Ins. Co.*, 34 So. 2d 234, 235 (Miss. 1948).**

### **Mandatory Injunctions**

In *Reynolds v. Amerada Hess Corp.*, we stated, “To obtain a permanent injunction, a party must show an imminent threat of irreparable harm for which there is no adequate remedy at law.” In *Reynolds*, this Court made no mention of a requirement of proof beyond a reasonable doubt, which the trial court stated is the proof required. In *Hall v. Wood*, though this Court suggested use of extreme caution in granting a mandatory injunction, we did not require a showing of proof beyond a reasonable doubt. We stated, “A mandatory injunction should be ordered where such is ‘the only effective remedy.’” For further clarification, we explained, mandatory injunctions should be granted only where that which they demand is reasonably practicable. A mandatory injunction requiring “a practical impossibility” should never issue. The expense and hardship to the party enjoined should also be considered. That these may be substantial counsels caution and restraint. This decision does require that the remedy be practicable. In *Pattillo v. Bridges*, this Court did cite *Thomas*, but not to the requirement of proof beyond a reasonable doubt. *Am. Jur.* Section 17-22, states that a mandatory injunction is a rather harsh remedial process and is not favored by the courts. It is not regarded with judicial favor and is used only with caution and in cases of great necessity. The case must be one clearly disclosing irreparable injury to the complainant. The trial court erred in not applying the correct legal standard. We reverse and remand this case with instructions to the trial court to apply the legal standard as stated in *Reynolds*, requiring the requesting party to show an imminent threat of irreparable harm for which there is no adequate remedy at law, and in keeping with *Homes, Inc.*, a mandatory injunction should be granted only if reasonably practicable. ***Punzo v. Jackson County*, 861 So. 2d 340, 347-48 (Miss. 2003) (citations omitted).**

We reaffirm and reemphasize our longstanding rules that a court of equity should grant a mandatory junction with extreme caution. A mandatory injunction should be ordered where such is "the only effective remedy." Mandatory injunctions should be granted only where that which they demand is reasonably practicable. A mandatory injunction requiring "a practical impossibility" should never issue. The expense and hardship to the party enjoined should also be considered. That these may be substantial counsels caution and restraint. ***Hall v. Wood*, 443 So. 2d 834, 841 (Miss. 1983) (citations omitted).**

### **Prohibitory Injunction**

The essence of the injunction is mandatory, although the "stop any further erosion" part has prohibitory trappings [as a prohibitory injunction prohibits a party from taking some form of action or inaction]. ***Hall v. Wood*, 443 So. 2d 834, 841 (Miss. 1983).**

### Temporary Restraining Orders

Mississippi Rule Civil Procedure 65, Injunctions states:

**(b) Temporary Restraining Order; Notice; Hearing; Duration.** 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

A temporary restraining order may be issued where “immediate and irreparable injury, loss, or damage will result to the applicant” before such time as a hearing on the matter can be held. *A-1 Pallet Co. v. City of Jackson*, 40 So. 3d 563, 567 (Miss. 2010).

(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  
state why the order was granted without notice; and  
shall expire by its terms within such time after entry,

not to exceed ten days, as the court fixes (except in domestic relations cases, when the ten-day limitation shall not apply), unless within the time so fixed the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be stated in the order.

**See § 93-21-11 Hearing; notice; hearing in absentia:**

(1) Within ten (10) days of the filing of a petition under the provisions of this chapter, the court shall hold a hearing, at which time the petitioner must prove the allegation of abuse by a preponderance of the evidence.

(2) The respondent shall be given notice of the filing of any petition and of the date, time and place set for the hearing by personal service of process. A court may conduct a hearing in the absence of the respondent after first ascertaining that the respondent was properly noticed of the hearing date, time and place.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence over all matters except older matters of the same character.

When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

The decision to grant a TRO is within the chancellor's discretion. In this instance, the chancellor was concerned about Jackson's assets - specifically, that her checking accounts and certificates of deposit might be depleted or transferred to another bank. The chancellor issued the TRO in order to freeze Jackson's assets. *In re Conservatorship of Estate of Jackson*, 203 So. 3d 4, 7 (Miss. Ct. App. 2016).

### Security

**Mississippi Rule Civil Procedure 65, Injunctions** states:

**(c) Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

A person wrongfully enjoined and thus prevented even temporarily from pursuing some lawful pursuit may, as a component of being made whole, recover the costs of fighting the injunction. *See also Cox v. Trustmark Nat'l Bank*, 733 So. 2d 353 (Miss. Ct. App. 1999) (“The wrongful acquisition of a preliminary injunction permits the

enjoined party to recover damages and attorneys' fees.”). *Young v. Deaton*, 766 So. 2d 819, 822 (Miss. Ct. App. 2000) (citations omitted).

**Mississippi Rule of Civil Procedure 65.1, Security: Proceedings Against Sureties** states:

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting the liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.