



# MISSISSIPPI GAP ACT:

An effort to **Guard and Protect** Mississippi's vulnerable children and adults

The Mississippi Supreme Court created the Commission on Guardianships and Conservatorships (MGCC) in the Spring of 2017 to protect both the person and property of vulnerable citizens in Mississippi, through (1) the clarification of statutes, Uniform Chancery Court Rules, and the Mississippi Rules of Civil Procedure, by amending or replacing their terms and introducing practical, workable provisions and (2) through MEC driven accountability measures. Recognizing these issues, the Commission's efforts have resulted in its recommendation and passage of the **Mississippi GAP Act**: a legislative solution which corresponds with existing court rules and ensures that Mississippians **Guard And Protect** those who cannot adequately defend themselves.

## WHAT DOES THE MISSISSIPPI GAP ACT DO?

- Distinguish guardian of the person from conservator of the estate.
- Clarify the role of a guardian/conservator in a ward's life.
- Specify basis for appointment of a guardian/conservator through improved medical evaluation forms.
- Encourage individualized planning and use of the least restrictive alternative.
- Create accountability between the guardian/conservator and the courts to prevent fraud and abuse.
- Inform ward of procedural and substantive rights at hearings and ensure due process through protection of ward's person and assets.
- Create a guardian/conservator plan for use throughout the appointment, with the option for the court to adjust the plan at its discretion.
- Monitor each ward's plan, and track inventories and accountings through MEC.
- Establish an avenue for required well-being reports.

Following the General Provisions of Article I, the Act is divided into three sections: Article II – Guardianship of the Minor, Article III – Guardianship of the Adult, and Article IV – Conservatorship of the Estate for a Minor/Adult.

### I. Basis and Petition for Appointment of Guardian/Conservator

- a. Any person including a chancellor, clerk, relative or friend interested in the welfare of a minor or adult may petition the court for appointment of a guardian/conservator.
- b. The petition must state the person for whom and the reason a guardianship/conservatorship is sought. It must also include the prescribed due process language to ensure the ward is aware of his/her rights. The petition must be served on the proposed ward at least seven days prior to the hearing along with the summons.
- c. The court may appoint a guardian or conservator when it would be in the minor's best interest or when an adult is incapable of taking care of his/her person or managing his/her estate.

### II. Notice of Hearing and Rights at Hearing

- a. Notice of hearing for a minor must be given to the minor if 14 or older, the parent(s) of a minor, and any adult with whom the minor resides. Notice of hearing for an adult must be given to the following persons, listed in order of preference, so that personal service is had on the person for whom the guardian/conservator is to be appointed and on at least one (1) relative who resides in Mississippi, other than the petitioner:
  - (i) Each of the spouse, children, parents and siblings of the adult for whom the conservator is to be appointed, *but if none of those can be found*, then to:
  - (ii) One (1) adult relative of the person for whom the conservator is to be appointed who is not the petitioner and who resides in Mississippi if that relative is within the third degree of kinship. If no relative within the third degree of kinship to the person for whom the conservator is to be appointed is found residing in the State of Mississippi, the court must either designate some other appropriate person to receive the notice or appoint a guardian ad litem to receive notice.
- b. Notice of subsequent hearings must be given to the respondent, the guardian/conservator and any other person the court requires.

### **III. Appointment of Attorney**

- a. In conjunction with this Act, we are suggesting a rule change to UCCR 6.01 to allow for those without funds to proceed without an attorney by including the following language: “Except where there are not assets or funds available, the court may decline appointment of an attorney. The duty of fiduciary, to keep the court informed, remains the same with or without attorney representation.”

### **IV. Professional Evaluation (Collaboration with MS Medical Association)**

- a. Court must find need for appointment of guardian/conservator by clear and convincing evidence. Proof must include written certificates, after personal examination of respondent (unless respondent is missing, detained or unable to return to USA) by:
  - i. At least two licensed physicians, or
  - ii. One licensed physician and one licensed psychologist, nurse practitioner or physician’s assistant. The NP or PA must not be in a collaborative or supervisory relationship with a certifying physician.
- b. Personal examination may be face to face or via telemedicine with audio-visual connection to licensed physician in MS. This will help in rural areas with little to no access to medical professionals.

