

## TERMINATION OF PARENTAL RIGHTS AND ADOPTION PROCEEDINGS

Parental rights may be terminated in either an adoption proceeding or in a termination action apart from adoption. Appointment of a guardian ad litem is mandatory in contested termination and adoption actions, and in adoption actions in which an agency is involved.

### **I. Appointment of a guardian ad litem**

Appointment of a guardian ad litem is mandatory in actions to terminate parental rights. *See* MISS. CODE ANN. § 93-15-107(1) (2004). An attorney must also be appointed as guardian ad litem in any contested adoption action in which parental rights will be terminated. The statute also appears to require appointment of a guardian ad litem when an adoption agency is involved in an uncontested adoption. MISS. CODE ANN. § 93-17-8(1)(b) (2004).

In an adoption based on parental consent, a chancellor has discretion to appoint a guardian ad litem. MISS. CODE ANN. § 93-17-8(1)(b) (2004). The Mississippi Supreme Court rejected a claim that appointment of a guardian is required because an uncontested adoption has the effect of terminating parental rights. The adoption statute specifically provides that appointment of a guardian is discretionary when the adoption is uncontested and no adoption agency is involved. *In re Adoption of D.T.H.*, 748 So. 2d 853, 855 (Miss. Ct. App. 1999).

The supreme court has refused to require the appointment of a guardian ad litem for minor parents whose rights will be terminated by adoption. *See Adoption of J.M.M. v. New Beginning of Tupelo, Inc.*, 796 So. 2d 975, 983 (Miss. 2001). However, the court

has suggested that a guardian should be appointed if the circumstances present an opportunity for overreaching. For example, a guardian would have been preferable to ensure that no overreaching occurred when a minor mother consented to adoption by her parents, in whose home she was living. *In re Adoption of a Minor*, 558 So. 2d 854, 857 (Miss. 1990) (but holding chancellor was within discretion in not appointing guardian).

Guardians ad litem are charged with “an affirmative duty to zealously represent the child’s best interest.” *P.K.C.G. v. M.K.G.*, 793 So. 2d 669, 674 (Miss. Ct. App. 2001) (quoting *D.K.L. v. Hall*, 652 So. 2d 184, 188 (Miss. 1995)). A guardian assists the court by investigating and making recommendations regarding custody. *S.N.C. v. J.R.D., Jr.*, 755 So. 2d 1077, 1082 (Miss. 2000) (guardian acts as representative of court). A guardian must be competent, without interests adverse to the child, and adequately informed regarding the duties of a guardian. *In re R.D.*, 658 So. 2d 1378, 1383 (Miss. 1995). At a minimum, a guardian must interview the children and their custodians or parents. Adequate representation may also require review of school, medical, and psychological records. *M.J.S.H.S. v. Yalobusha County Dep’tartment of Human Servs*, 782 So. 2d 737, 741 (Miss. 2001). The supreme court reversed and remanded a termination action in which the guardian cross-examined witnesses but did not testify or provide an independent report. *See D.J.L. v. Bolivar County Dep’t Human Servs.*, 824 So. 2d 617, 622-23 (Miss. 2002).

A chancellor’s findings of fact in a termination action should include a summary of the guardian’s qualifications and report. *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1082 (Miss. 2000). The court remains the ultimate fact finder and is not required to follow the guardian’s recommendation. However, if the court rejects the guardian’s

recommendation, the court's findings must include its reasons for rejecting the report. *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1082 (Miss. 2000).

## **II. Termination grounds**

The grounds for involuntary termination of parental rights are statutory. The supreme court has emphasized that the grounds are controlled by the legislature and must be strictly construed. Courts may not add to the enumerated grounds. Grounds for termination that occurs separate from adoption are set out in MISS. CODE ANN. § 93-15-103. Grounds for termination in an adoption proceeding are set out in MISS. CODE ANN. § 93-17-8. In an adoption action, a parent's rights may be terminated based on the grounds in either statute, but in a stand-alone termination, only the grounds in the termination statute may be used.

### **[A] Grounds for stand-alone termination**

The statute provides that termination may be ordered when a child cannot be returned to its parents, relatives are not available to care for the child, adoption is in the child's best interest, and one of the following grounds for termination is proved.

**[1] Abandonment**, described as conduct that shows a "settled purpose to forego all duties and relinquish all parental claims."

