

**LGBT DOCUMENTS CLINIC
ATTORNEY/STUDENT TRAINING
MATERIALS**

**October 7, 2014
10:00 – 3:00**

**Room 1115
University of Mississippi School of law**

This program is a joint project of the University of Mississippi School of Law Pro Bono Initiative, OUTlaw, and the Family Equality Council

This program has been approved for four hours of CLE credit by the Mississippi Commission on Continuing Legal Education, including one hour of ethics

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LGBT TRAINING MATERIALS

Hypothetical: Eaves, Garner

Facts: Janet Eaves and Lindsay Garner are lesbian partners living in Oxford, Mississippi. Janet works at the University of Mississippi in the Accounting Office earning \$35,000 a year. Lindsay is finishing a community college degree in business. They have been in a committed relationship for five years. Janet's eight-year-old daughter Ariel, from a brief marriage in her 20s, lives with them. Janet received primary custody in the divorce action and her husband, Stephen, was awarded visitation. He moved to Texas shortly after the divorce and has seen Ariel only a couple of times a year. He recently moved back to Oxford and has resumed visitation with Ariel. Lindsay has acted as a second parent to Ariel since she was three years old. Janet is 33 and Lindsay is 29. Janet provides financial support for the couple.

Lindsay's tuition is covered by student loans in her name alone. She plans to complete her degree in two years. At that point, she will begin to contribute to household support as well. Her income will likely be less than Janet's – their plan is that each will contribute to household expenses (mortgage, utilities, food, joint travel, entertaining, yard, insurance, etc.) in proportion to their incomes. They recently moved into a home that Janet inherited from her mother. Their only other assets are Janet's PERS account (defined benefit retirement with the state) and furnishings and personal items.

They would like to come in to discuss several concerns with you. First, they are interested in learning how they can best secure "marriage-like" rights in Mississippi by executing whatever documents will assist them to do that. Janet and Lindsay would like to be married or to have the benefits of a civil union. But, they are both Mississippians. Their extended families are in North Mississippi. Lindsay's family members are supportive of the relationship. Some of Janet's family members are not. They do not envision leaving the state. As a result, they want to do whatever they can to secure marriage-like benefits for themselves, including inheritance at death, joint ownership of property, tax or employment benefits, rights of support, medical-decision making on behalf of the other, and any other rights that can be secured by agreement or by the execution of other documents. They also want to secure rights similar to those available to a married couple in the event the relationship ends.

Janet and Lindsay are also interested in having a child together. They are open to adoption. They are also considering having a child together through assisted reproduction. And, Lindsay is interested in securing parental rights with regard to Ariel. She feels that she has become a real parent to Ariel, providing as much care for her as Janet. She is afraid that if something happened to Janet, Janet's family would not allow her to even see Ariel. They are also both concerned about Stephen's reaction to their relationship and whether he might seek to take custody from Janet.

PARENTAL RIGHTS

These materials are for use by attorney/student teams in providing advice and counsel to LGBT families regarding parental rights. Currently, there are limited options available to LGBT families in Mississippi. These materials are to assist you in explaining current Mississippi law and helping families to evaluate the options that are now available.

Disclaimers: It is critically important that you emphasize to clients the unpredictable nature of any steps that you suggest. There is little or no case law on these issues. Even where there is, a particular judge or institution may refuse to recognize a document.

Potential conflicts: Advising LGBT – or opposite sex - couples about securing equal parental rights raises concerns about potential conflicts of interest. It is important that you discuss potential conflicts and obtain consent to proceed, or that you limit your representation in a manner that will avoid a conflict.

I. DE FACTO PARENTING: RELATIONSHIPS WITH A PARTNER'S CHILD

This section explores the rights and responsibilities of a person who acts as a parent to his or her partner's adopted or biological child. In the Eaves/Garner hypothetical, this would apply to Lindsay's relationship with Ariel, Janet's child from an earlier marriage.