### **V. Order for Appointment**

- a. Order appointing guardian/conservator must include findings to support appointment. If full guardianship/conservatorship, order must explain why limited guardianship/conservatorship is not sufficient. If limited, specific powers granted to guardian/conservator must be detailed.
- b. Court order for guardian/conservator of an adult must give name and contact information of any person entitled to: notice of ward’s rights, ward’s change in residence, ward’s death or condition, copy of the guardian/conservator plans, access to court records, court limitation on powers and removal of guardian/conservator.

### **VI. Emergency Guardian/Conservator**

- a. An interested person may file petition for emergency guardian/conservator and court may appoint if it so finds that appointment is likely to prevent substantial and irreparable harm; no one else has authority or willingness to act in the circumstances; and there is reason to believe a guardian/conservator is necessary.
- b. Emergency guardian/conservator may serve no longer than 60 days although an extension might be allowed. The powers of the emergency guardian/conservator must be specified in the order.
- c. There must be reasonable notice of date, time and place of hearing. However, if the court finds from affidavit or testimony that respondent will likely be substantially and irreparably harmed, then the court can appoint an emergency guardian/conservator without notice. Within 48 hours after appointment of an emergency guardian/conservator, the court must give notice and hold a hearing of appointment within five days of the emergency appointment.
- d. Appointment of an emergency guardian/conservator is not a determination that a basis for a permanent protective arrangement exists. Court may remove and require any type of report from an emergency guardian/conservator any time.

### **VII. Bond; Oath; Financial Institutions; Alternative Arrangements (Collaborated with Bankers Association)**

- a. Except for exempt financial institutions, court shall require conservator’s bond or require alternative asset protection arrangement. Court may fully or partially waive bond if: ward is a minor and parent has waived bond in will or testamentary instrument witnessed by two witnesses other than conservator; assets are deposited in FDIC-insured financial account subject to prior court approval for release and where depository institution receives copy of the order and files acknowledgement of receipt; court finds bond or other arrangement is not necessary to protect ward’s property but can’t waive bond for professional non-bank conservator.

- b. FDIC-insured institution authorized to do trust business in MS not required to give bonds. Financial institutions with funds or deposit that complies with Act is not liable if no knowledge the representations made are incorrect.
- c. Depository institution may change fee to service account.
- d. Prescribed form for acknowledgment of receipt.

#### **VIII. Duties and Powers of Guardian/Conservator**

- a. Serving as a fiduciary, guardian/conservator must make decisions s/he believes ward would make unless it would fail to preserve resources needed for ward's wellbeing. S/he must consider ward's directions, preferences, opinions, values and actions to extent known.
- b. If guardian/conservator does not know preferences or believe the ward's decision would fail to preserve resources, the guardian/conservator must act in the ward's best interest.
- c. Article IV, Sec. 414 contains conservator powers requiring court approval and Sec. 421 contains conservator powers that do not require court approval.

#### **IX. Guardian/Conservator Plans**

- a. Within 90 days after the initial appointment, a guardian/conservator must file a plan with the court taking into account the ward's best interest and preferences, values and prior directions to the extent known.
- b. Court must review plan and consider any objections the guardian/conservator duties in determining whether to approve the plan.
- c. Court must not approve the plan until 30 days after the plan is filed. After the court approves the plan, guardian/conservator must give a copy to ward and others entitled to notice. This will ensure both the ward and guardian/conservator are on the same page in regards to the ward's care either personally or financially.

#### **X. Inventory and Accounting**

- a. Within 90 days after appointment, conservator must file a detailed inventory and oath/affirmation that it is believed to be complete and accurate.
- b. Within 14 days after filing, the conservator must give notice of filing the inventory to the ward and any other person entitled to notice.
- c. Conservator must keep records of actions and make available for examination on request of ward, guardian, or other persons permitted by court.
- d. Conservator must file a report and a petition for the court to approve the report annually unless the court directs otherwise and upon resignation, removal or termination.
- e. The court may establish procedures for monitoring a report and annual review of each report.

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