**[2] Desertion**, defined as "forsaking one's duty as well as a breaking away from or breaking off associations with some matter involving a legal or moral obligation." *Petit v. Holifield*, 443 So. 2d 874, 878 (Miss. 1984) (citing *Ainsworth v. Natural Father*, 414 So. 2d 417 (Miss. 1982)).

**[3] Failure to contact** a child under the age of three for six months or a child over the age of three for one year.

[4] **Abuse.** Termination may be ordered when a parent “has been responsible for a series of abusive events concerning one or more children.”

[5] **Agency custody.** Parental rights may be terminated if (1) a child has been in the custody of the Department of Human Services or other agency for a year; (2) the agency has “made diligent efforts to develop and implement a plan for return of the child;” and (3) the parent has failed to exercise visitation with the child or has failed to implement an agreed plan for return of the child.

[6] **Ongoing parental behavior.** Termination may be based on a parent’s ongoing behavior that makes a child’s return to the parent impossible. This may include a condition that prevents the parent from providing “minimally acceptable” care for a child, such as alcohol or drug addiction, mental disability or illness, or extreme physical disability. In addition, if a child care agency or court has specified behavior that is a barrier to parental custody and has made diligent attempts to assist the parent, the parent’s failure to eliminate the identified behavior may be grounds for termination.

[7] **Extreme antipathy.** Termination of parental rights may be based on a child’s “extreme and deep-seated antipathy” toward a parent or on a substantial erosion of the parent-child relationship caused in part by serious neglect or abuse or prolonged absence or imprisonment.

[8] **Felonious assault or sexual assault.** A parent’s conviction for a crime against any child involving sexual assault or exploitation may be a basis for termination of parental rights with regard to other children. In addition, a conviction for the murder, involuntary manslaughter, or felony assault of another of the defendant’s children is grounds for termination.

**[9] Abuse and neglect.** Parental rights may be terminated when a court has made a finding of abuse or neglect and provided for foster placement under section 43-15-13 of the Mississippi Code and the court finds that it is not in the child's best interests to be returned to his or her parents.

**[10] Voluntary relinquishment.** Parental rights may be relinquished through a written voluntary release of rights.

MISS. CODE ANN. § 93-15-103.

**[B] Alternatives to termination**

The Mississippi termination statute provides that courts should consider permanent alternatives to termination such as placing legal custody with a third party. The court should select these alternatives if continued parental contact is in a child's best interest and it is possible to provide a permanent placement and end DHS supervision without termination. MISS. CODE ANN. § 93-15-103.

**[C] Grounds for termination in an adoption proceedings**

In an adoption proceeding, parental rights may be terminated by consent (an uncontested adoption) or based on the grounds set out below. Adoption may not be ordered unless the court finds by clear and convincing evidence that the statutory grounds for termination of parental rights and adoption exist.

**[1] Test.** Adoption may be ordered over a parent's objection upon proof that the parent abandoned or deserted the child or is "mentally, morally, or otherwise unfit" and if adoption is in the child's best interest. MISS. CODE ANN. 93-17-1. The supreme court has emphasized that the test for adoption is two-fold. First, the court must find that the

statutory grounds for termination and adoption have been met. If grounds are proved, the court must then determine whether adoption is in the child's best interest.

**[2] Enumerated grounds.** The adoption statute provides a list of circumstances that meet the "abandoned, deserted, or unfit" test. There is substantial overlap between the grounds set out in the adoption and termination statutes, but they are not identical.

**[a] Abandonment.** Abandonment is listed as a ground for termination independent of adoption and in connection with an adoption.

**[b] Desertion.** Desertion is listed as a ground for termination independent of adoption and in connection with an adoption.

**[c] Abuse.** Adoption may be ordered over the objection of a parent who has (1) inflicted physical or mental injury that caused a child's deterioration; (2) sexually abused a child; or (3) exploited or overworked a child to the point of endangering his or her health or emotional well-being.

**[d] Failure to provide.** Adoption may be ordered when a parent has failed to provide reasonable care for a child, including food, clothing, shelter, and treatment.

**[e] Condition making parent unable to provide.** Adoption may be ordered over the objection of a parent whose illness, disability, mental condition, behavior or conduct disorder, or substance abuse or dependency makes the parent "unable or unwilling to provide an adequate permanent home for the child . . . based upon expert opinion or . . . an established pattern of behavior." The termination chapter contains a similar but not identical ground.