A. MISSISSIPPI LAW

1. Natural parent presumption. A “legal” parent is a biological or adoptive parent who has legal rights and responsibilities with regard to a child – the right to custody and/ or visitation, the right to make important decisions about the child's life, and the duty to provide support for the child. The law presumes that a legal parent is the best custodian of a child and protects the parent's rights against other third parties. To gain rights over a legal parent, a third party must prove that the parent has abandoned or deserted the child or is unfit – a very difficult standard to meet. *See Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013) (grandmother who cared for a child all her life required to rebut the natural parent presumption).

2. De facto parents. A “de facto” parent is one who, although not a legal parent, has in fact acted as a child's parent, providing support and care, assuming parental authority, and forming a parent-child bond. In some states, courts have begun to recognize de facto parents (also called equitable or psychological parents) to provide them with legal rights of custody, visitation, and decision-making, and to require that they provide financial support for their de facto children. Some states extend this recognition to same-sex de facto parents.

Mississippi courts have used a similar doctrine – *in loco parentis* – to extend parental rights to men who have acted as a parent to a child they believed to be their biological child. It appeared that this doctrine might be extended to other third parties who acted as de facto parents. *See In re Marriage of Leverock*, 23 So. 3d 424, 430-32 (Miss. 2009) (using *in loco parentis* doctrine as alternative holding for awarding custody to foster parents); *see also Logan v. Logan*, 730 So. 2d 1124, 1127 (Miss. 1998) (discussing stepfather's *in loco parentis* status; also finding mother unfit). A recent case foreclosed that possibility.

3. Custody rights. In *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013), a custody action between a father and maternal grandmother, the Mississippi Supreme Court clarified the standards for awarding third-party custody and the scope of the *in loco parentis* doctrine. The child (whose mother was deceased) lived with her grandmother until she was seven. The chancellor held that the grandmother's *in loco parentis* status did not confer on her rights equal to a parent. She failed to rebut the natural parent presumption by proving that the father had abandoned or deserted the child, was unfit, or immoral. The Mississippi Supreme Court affirmed, holding that a person who acts as a child's parent does NOT gain parental rights equal to the legal parent. The court limited the *in loco parentis* doctrine to the narrow precedent involving defrauded fathers. The court also stated, however, that the *in loco parentis* status protects third-party custody *against other third parties*.

4. Visitation. Mississippi law limits third-party visitation to grandparents. Some states have extended third-party visitation rights to persons other than grandparents. A few extend the possibility of visitation to any party with a significant relationship with a child. The Mississippi Supreme Court has refused to judicially extend visitation to third parties other than grandparents. The supreme court rejected a sister's petition for visitation with her half-brother after their mother died. The court held that the creation of visitation rights is a legislative function. See *Scruggs v. Saterfiel*, 693 So. 2d 924, 926 (Miss. 1997). Similarly, a chancellor properly dismissed a stepfather's petition for visitation with his three stepchildren after their mother's death. *Pruitt v. Payne*, 14 So. 3d 806, 811 (Miss. Ct. App. 2009).

5. De facto parents vs. biological parents. As a result of the *Davis* case, in Mississippi a parent's same-sex partner or spouse will be treated as a third party in any dispute with the parents. For example, if Janet and Lindsay separate, Lindsay will have no right to shared custody or visitation with Ariel under Mississippi law. And, she would have no obligation to provide financial support for Ariel. If Janet died or was unable to care for Ariel, Lindsay would be treated as a third party in a custody action with Ariel's father.

6. De facto parents vs. other third parties. A de facto parent may, however, have some additional rights against other third parties. For example, if Janet died or became unable to care for Ariel, Lindsay might be given preference in a custody action with Janet's family. In *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013), the Mississippi Supreme Court explained that while the *in loco parentis* doctrine does not make a de facto parent equal to a legal parent, their status DOES give them rights greater than other third parties. The court did not expand on the scope of this status or the tests for custody. Arguably, based on *Davis*, Lindsay should be given preference in a custody action with anyone other than Janet or Ariel's biological father.

Even if a court did not treat her as a preferred custodian, she would at least be on an equal status with other third parties. Ordinarily, when custody is litigated between two parties neither of whom are the child's legal parents, the court determines custody based on the child's best interest. For example, in a custody action between a child's maternal and paternal grandparents, the court weighed the relative merits of each family. The mother, who was imprisoned for the murder of the children's father, was not entitled to designate her parents as custodians. It was the court's duty to determine the children's best interests. *Worley v. Jackson*, 595 So. 2d 853, 855 (Miss. 1992).

