

DUTIES AND PRINCIPLES OF PROFESSIONALISM FOR THE GUARDIAN AD LITEM

Judge Larry Primeaux and Justice Randy Pierce have offered the following principles of professionalism principles for GALs:

- A. COMPETENCE.** A GAL is required to maintain the required certification. Beyond that, the GAL must maintain CLE and demonstrate knowledge, skill, thoroughness and preparation.
- B. PROMPTNESS.** Complies with the court's deadlines and does everything possible to move the case forward. A GAL does not delay the cause without justification.
- C. DILIGENCE.** Interviews all witnesses and reviews all relevant evidence to ensure that the appropriate action is taken for the best interest of the children. Investigates to discover any pertinent information not disclosed by the participants. A GAL does not neglect to perform the task assigned. Timely submits a written report addressing all relevant considerations.
- D. FAIRNESS.** The GAL's duty is to protect the best interest of the children, not to advocate for any of the litigant parties. The GAL must have no conflict of interest. The GAL maintains neutrality and the appearance of impartiality consistent with this duty, and presents a fair account of the investigation to the Court.
- E. ZEAL IN PROTECTING THE BEST INTEREST OF CHILDREN.** Pursues the best interest of the children actively through reasonably available means permitted by law and the rules of professional conduct.
- F. KNOWLEDGE OF THE APPLICABLE LAW.** Is current in the law applicable to the case, and develops legal authority to support the GAL report.
- G. CANDOR WITH THE COURT.** Communicates with the court through properly noticed pleadings as to all matters affecting the best interest of the children, the cooperation of the parties, any impropriety, and need for a change in the role assigned.
- H. FIDELITY TO THE ROLE ASSIGNED.** Acts within the scope of the role assigned by the court.
- I. INDEPENDENCE.** Maintains and exercises independent judgment about the best interests of the children.

- J. WILLINGNESS TO ACCEPT APPOINTMENTS.** Rule 6.2 of the Rules of Professional Conduct requires that lawyers not seek to avoid appointments except under certain specified conditions. The fact that the appointment would be controversial or unpopular is not in and of itself a disqualifying factor.

GENERAL DUTIES OF THE GAL IN MISSISSIPPI

A. TRAINING AND APPOINTMENTS.

MISS. CODE ANN. § 43-21-121 PROVIDES:

- (1) The youth court shall appoint a guardian ad litem for the child:
- (a) When a child has no parent, guardian or custodian;
 - (b) When the youth court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;
 - (c) When the parent is a minor or a person of unsound mind;
 - (d) When the parent is indifferent to the interest of the child or if the interests of the child and the parent, considered in the context of the cause, appear to conflict;
 - (e) In every case involving an abused or neglected child which results in a judicial proceeding; or
 - (f) In any other instance where the youth court finds appointment of a guardian ad litem to be in the best interest of the child.**
- (2) The guardian ad litem shall be appointed by the court when custody is ordered or at the first judicial hearing regarding the case, whichever occurs first.
- (3) In addition to all other duties required by law, a guardian ad litem shall have the DUTY TO PROTECT THE INTEREST OF A CHILD for whom he has been appointed guardian ad litem. The guardian ad litem shall INVESTIGATE, MAKE RECOMMENDATIONS TO THE COURT OR ENTER REPORTS AS NECESSARY TO HOLD PARAMOUNT THE CHILD'S BEST INTEREST. The guardian ad litem is not an adversary party and the court shall insure that guardians ad litem perform their duties properly and in the best interest of their wards. The guardian ad litem shall be a competent person who has no adverse interest to the minor. THE COURT SHALL INSURE THAT THE GUARDIAN AD LITEM IS ADEQUATELY INSTRUCTED ON THE PROPER PERFORMANCE**

OF HIS DUTIES.