**[f] Conduct posing a substantial risk of harm.** Grounds for adoption also include a parent's present or past conduct that poses a substantial risk of harm to a child's physical, mental, or emotional health.

**[g] Grounds in termination statute.** Adoption may be ordered over a parent's objection if the court finds that any of the grounds set out in the statute governing independent termination of parental rights have been proved.

MISS. CODE ANN. § 93-17-8 (2004).

**[h] Other unfitness.** In adoption actions, courts may find unfitness based on conduct not specifically enumerated in the statutory listing. However, the catch-all provision has been applied sparingly. Only parental conduct equal in severity to the more specific grounds has been found to prove unfitness. For example, a parent's nonmarital cohabitation or adulterous relationship is not in itself unfitness for purposes of adoption. *See In re J.D.*, 512 So. 2d 684, 686 (Miss. 1987) (cohabitation); *Petit v. Holifield*, 443 So. 2d 874 (Miss. 1984) (adultery).

### **III. Uncontested terminations and adoptions**

A termination is considered uncontested if all persons with a right to object have executed a valid consent to adoption. The consent may not be executed prior to seventy-two hours after the child's birth. MISS. CODE ANN. § 93-17-5(1) (2004). If the child's physical or legal custodian is an institutional home, an authorized officer or representative of the home may consent to the adoption.

**[A] Parties who must consent**

**[1] Mother and legal father.** No child may be adopted over the objection of a parent unless his or her rights have been terminated. A parent whose rights have been terminated prior to adoption need not be included in the action. MISS. CODE ANN. § 93-17-7(1) (2004).

**[2] Unmarried father.** Until 2002, an unmarried father had no statutory right to be notified of or to object to an adoption. In 1998, the Mississippi Supreme Court held that the state's adoption statute was unconstitutional as applied to an unmarried father who had established a substantial relationship with a child. *Smith v. Malouf*, 722 So. 2d 490 (Miss. 1998).

The statute was amended in 2002. Under the amended statute, an unmarried father may not object to adoption unless, within thirty days after the child's birth, he has demonstrated "a full commitment to the responsibilities of parenthood." MISS. CODE ANN. § 93-17-7(1) (2004). The statute sets out a procedure for determining the rights of an unmarried father.

**[3] Child over fourteen.** A child over the age of fourteen must consent to adoption in a sworn or acknowledged document or be joined in the action as a party. MISS. CODE ANN. § 93-17-7(1) (2004).

**[4] Grandparents/other custodians.** A child's grandparents have no right to object to adoption. Their consent is not required even if they have been granted statutory visitation rights. *In re Adoption of D.T.H.*, 748 So. 2d 853, 857 (Miss. Ct. App. 1999); *In re Adoption of J.J.G.*, 736 So. 2d 1037, (Miss 1999).

**[5] Department of Human Services.** DHS consent is not a prerequisite to adoption. The Mississippi Supreme Court held that a chancellor erred in dismissing an adoption on the grounds that DHS did not consent – chancery courts are vested with the ultimate responsibility for determining whether adoption is in a child’s best interest.

**[B] Procedure for consent**

The requirements for consent are set out in two separate provisions – one describing consent in connection with surrender of a child to a home, the other referring to the procedure for consent in the termination of parental rights statute.

**[1] Surrender of child to home.** The adoption statute provides that a parent may surrender a child to a home by a written, acknowledged document giving the home custody of the child, relinquishing all parental rights, authorizing the home to consent to the child’s adoption, and waiving process in an adoption proceeding. The surrender must be in writing and executed more than seventy-two hours after the child’s birth. MISS. CODE ANN. § 93-17-9 (2004).

**[2] Consent to private adoption.** The adoption statute addresses a parent’s consent to private adoption indirectly, by reference to the termination statute. The adoption statute provides a list of circumstances under which a child may be adopted over a parent’s objection. These include the grounds set out in the termination of parental rights statutes. MISS. CODE ANN. § 93-17-7(2)(e) (2004). Those statutes provide that a parent’s rights, including the right to object to adoption, may be terminated “by the execution of a written voluntary release, signed by the parent, regardless of the age of the parent.” MISS. CODE ANN. § 93-15-103(2) (2004). In 2008, the Mississippi Supreme Court held that a parent’s consent to adoption by a particular couple did not constitute a

blanket consent to adoption and termination of parental rights. *A.D.R. v. J.L.H.*, 994 So. 2d 177 (Miss. 2008).