B. POTENTIAL SOLUTIONS: IN GENERAL

The discussion below sets out options available to same sex partners in some states, but not in Mississippi. This information is included because clients may ask you about these options and whether they are available in Mississippi. Similarly, clients may ask you about the enforceability of out-of-court agreements or guardianships.

1. Adoption. In some states, a de facto parent in an LGBT family may adopt a partner's child through a "second parent" adoption. In Mississippi, second parent adoptions are available only to married couples. And, the statute specifically prohibits same-sex couples from adopting, providing that "Adoption by couples of the same gender is prohibited." MISS. CODE ANN. 93-17-3(5). However, as discussed below, out-of-state adoptions may be an option for Mississippi couples seeking to start a family together.

2. Court recognition. There is currently no case law in Mississippi discussing whether a same-sex partner who acts *in loco parentis* to a child is entitled to parental status. However, as discussed above, since Mississippi has declined to extend parental rights to others who are *in loco parentis*, and given Mississippi's non-recognition of same-sex marriage, courts are unlikely to recognize parental rights in this situation.

3. Agreements. Out-of-court agreements regarding custody, visitation, and child support have traditionally not been recognized by courts. The Mississippi appellate courts have deemed such agreements, even between legal, biological parents, as "void." The Mississippi Supreme Court noted that while agreements are generally enforced, the best interest of children may override an agreement. *McManus v. Howard*, 569 So. 2d 1213, 1215 (Miss. 1990); see *Lowrey v. Lowrey*, 919 So. 2d 112, 119-22 (Miss. Ct. App. 2005) (court may override agreement on financial matters only upon showing of overreaching or fraud, but reviews custody agreement in light of child's best interests). For example, a father's petition for custody was treated as an original custody action even though he had privately agreed that the mother would have custody of the child. See *White v. Thompson*, 822 So. 2d 1125, 1128 (Miss. Ct. App. 2002). Similarly, a couple's postnuptial agreement giving the father custody upon separation was void as against public policy. See *McKee v. Flynt*, 630 So. 2d 44, 50 (Miss. 1993); see also *McManus v. Howard*, 569 So. 2d 1213, 1216 (Miss. 1990). However, as suggested below, there may nonetheless be practical reasons for entering into a parenting agreement.

4. Guardianships. One option that has been raised as a possible solution is for the legal parent to sign an agreement appointing a partner as her child's legal guardian. In Mississippi, a guardianship is treated as an award of custody for purposes of the legal status of the guardian. The agreement is probably unenforceable without court approval, although the court might well approve the agreement if the partner was considered a fit custodian for the child. However, court approval would have a negative impact on the legal parent's rights. In *Grant v. Martin*, 757 So. 2d 264, 266 (Miss. 2000), the Mississippi Court of Appeals held that when a parent agrees to third-party custody in a legal proceeding, he or she forfeits the natural parent presumption in any future custody action with the custodian. In order to regain custody, the parent has the burden of proving by clear and convincing evidence that it is in the child's best interest to return the child to her custody – in effect giving the legal custodian greater rights than the legal parent. This is not recommended as a solution for a couple seeking equal rights with regard to children.

C. SUGGESTIONS FOR MISSISSIPPI COUPLES

1. **Each partner should determine his/her goals.** An LGBT couple's decision to attempt to secure equal parental rights is a serious decision with far-reaching consequences and should not be entered without a full understanding of the consequences of the decision.

The benefits of de facto parent recognition

- Provides legal recognition for the family
- Provides the emotional and psychological benefit of recognition
- Protects the family relationship from interference by others
- Secures financial support for children

On the other hand, there are potential downsides, depending on the strength of the relationships. By taking this step, a legal parent relinquishes some of her authority and autonomy to a partner with whom she may eventually be at odds. If Lindsay secures full parental rights with regard to Ariel and her relationship with Janet ends, Lindsay may be entitled custody, joint custody, or visitation. The legal parent should be sure she is ready to take this step.