(4) The court may appoint either a suitable attorney or a suitable layman as guardian ad litem. **IN CASES WHERE THE COURT APPOINTS A LAYMAN AS GUARDIAN AD LITEM, THE COURT SHALL ALSO APPOINT AN ATTORNEY TO REPRESENT THE CHILD.** From and after January 1, 1999, in order to be eligible for an appointment as a guardian ad litem, such attorney or lay person **MUST HAVE RECEIVED CHILD PROTECTION AND JUVENILE JUSTICE TRAINING PROVIDED BY OR APPROVED BY THE MISSISSIPPI JUDICIAL COLLEGE WITHIN THE YEAR IMMEDIATELY PRECEDING SUCH APPOINTMENT.**

The Mississippi Judicial College shall determine the amount of child protection and juvenile justice training which shall be satisfactory to fulfill the requirements of this section. The Administrative Office of Courts shall maintain a roll of all attorneys and laymen eligible to be appointed as a guardian ad litem under this section and shall enforce the provisions of this subsection.

(5) Upon appointment of a guardian ad litem, the youth court shall continue any pending proceedings for a reasonable time to allow the guardian ad litem to familiarize himself with the matter, consult with counsel and prepare his participation in the cause.

(6) Upon order of the youth court, the guardian ad litem shall be paid a reasonable fee as determined by the youth court judge or referee out of the county general fund as provided under Section 43-21-123. To be eligible for such fee, the guardian ad litem shall submit an accounting of the time spent in performance of his duties to the court.

(7) The court, in its sound discretion, may appoint a volunteer trained layperson to assist children subject to the provisions of this section in addition to the appointment of a guardian ad litem.

B. YOUTH COURT.

Rule 13, URYCP sets forth the requirements for appointment of a GAL in Youth Court. Rule 13 provides in part:

(a) Appointment of guardian ad litem. **The court shall appoint a guardian ad litem for the child when custody is ordered or at the first judicial hearing regarding the case, whichever occurs first,**

(1) when a child has no parent, guardian or custodian;

(2) when the court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;

(3) when the parent is a minor or a person of unsound mind;

(4) when the parent is indifferent to the interest of the child or if the interests of the child and the parent, considered in the context of the cause, appear to conflict;

- (5) in every case involving an abused or neglected child which results in a judicial proceeding; or**
- (6) in any other instance where the court finds appointment of a guardian ad litem to be in the best interest of the child.**

C. CHANCERY COURT.

IF AN ALLEGATION OF ABUSE OR NEGLECT ARISES DURING A CUSTODY PROCEEDING IN CHANCERY COURT, MISS. CODE ANN. 93-5-23 AND MISS. CODE ANN. § 93-11-65 PROVIDE THAT THE GUARDIAN AD LITEM APPOINTED MUST MEET THE QUALIFICATIONS SET OUT IN 43-21-121(4) and 43-21-151.

D. DUTIES OF THE GAL IN MISSISSIPPI

1. Independently investigate
2. Make recommendations to the court or enter reports as necessary
3. Be a competent person
4. Not have an adverse interest to the child
5. Receive adequate instruction by the trial court as to duties
6. Receive training by the Mississippi Judicial College within the preceding year.
7. Visit with the children to ascertain their current status
8. Being prepared to testify as to the present health, education, estate and general welfare of the children, which means interviewing the children, their current custodians, and prospective custodians or adoptive parents.
9. Reviewing records, such as school records, law enforcement records, court records, and current medical and/or psychological records, in addition to any records already held by social workers and therapists.
10. Contact the parent who objects to the loss of custody or the termination of his/her parental rights.
11. Interview witnesses who have relevant knowledge concerning the condition of the minor child

E. MANDATORY GAL APPOINTMENT

1. **All abuse and neglect cases** in either Youth Court (Rule 13 URYC) or Chancery Court (Miss. Code Ann. § 93-5-23 and § 93-11-65).
2. **Termination of parental rights** - - Miss Code Ann 93-15-107(1).
3. **Contested adoptions (trial court may waive GAL in uncontested)**, or where an adoption agency is involved - - Miss Code Ann 93-17-8

F. DISCRETIONARY GAL APPOINTMENTS

1. Infant or defendant of unsound mind - - Miss Code Ann 9-5-89 (“The court may appoint a guardian ad litem to an infant or defendant of unsound mind ... [if] the court shall consider it necessary for the protection of the interest of such defendant.”)