**[C] Revocation of consent.** Consent to adoption may not be revoked absent clear and convincing proof that the agreement was produced by fraud, duress, or undue influence. *In re Adoption of D.N.T.*, 843 So. 2d 690 (Miss. 2003); *Adoption of J.M.M. v. New Beginnings of Tupelo, Inc.*, 796 So. 2d 975, 978-79 (Miss. 2001); *Grafe v. Olds*, 556 So. 2d 690 (Miss. 1990) (private adoption); *C.C.I. v. Natural Parents*, 398 So. 2d 220, 226 (Miss. 1981) (public adoption).

A minor mother's attempt to withdraw consent three days after agreeing to adoption was properly denied in the absence of a showing of fraud or duress. *Grafe v. Olds*, 556 So. 2d 690 (Miss. 1990). Several justices of the Mississippi Supreme Court have urged that minor parents who are asked to consent to adoption should be represented by guardians ad litem. *See In re Adoption of D.N.T.*, 843 So. 2d 690, 712 (Miss. 2003) (Cobb, J., concurring); *In re Adoption of J.M.M.*, 796 So. 2d 975, 978-79 (Miss. 2001) (McRae, J., dissenting).

#### **IV. Jurisdiction and venue**

Jurisdiction and venue are different for termination actions separate from adoption and for adoption actions.

##### **[A] Termination apart from adoption**

Jurisdiction to terminate parental rights is shared by chancery courts and family and county courts sitting as youth courts. MISS. CODE ANN. § 93-15-105(1) (2004). However, if a court has previously exercised jurisdiction over a child, that court has

continuing exclusive jurisdiction to hear a petition for termination. For example, a chancery court erred in exercising jurisdiction over foster parents' suit to terminate the rights of a child's parents; the youth court had previously denied a similar petition and entered an order of custody and visitation. *See K.M.K. v. S.L.M.*, 775 So. 2d 115, 118 (Miss. 2000) (holding is limited to counties which have a county court sitting as a youth court, in addition to a chancery court). *But cf. In re Petition of Beggiani*, 519 So. 2d 1208, 1211 (Miss. 1988) (no youth court jurisdiction over adoption in spite of prior order; continuing jurisdiction applicable only to suits of similar nature).

A petition for termination should be filed in the county of the child's or defendant's residence or where an agency with custody of the child is located. MISS. CODE ANN. § 93-15-105(1) (2004).

### **[B] Adoption**

Jurisdiction over adoption is vested in the chancery courts of the state. Until 2006, jurisdiction was based on the adopting petitioner's residency in the state. The jurisdictional requirements were changed by the legislature in 2006 to correspond to the Uniform Adoption Act. Under the new provisions, Mississippi has jurisdiction over an adoption if (1) the child has lived in the state for six months or since birth, with a parent or one acting as a parent (including adopting parents), and there is substantial evidence in the state related to the child's care; (2) the prospective parent has lived in the state for six months immediately prior to the action and there is substantial evidence in the state related to the child's care; (3) the adoption agency is licensed in Mississippi and jurisdiction is in the child's best interest because of (a) the child and biological parents' connection with Mississippi or the child and adopting parents' connection with the state

and (b) substantial evidence in the state related to the child's care; (4) the child and adopting parent are in the state physically and the child has been abandoned or is in danger of mistreatment, abuse, or neglect; or (5) no other state has jurisdiction or the state with jurisdiction has deferred to Mississippi courts. MISS. CODE ANN. § 93-17-3(1) (Supp. 2007).

Although youth courts have concurrent jurisdiction over actions for termination of parental rights, they do not have authority to hear adoption actions. A chancery court properly proceeded with an adoption action in spite of a youth court's outstanding custody order and continuing jurisdiction over a child. *In re Petition of Beggiani*, 519 So. 2d 1208, 1211 (Miss. 1988) (continuing jurisdiction applicable only to suits of similar nature).

Suit should be brought in the county in which the petitioner or child resides, the county in which the child was born or found after abandonment or, if the child has been surrendered to a home, in the county in which the home is located. MISS. CODE ANN. § 93-17-3(1) (2004).