For the de facto parent, the rights that go with full parenthood are accompanied by responsibility for financial support. If the relationship ends, the de facto parent may be ordered to pay child support for the child until he or she is an adult.

Before taking steps to bolster a de facto parent's claim to full parenthood, both partners should carefully examine their goals.

2. **Limited Power of Attorney.** LGBT families may be able to provide a de facto parent with some of the rights and duties of parenthood through a Limited Power of Attorney. Parents often execute powers of attorney to friends or family members who care for children in their absence, providing them with medical decision-making authority and other limited powers to act on behalf of the child. There is no legal reason that a child's parent and custodian should not be able to create the same limited powers in his/her partner. A sample Limited Power of Attorney is provided for your use in the Clinic for families who want to execute a POA. (Attachment A).

3. **Parenting agreement.** The couple may also want to consider entering into a parenting agreement that sets out the couple's understanding of the relationship, the desired status of the de facto parent, the de facto parent's rights with regard to custody or visitation upon termination of the partnership, and the de facto parent's obligations of support for the child. A list of matters that might be included in a parenting agreement is attached as Attachment B.

As discussed above, a court is not bound by an out-of-court agreement. The potential value of a parenting agreement is that (1) it provides a moral, if not legal, recognition of the family relationship; (2) as between the partners, it is an embodiment of their understanding that may allow them to avoid or resolve future disputes; and (3) the agreement may serve as evidence of the couple's intent in states that recognize de facto parents based on conduct and intent.

Because of the potential long-range consequences of a co-parenting agreement, and the potential conflict in interest in drafting these agreements, attorneys are requested not to draft these agreements as part of the limited, daylong clinic. However, it is appropriate to advise clients that this is an option, providing the advice set out above regarding the consequences of a parenting agreement.

4. Appointment of guardian. A legal parent may want to provide evidence of her wishes with regard to custody and guardianship of children if she dies or is incapacitated and unable to care for them. This may be done as part of a will and as an independent document. It is NOT binding on a court. In a custody action between a child's maternal and paternal grandparents, the court refused to abide by the imprisoned mother's designation of her parents as the children's guardians. Instead, the court weighed the relative merits of each family, holding that it is the province of the court to determine a child's best interests. *Worley v. Jackson*, 595 So. 2d 853, 855 (Miss. 1992). However, a court might well give deference to a parent's wishes, particularly if there is evidence that the partner designated as guardian also served as the child's de facto parent. This would not apply if the action was against the child's other biological parent – only in actions with other third parties. A sample appointment of guardian is included in the forms. An Appointment of Guardian form is attached as Attachment C.

II. STARTING A FAMILY TOGETHER

LGBT couples may choose to start a family together, raising similar issues about full parental rights. The family may decide to adopt or to have a child through assisted reproduction such as artificial insemination, in vitro fertilization, or use of a surrogate.

A. ADOPTION

Mississippi law prohibits adoption by same-sex couples. MISS. CODE ANN. § 93-17-3. The statute does not, however, bar adoption by a single gay or lesbian parent. It is likely that some judges would not approve adoption by a single gay parent, while others would. However, Mississippi is required by the Full Faith and Credit Clause to recognize adoptions from other states. If a same-sex couple adopts a child in another state, Mississippi must recognize the adoption. The Fifth Circuit Court of Appeals held in 2010 that a state must recognize a judgment of another state granting adoption to a same-sex couple. A New York same-sex couple adopted a Louisiana child and sought to have the child's birth certificate reissued in his new name. The Louisiana Attorney General issued an opinion that Louisiana did not owe full faith and credit to the New York adoption judgment because it was repugnant to Louisiana's public policy of not allowing joint adoptions by unmarried persons. The Fifth Circuit reversed, holding that a state must recognize the valid judgments of other states, and that there is no public policy exception. The court held that Louisiana was required to recognize the parental rights of the couple. However, the court held that the Full Faith and Credit Clause did NOT require that Louisiana amend the child's birth certificate. *Adar v. Smith*, 639 F. 3d 146 (5th Cir. Feb. 18, 2011).

Most states permit out-of-state parents to adopt a child who resides in the state. A Mississippi couple that adopts a child in another state is entitled to recognition of the legal relationship created by the sister state judgment.