2. Any other instance when in child's best interest - - Miss Code Ann 43-21-121(1)(f) ("In any other instance where the youth court finds appointment of a guardian ad litem to be in the best interest of the child.")

3. Infants or Persons Under Legal Disability - - Rule 17(c), Miss.R.Civ.P. “Whenever a party to an action is an infant or is under legal disability and has a representative duly appointed under the laws of the State of Mississippi or the laws of a foreign state or country, the representative may sue or defend on behalf of such party. **A party defendant who is an infant or is under legal disability and is not so represented may be represented by a guardian ad litem appointed by the court WHEN THE COURT CONSIDERS SUCH APPOINTMENT NECESSARY FOR THE PROTECTION OF THE INTEREST OF SUCH DEFENDANT. The guardian ad litem shall be a resident of the State of Mississippi, shall file his consent and oath with the clerk, and shall give such bond as the court may require.** The court may make any other orders it deems proper for the protection of the defendant. When the interest of an unborn or unconceived person is before the court, the court may appoint a guardian ad litem for such interest. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend.

G. Must a Judge Follow the GAL's Recommendation?

While the court is not bound to follow the recommendations of the GAL, it must consider them, therefore it is imperative that the GAL in the course of representation of child's interest make sure that there is a record of the GAL’s recommendations. This record will become a part of the court file.

H. GAL FEES.

1. **YOUTH COURT.** The fees of a GAL in Youth Court are paid by the county as authorized by its Board of Supervisors. Upon order of the Youth Court, the Guardian ad Litem shall be paid a reasonable fee as determined by the youth court judge or referee out of the county general fund as provided under Section 43-21-123. To be eligible for such fee, the guardian ad litem shall submit an accounting of the time spent in performance of his duties to the court. Miss. Code Ann. 43-21-121(6)

2. The reasonableness of the fee is "based on the normal amount of compensation paid to guardian ad litem in the locality." *In the Interest of L.D.M.*, 872 So. 2d 655 (Miss. 2004) (providing suggestions for proper accounting of fees).

3. **CHANCERY COURT.** GAL fees are paid by the parties. The chancellor determines

the amount of the fee, and should address this issue in the order of appointment.

I. SUGGESTIONS AS TO WHAT A GAL REPORT SHOULD CONTAIN.

TABLE OF CONTENTS

(if the report is very long, put this at the beginning after the cover page and include page references)

I. INTRODUCTION

II. SUMMARY OF RECOMMENDATIONS

III. PROCEDURAL HISTORY OF THE LITIGATION BETWEEN THE PARTIES

IV. TIMELINE OF SIGNIFICANT EVENTS

V. INDIVIDUALS INVOLVED IN THIS CASE AND THEIR RELATIONSHIP TO THE CHILD

VI. INVESTIGATION

A. INSERT NAME #1

1. summary of first interview with this person by date
2. summary of second interview with this person by date, etc.

B. INSERT NAME #2

1. summary of first interview with this person by date
2. summary of second interview with this person by date, etc.

C. ETC. for additional persons interviewed

D. SUMMARY OF REVIEW OF MEDICAL RECORDS

Describe document type, date and info (a suggestion is that the documents be scanned and bates numbered, so that the report can reference the documents by number, and the Court can easily identify specific documents)

E. SUMMARY OF REVIEW OF SCHOOL RECORDS

F. SUMMARY OF REVIEW OF OTHER DOCUMENTS,

G. SUMMARY OF REVIEW OF PHOTOS

H. SUMMARY OF REVIEW OF SOCIAL MEDIA RECORDS PROVIDED BY X

VI. APPLICABLE LEGAL STANDARDS

(The GAL is obligated to identify and address the legal standards applicable to the dispute)

EXAMPLES:

1. Whether a material change in circumstances has occurred to justify a modification of custody - - *Gainey v Edington*, 24 So.3d 333, 340 (¶ 24) (Miss. App. 2009) (the guardian ad litem failed to make a recommendation as to whether or not a material change in circumstances had occurred").
2. Whether the domestic violence presumption against custody applies - - Miss. Code Ann. § 93-5-24(9) (West 2018). *J.P. v. S.V.B.*, 987 So.2d 975, 982 (¶ 20) (Miss. 2008) (chancellor refused to adopt GAL's recommendations because GAL considered only one isolated incident in which father physically harmed girl and not all of the times that girl witnessed abuse of mother, and chancellor also found that GAL failed to recognize statute providing for a rebuttable presumption that it is not in the best interest of a child to be placed in custody of a parent who has a history of perpetrating family violence).

3. Albright Analysis - - *Borden v. Borden*, 167 So.3d 238, 240 (Miss.,2014) (“Based on his *Albright* analysis, the guardian ad litem recommended that Mary Jane receive primary physical custody of the children.”)

NOTE: If there could be a legitimate dispute about the applicable legal standard, the GAL should present alternate standards. For example, in a termination of parental rights case, the GAL should discuss the standards for termination of parental rights. However, in the alternative, the GAL should also discuss the standards for a custody determination, and make recommendations about child custody between the parties, in case the Chancellor decides not to terminate parental rights.

VII. RECOMMENDATIONS

IF APPLICABLE, INCLUDE A SECTION DISCUSSING EACH OF THE ALBRIGHT FACTORS

1. Age, Sex and Health of the Child.
2. Which parent had the continuity of care prior to the separation.
3. Which parent has the best parenting skills
4. Which parent has the willingness and capacity to provide primary child care.
5. Employment status of each parent and responsibilities of that employment.
6. Physical and Mental Health and Age of Parents.
7. Emotional Ties between Parent and Children.
8. Moral Fitness of the Parties.
9. Home, School, and Community Record of the Child.
10. Preference of a child twelve or older.
11. Stability of the Home Environment and Employment of Each Parent.
 - (a) Stability of Home Environment.
 - (b) Stability of Employment.
12. Any other factors relevant to the parent-child relationship.
 - (a) Separation of Siblings
 - (b) History of family violence (may be statutory rebuttable presumption against custody under Miss. Code Ann. § 93-5-24)

J. SAMPLE DISCLAIMER AT THE END OF THE GAL REPORT

“All facts and events provided herein have been disclosed to the Guardian ad Litem by the persons who are indicated. The Guardian ad Litem has based this report on the assumption that all facts that have been provided are completely true

and accurate as they were presented during the interview process. As this is a pending case, any new or conflicting evidence that could arise may alter the view and opinion of the Guardian ad Litem. Therefore, the undersigned reserves the right to modify this report and recommendation after hearing all testimony and evidence that may be offered at trial.”

K. REQUEST THAT THE REPORT BE FILED UNDER SEAL IN CHANCERY COURT

1. Sample cover page for the GAL Report:

IN THE CHANCERY COURT OF xxxxxxxx COUNTY, MISSISSIPPI

XXXXXXXXXXXX

PLAINTIFF

v.

CAUSE NO. 2019-123

XXXXXXXXXXXX

DEFENDANT

REPORT OF THE GUARDIAN AD LITEM

COMES NOW, the undersigned, xxxxxxxxx, duly appointed Guardian ad Litem by an Order entered in this case, and having made investigation, submits this report and recommendation to the Court concerning the minor child named herein.

DUE TO THE HIGHLY SENSITIVE SUBJECT MATTER AND CONFIDENTIAL INFORMATION CONTAINED IN THIS REPORT CONCERNING THE MINOR CHILD NAMED HEREIN, THE GUARDIAN AD LITEM RESPECTFULLY REQUESTS THAT THE FOLLOWING REPORT AND RECOMMENDATION BE SUBMITTED AND FILED UNDER SEAL WITH THE CLERK OF COURT, AND THAT THE PARTIES BE INSTRUCTED NOT TO DISCUSS OR DISSEMINATE THE CONTENTS OF THIS REPORT WITH ANYONE OTHER THAN THEIR ATTORNEYS.