B. ASSISTED REPRODUCTION

Several options are available to couples that want to have children together. Male partners may choose to have a child through a surrogate, using sperm donated by one of them. Lesbian partners may decide that one partner will have a child through artificial insemination by a donor or through in vitro fertilization.

1. **De Facto parents.** A partner who does not give birth to, and is not genetically related to, a child born through assisted reproduction will be a de facto parent, with the rights discussed in Section I. Courts in some states use an intent-based test to find that a same-sex partner in this situation is a legal parent. Others have used the de facto parenting test discussed earlier. There are no Mississippi cases on this issue. However, as discussed above, the Mississippi courts have rejected third-party parental rights under the *in loco parentis* doctrine.

2. **Out-of-state surrogacy.** For male partners, using an out-of-state surrogate may provide much more substantial rights than using a Mississippi resident as surrogate. Some states provide for pre-birth orders that recognize same-sex parents as the legal parents of a child born through surrogacy. Because the order is a judgment, Mississippi courts would be required to recognize the validity of their parental status.

3. **Dual parenthood.** At least one other (untested) option is available to lesbian couples. One partner could provide an egg to be fertilized through in vitro fertilization, with the embryo implanted in the other as birth mother. Both would have a connection to the child – one through genetics and the other through birth. While there is no case law on this issue in Mississippi (and little outside Mississippi), at least both mothers have an arguable legal claim to parenthood. It is important, of course, to advise clients that the outcome of such an arrangement is untested. A court might well decide to award legal rights to only one of them.

4. **Artificial insemination.** One warning is important. Some states have found that a known sperm donor who is involved in a child's life has parental rights, including visitation and possibly the right to custody. Clients contemplating conception through use of artificial insemination should be advised of this possibility.

5. **Parenting agreements.** Mississippi has no statute governing assisted reproduction and no cases discussing parental status for children of assisted reproduction. In this situation, where the parents clearly intend at the outset to share equal parental rights, a parenting agreement is of great importance. Even though the agreement may not be enforceable in Mississippi, the couple might move to a state in which courts recognize same-sex "intended parents" or de facto parents. And, Mississippi might ultimately recognize dual parenthood in this situation. The parenting agreement would be critical evidence of the couple's intentions at the time of the child's birth.

6. **Other.** Partners may also want to use the Appointment of Guardian and Limited Powers of Attorney discussed in above.

III. MAINTAINING CUSTODY OF CHILDREN

You may be asked by clients to discuss their rights with regard to children from a previous, opposite-sex relationship. For example, in the hypothetical, Janet's former husband, Ariel's father, has just returned to Mississippi and is becoming involved in Ariel's life. Janet has legal custody through the divorce judgment, but is concerned that he will attempt to take custody from her in a modification action.

A. ORIGINAL CUSTODY ORDERS: THE ALBRIGHT FACTORS

In determining custody between two biological or adoptive parents, Mississippi courts consider twelve factors:

- the age, health and sex of a child
- which parent had continuing care of the child prior to separation
- which parent has the best parenting skills
- which has the willingness and capacity to provide primary child care
- the employment responsibilities of both parents
- the physical and mental health and age of parents
- emotional ties of the parent and child
- the parents' moral fitness
- the child's home, school and community record
- the preference of a child at the age of twelve
- stability of the home environment and employment of each parent
- other relevant factors.

Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983). The list is not exhaustive – courts may consider other relevant factors.

B. APPLICATION TO GAY OR LESBIAN PARENTS

In 2001, the Mississippi Court of Appeals held that a parent's same-sex relationship may not be the sole reason for denying him or her custody. As with heterosexual conduct, however, it may be one of several factors on which an award is based. *S.B. v. L.W.*, 793 So. 2d 656, 661 (Miss. Ct. App. 2001).