[nothing else on cover page]

2. PROPOSED ORDER FOR GAL REPORT TO BE FILED UNDER SEAL.

IN THE CHANCERY COURT OF XXXXXXXXXX COUNTY, MISSISSIPPI

XXXXXXXXXXXXXXXXXX

PLAINTIFF

V.

NO. _____

XXXXXXXXXXXXXXXXXX

DEFENDANT

ORDER THAT REPORT AND RECOMMENDATION OF THE GUARDIAN AD LITEM BE FILED UNDER SEAL

Due to the highly sensitive subject matter and confidential information contained in the investigation and report of the guardian ad litem concerning the minor children named herein, the Court hereby orders that all such reports be submitted and filed under seal with the Clerk of Court, to be opened only upon the order of this Court.

SO ORDERED, THIS THE _____ DAY OF XXXXXXXXXX, 20xx.

CHANCELLOR

Order prepared by:
XXXXXXXXXXXX, MSB # XXXX
Guardian ad Litem
P.O. Box XXXXXXX
XXXXXXXXXXXX, MS XXXXXX
Phone XXXXXXXXXX
Fax: XXXXXXXXXX
e-mail: XXXXXXXXXXXXXXX

**RELEVANT STATUTES CONCERNING CUSTODY, MODIFICATION,
AND THE DOMESTIC VIOLENCE PRESUMPTION AGAINST
CUSTODY IN CHANCERY COURT ACTIONS**

MISS. CODE ANN. § 93-5-23

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.

MISS. CODE ANN. § 93-5-24

(Child Custody - - Terms of Art, and 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.

(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.

(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.

(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.

(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.

(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.

(8) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including, but not limited to, medical, dental and school records, shall not be denied to a parent because the parent is not the child's custodial parent.

(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.

(b)(i) If custody is awarded to a suitable third person, it shall not be until the natural grandparents of the child have been excluded and such person shall not allow access to a violent parent except as ordered by the court.

(ii) If the court finds that both parents have a history of perpetrating family violence, but the court finds that parental custody would be in the best interest of the child, custody may be awarded solely to the parent less likely to continue to perpetrate family violence. In such a case, the court may mandate completion of a treatment program by the custodial parent.

(c) If the court finds that the allegations of domestic violence are completely unfounded, 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 allegations.

(d)(i) A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.

(ii) In a visitation order, a court may take any of the following actions:

1. Order an exchange of the child to occur in a protected setting;

2. Order visitation supervised in a manner to be determined by the court;

3. Order the perpetrator of domestic or family violence to attend and complete to the satisfaction of the court a program of intervention for perpetrators or other designated counseling as a condition of visitation;

4. Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four (24) hours preceding the visitation;

5. Order the perpetrator of domestic or family violence to pay a fee to defray the cost of supervised visitation;

6. Prohibit overnight visitation;

7. Require a bond from the perpetrator of domestic or family violence for the return and safety of the child; or

8. Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of family or domestic violence, or other family or household member.

(iii) Whether or not visitation is allowed, the court may order the address of the child or the victim of family or domestic violence to be kept confidential.

(e) The court may refer but shall not order an adult who is a victim of family or domestic violence to attend counseling relating to the victim's status or behavior as a victim, individually or with the perpetrator of domestic or family violence, as a condition of receiving custody of a child or as a condition of visitation.

(f) If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

CASE SAMPLE:

THOMPSON V. HUTCHINSON, 84 So.3d 840 (Miss. App. 2012)(Marks on child's neck were caused by mother's boyfriend during disciplining of the child, who allegedly used choking as a form of discipline. The Court held that these marks were not sufficient to justify the application of the presumption against custody based on a history of perpetrating domestic violence, so as to remove child from mother's custody.

MANDATORY REPORTING TO CHILD ABUSE HOTLINE

A. MANDATORY REPORTING STATUTE

MISS. CODE ANN. § 43-21-353 outlines the duty of individuals having reasonable cause to suspect that a child is a neglected or abused child to immediately notify DCPS through the CHULD ABUSE HOTLINE (on online or through the APP Mississippi has developed. MDCPS will then notify the appropriate Youth Court Intake Unit.

“Any attorney, physician, dentist, intern, resident, nurse, psychologist, social worker, family protection worker, family protection specialist, child caregiver, minister, law enforcement officer, public or private school employee or any other person having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Child Protection Services ...”

Failure to report abuse or neglects is a misdemeanor, and upon being found guilty, an individual shall be punished by a fine not to exceed \$5,000, imprisonment in jail not to exceed one year, or both. Miss. Code Ann. § 43-21-353(7)).

HOW TO DEFINE/IDENTIFY ABUSE AND NEGLECT

A. FELONY CHILD ABUSE STATUTE, MISS CODE ANN. § 97-5-39 - - THE LONNIE SMITH ACT OF 2013.

This bill revised the elements of felonious child abuse to provide an "intentionally, knowingly or recklessly" standard. **The bill adds 3 categories of felonious child abuse which are:**

- (a) whether bodily harm results or not,**
- (b) if some bodily harm occurs, and**
- (c) if serious bodily harm occurs.**

97-5-39. (1)(a) Except as otherwise provided in this section, any parent, guardian or other person who * * * **intentionally, knowingly or recklessly commits any act or omits the performance of any duty, which act or omission contributes to or tends to contribute to the neglect or delinquency of any child or which act or omission results in the abuse of any child,** as defined in Section 43-21-105(m) of the Youth Court Law, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency or institution to which the child shall

have been committed by the youth court **shall be guilty of a misdemeanor**, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment not to exceed one (1) year in jail, or by both such fine and imprisonment.

(b) For the purpose of this section, a child is a person who has not reached his eighteenth birthday. A child who has not reached his eighteenth birthday and is on active duty for a branch of the armed services, or who is married, is not considered a child for the purposes of this statute.

(c) If a child commits one (1) of the proscribed acts in subsection (2)(a), (b) or (c) of this section upon another child, then original jurisdiction of all such offenses shall be in youth court.

(d) If the child's deprivation of necessary clothing, shelter, health care or supervision appropriate to the child's age results in substantial harm to the child's physical, mental or emotional health, the person may be sentenced to imprisonment in custody of the Department of Corrections for not more than five (5) years or to payment of a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(e) A parent, legal guardian or other person who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment in the custody of the Department of Corrections for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(2) Any person shall be guilty of felonious child abuse in the following circumstances:

(a) Whether bodily harm results or not, if the person shall intentionally, knowingly or recklessly:

- (i) Burn any child;**
- (ii) Physically torture any child;**
- (iii) Strangle, choke, smother or in any way interfere with any child's breathing;**
- (iv) Poison a child;**
- (v) Starve a child of nourishments needed to sustain life or growth;**
- (vi) Use any type of deadly weapon upon any child;**

(b) If some bodily harm to any child actually occurs, and if the person shall intentionally, knowingly, or recklessly:

- (i) Throw, kick, bite, or cut any child;**
- (ii) Strike a child under the age of fourteen (14) about the face or head with a**

closed fist;

(iii) Strike a child under the age of five (5) in the face or head;

(iv) Kick, bite, cut or strike a child's genitals; circumcision of a male child is not a violation under this subparagraph (iv);

(c) If serious bodily harm to any child actually occurs, and if the person shall intentionally, knowingly or recklessly:

(i) Strike any child on the face or head;

(ii) Disfigure or scar any child;

(iii) Whip, strike, or otherwise abuse any child;

(d) Any person, upon conviction under paragraph (a) or (c) of this subsection, shall be sentenced by the court to imprisonment in the custody of the Department of Corrections for a term of not less than five (5) years and up to life, as determined by the court. Any person, upon conviction under paragraph (b) of this subsection shall be sentenced by the court to imprisonment in the custody of the Department of Corrections for a term of not less than two (2) years nor more than ten (10) years, as determined by the court. For any second or subsequent conviction under this subsection (2), the person shall be sentenced to imprisonment for life.