The Mississippi Supreme Court reversed a custody award to a father based primarily on a mother's alleged homosexual relationship, holding that a same-sex relationship may not be emphasized to the exclusion of other factors. *See Hollon v. Hollon*, 784 So. 2d 943, 952 (Miss. 2001) (chancellor failed to consider that mother was primary caretaker). Subsequently, the Mississippi Court of Appeals reversed a custody decision that placed undue emphasis on a mother's lesbian relationship, stating, "it is of no consequence that a mother was having an affair with a woman rather than a man." *Fulk v. Fulk*, 827 So. 2d 736, 740-741 (Miss. Ct. App. 2002) (quoting *Plaxico v. Michael*, 735 So. 2d 1036, 1039-40 (Miss. 1999)).

However, if other factors also support denial of custody, an award will be affirmed even though the decision was based partly on the existence of a same-sex relationship. Custody was granted to a father who was married and in a stable home and employment rather than to the mother, who had only part-time income, was beginning a new and uncertain business, was living with a lesbian partner, and planned to relocate. *S.B. v. L.W.*, 793 So. 2d 656, 661 (Miss. Ct. App. 2001) (evidence also showed lack of financial and emotional stability); *see also White v. Thompson*, 569 So. 2d 1181, 1184 (Miss. 1990) (custody to father based on mother's lesbian relationship, neglect, and drug use).

C. RESTRICTIONS ON VISITATION AND CUSTODY

At one time, an unmarried parent's sexual conduct (with opposite or same sex partners) was presumed to have an adverse impact on a child; restrictions on visitation in the presence of opposite sex partners were readily upheld. Today, restrictions based on sexual conduct are permitted only upon a showing of actual adverse effect on a child. Appellate courts are quick to reverse broad restrictions, such as an order barring a mother's visitation in the company of any man who was not a member of her family. *See, e.g., Rushing v. Rushing*, 724 So. 2d 911, 917 (Miss. 1998). Similarly, appellate courts have reversed orders barring fathers from any visitation

in the presence of women with whom they had affairs. See *Dunn v. Dunn*, 609 So. 2d 1277 (Miss. 1992); *Carr v. Carr*, 724 So. 2d 937, 941-42 (Miss. Ct. App. 1998); *Dunn v. Dunn*, 609 1277 (Miss. 1992). Overnight visitation restrictions will be affirmed, however, if there is actual evidence of emotional harm to a child. A father was properly ordered to refrain from overnights with his girlfriend present, based on testimony that the child was traumatized by the visits and required treatment for depression. *Robison v. Robison*, 722 So. 2d 601, 605 (Miss. 1998).

Restrictions related to a parent's same-sex relationship are subject to the same test. In two recent cases, the appellate courts required evidence of an adverse impact to justify visitation restrictions. The Mississippi Supreme Court held that a chancellor erred in prohibiting a noncustodial father from visiting with his fourteen-year-old son in the presence of his live-in partner. See *Weigand v. Houghton*, 730 So. 2d 581, 587 (Miss. 1999). Similarly, the Mississippi Court of Appeals reversed an order restricting a lesbian mother to visitation for one hour a week at McDonald's. Emphasizing the presumption that parents are entitled to overnight visits, the court held that restrictions should be imposed only to prevent harm to a child. See *Fulk v. Fulk*, 827 So. 2d 736, 743 (Miss. Ct. App. 2002). But the court of appeals upheld overnight restrictions in light of evidence that a mother's nudity with her partner had an adverse impact on her children. See *Lacey v. Lacey*, 822 So. 2d 1132, 1138 (Miss. Ct. App. 2002).

D. MODIFICATION OF CUSTODY

An LGBT parent with custody of children from a prior relationship may face a modification action by the child's other legal parent. For example, Janet's ex-husband might petition the court to modify custody of Ariel from Janet to him, arguing that her relationship is a detriment to Ariel.

Courts are protective of the stability of a child's home – in order to modify custody, the petitioner must show that (1) there has been a material change in circumstances in the custodial parent's home; (2) that the change has injured the child in some way – that it has adversely affected her; and (3) that a change in custody is in the child's best interest. An LGBT family facing a modification petition should emphasize the positive influence that the parent's partner has on the child, the care and support that he or she provides for the child, and provide evidence that the child is doing well in the couple's home.