(e) For the purposes of this subsection (2), "bodily harm" means any bodily injury to a child and includes, but is not limited to, bruising, bleeding, lacerations, soft tissue swelling, and external or internal swelling of any body organ.

(f) For the purposes of this subsection (2), "serious bodily harm" means any serious bodily injury to a child and includes, but is not limited to, the fracture of a bone, permanent disfigurement, permanent scarring, or any internal bleeding or internal trauma to any organ, any brain damage, any injury to the eye or ear of a child or other vital organ, and impairment of any bodily function.

(g) Nothing contained in paragraph (c) of this subsection shall preclude a parent or guardian from disciplining a child of that parent or guardian, or shall preclude a person in loco parentis to a child from disciplining that child, if done in a reasonable manner, and reasonable corporal punishment or reasonable discipline as to that parent or guardian's child or child to whom a person stands in loco parentis shall be a defense to any violation charged under paragraph (c) of this subsection.

(h) Reasonable discipline and reasonable corporal punishment shall not be a defense to acts described in paragraphs (a) and (b) of this subsection or if a child suffers serious bodily harm as a result of any act prohibited under paragraph (c) of this subsection.

(3) Nothing contained in this section shall prevent proceedings against the parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor. Nothing in the provisions of this section shall preclude any person from having a right to trial by jury when charged with having violated the provisions of this section.

(4) (a) A parent, legal guardian or caretaker who endangers a child's person or health by knowingly causing or permitting the child to be present where any person is selling, manufacturing or possessing immediate precursors or chemical substances with intent to manufacture, sell or possess a controlled substance as prohibited under Section 41-29-139 or 41-29-313, is guilty of child endangerment and may be sentenced to imprisonment for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(b) If the endangerment results in substantial harm to the child's physical, mental or emotional health, the person may be sentenced to imprisonment for not more than twenty (20) years or to payment of a fine of not more than Twenty Thousand Dollars (\$20,000.00), or both.

(5) Nothing contained in this section shall prevent proceedings against the parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor. Nothing in the provisions of this section shall preclude any person from having a right to trial by jury when charged with having violated the provisions of this section.

(6) After consultation with the Department of Human Services, a regional mental health center or an appropriate professional person, a judge may suspend imposition or execution of a sentence provided in subsections (1) and (2) of this section and in lieu thereof require treatment over a specified period of time at any approved public or private treatment facility. A person may be eligible for treatment in lieu of criminal penalties no more than one (1) time.

(7) In any proceeding resulting from a report made pursuant to Section 43-21-353 of the Youth Court Law, the testimony of the physician making the report regarding the child's injuries or condition or cause thereof shall not be excluded on the ground that the physician's testimony violates the physician-patient privilege or similar privilege or rule against disclosure. The physician's report shall not be considered as evidence unless introduced as an exhibit to his testimony.

(8) Any criminal prosecution arising from a violation of this section shall be tried in the circuit, county, justice or municipal court having jurisdiction; provided, however, that nothing herein shall abridge or dilute the contempt powers of the youth court.

SECTION 2. [Effective date] This act shall take effect and be in force from and after July 1, 2013.

B. THERE ARE NUMEROUS OTHER CRIMINAL STATUTES THAT MAY BE APPLICABLE IN REGARD TO PHYSICAL ABUSE OF CHILDREN

C. NEGLECT OF A CHILD IS ALSO A CRIMINAL OFFENSE

Miss. Code Ann. _____

D. YOUTH COURT ACT DEFINITIONS OF ABUSE OR NEGLECT

1. Youth Court Act Definitions under Miss. Code Ann. § 43-21-105

a. NEGLECTED CHILD

(l) “Neglected child” means a child:

- (i) Whose parent, guardian or custodian or any person responsible for his care or support, neglects or refuses, when able so to do, to provide for him proper and necessary care or support, or education as required by law, or medical, surgical, or other care necessary for his well-being; however, a parent who withholds medical treatment from any child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall not, for that reason alone, be considered to be neglectful under any provision of this chapter; or
- (ii) Who is otherwise without proper care, custody, supervision or support; or
- (iii) Who, for any reason, lacks the special care made necessary for him by reason of his mental condition, whether the mental condition is having mental illness or having an intellectual disability; or
- (iv) Who, for any reason, lacks the care necessary for his health, morals or well-being.

b. ABUSED CHILD

(m) “Abused child” means a child whose parent, guardian or custodian or any person responsible for his care or support, whether legally obligated to do so or not, has caused or allowed to be caused, upon the child, sexual abuse, sexual exploitation, emotional abuse, mental injury, nonaccidental physical injury or other maltreatment. However, physical discipline, including spanking, performed on a child by a parent, guardian or custodian in a reasonable manner shall not be deemed abuse under this section. “Abused child” also means a child who is or has been trafficked within the meaning of the Mississippi Human Trafficking Act by any person, without regard to the relationship of the person to the child.

c. SEXUAL ABUSE

(n) “Sexual abuse” means obscene or pornographic photographing, filming or depiction of children for commercial purposes, or the rape, molestation, incest, prostitution or other such forms of sexual exploitation of children under circumstances which indicate that the child's health or welfare is harmed or threatened.

E. TYPES AND INDICATORS OF ABUSE IDENTIFIED BY MDCPS

1. Emotional and verbal Abuse

Anything said or done that is hurtful or threatening to a child and is the most difficult form of maltreatment to identify.

Examples include:

- (1) Name calling (“You’re stupid”)
- (2) Belittling (“I wish you were never born”)
- (3) Destroying child’s possessions or pets
- (4) Threatens to harm child or people they care about (“I’m going to choke you” or “I’ll break your arm”)
- (5) Locking a child in a closet or box
- (6) Rejecting a child
- (7) Isolating a child

2. Sexual abuse

Any inappropriate touching by a friend, family member, anyone having on-going contact, and/or a stranger.

Examples include:

- (1) Touching a child’s genital area
- (2) Any type of penetration of a child
- (3) Allowing a child to view or participate in pornography
- (4) Prostitution, selling your child for money, drugs, etc.
- (5) Forcing a child to perform oral sex acts
- (6) Masturbating in front of a child
- (7) Having sex in front of a child

3. Physical abuse

Any type of contact that results in bodily harm, such as bruising, abrasions, broken bones, internal injuries, burning, missing teeth, and skeletal injuries.

Examples include:

- (1) Hitting or slapping a child with an extension cord, hands, belts, fists, broom handles, brushes, etc.
- (2) Putting child into hot water
- (3) Cutting the child with a knife or any other sharp object
- (4) Shaking or twisting arms or legs or yanking a child by the arm
- (5) Putting tape over a child’s mouth
- (6) Tying a child up with rope or cord
- (7) Throwing a child across a room or down the stairs

In regard to physical abuse, it is important to understand that although parents, guardians, and custodians are legally allowed to utilize corporal punishment, they are not allowed to cause bruises, marks, or other injuries to children when utilizing corporal punishment. Any evidence of such will constitute abuse by the Mississippi Department of Child Protection Services.

4. Neglect

Not meeting the basic needs of the child which is the most common form of maltreatment:

- (1) Medical** – not giving a child life-sustaining medicines, over-medicating, and not obtaining special treatment devices deemed necessary by a physician
- (2) Supervision** – leaving child/children unattended and leaving child/children in the care of other children too young to protect them (depending upon the maturity of the child)
- (3) Clothing and Hygiene** – dressing children inadequately for weather and persistent skin disorders resulting from improper hygiene
- (4) Nutrition** – lack of sufficient quantity or quality of food, letting a child consistently complain of hunger, and allowing the child to rummage for food
- (5) Shelter** – having structurally unsafe housing, inadequate heating, and unsanitary housing conditions
- (6) Educational** – not providing a proper education for the child