There are very few custody modification cases involving gay or lesbian parents. In one case, a father's same-sex relationship appeared to be the primary reason for denying his petition for modification. He sought custody based on the fact that the mother was married to an alcoholic ex-felon who had been charged with domestic violence. See *Weigand v. Houghton*, 730 So. 2d 581, 586-87 (Miss. 1999) (only factor weighing in mother's favor was church attendance and only factor weighing against father was his homosexuality). Custody was modified to a father in one case, but the mother's behavior involved circumstances that would also be grounds for modification in most cases. The mother lived with three different women, shared a bedroom with her current girlfriend, and watched sexual videos with her partner in the children's presence. The court of appeals noted that custody may be modified if a relationship is coupled with other behavior that is harmful to a child or if the relationship clearly endangers the child's well-being. *Davidson v. Coit*, 899 So. 2d 904, 909-10 (Miss. Ct. App. 2005).

PROPERTY RIGHTS: WHEN THE RELATIONSHIP ENDS

These materials are for use by attorney/student teams in providing advice and counsel to LGBT families regarding property rights upon termination or dissolution of the relationship.

Potential conflicts: Advising LGBT – or opposite sex - couples about property rights raises concerns about potential conflicts of interest. It is important that you discuss potential conflicts and obtain consent to proceed, or that you limit your representation in a manner that will avoid a conflict.

I. MARRIAGE DISSOLUTION

When a marriage ends, spouses are entitled to a fair division of any property accumulated during the marriage through either's efforts, regardless of who holds title to the property (called "equitable distribution.") Property owned by a spouse before the marriage and gifts or inheritances received during the marriage belong to the owner. Most other property owned by either spouse will be marital property and be divided between them, often equally. *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994).

II. LGBT FAMILIES: SPOUSES

Same-sex couples who are legally married in another state but living in Mississippi are not currently guaranteed the property rights accorded to other couples married outside the state. Mississippi adopted a "mini-DOMA" statute in 1997, providing that "Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi." MISS. CODE ANN. 93-3-1. A case is pending before the Mississippi Supreme Court in which this statute is challenged.

One case does open the door to an argument by same-sex spouses that a court should divide the couple's assets when their relationship ends. In *Cotton v. Cotton*, 44 So. 2d 371 (Miss. Ct. App. 2010), the court of appeals held that a bigamous wife of thirty-seven years was entitled to an equitable division of the couple's jointly accumulated assets, even though she did not enter into the marriage in good faith. Nonetheless, the chancellor ordered equitable distribution of their assets, based primarily on her homemaker and childcare contributions. Affirming, the court of appeals applied the putative spouse doctrine to allow the court to divide their property, even though the marriage was void by statute. At least arguably, this doctrine could be extended to same-sex marriages otherwise considered void in Mississippi.

III. LGBT Families: Cohabiting couples

Mississippi courts have generally refused to recognize marriage-like property rights between cohabitants. However, the courts will recognize express contracts between unmarried couples (both same- and opposite-sex) with regard to division of property accumulated during their relationship. And, in a recent case, the Mississippi Supreme Court recognized limited property rights between same-sex couples based on financial contribution to an asset owned by the other.

A. Implied contracts; unjust enrichment. In the absence of an express contract, Mississippi courts may reimburse a cohabitant for her financial contribution to assets owned by her partner. In *Cates v. Swain*, No. 2010–CT–01939–SCT (Miss. 2013), the Mississippi Supreme Court held that a woman in a same-sex relationship was entitled to recover \$45,000 in contributions to a home titled in her partner’s name. The court noted that unjust enrichment “applies to situations where there is no legal contract and ‘the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.’”

B. Express Contracts. In two cases, the Mississippi appellate courts have held that express contracts between same-sex partners regarding financial matters will be enforced. The supreme court rejected the argument that a post-separation agreement was unenforceable as against public policy, stating, “no authority states that a contract between two unmarried persons is illegal. . . .the law of this State does not support any finding of illegality with regard to this contract.” *In re Estate of Reaves*, 744 So. 2d 799, 802 (Miss. Ct. App. 1999). This rule was reinforced in dicta in 2012 in *Cates*.

A couple might choose to enter into a cohabitation agreement that defines their property rights in the event their relationship ends. In effect, the agreement is similar to a prenuptial agreement that can be enforced by a court upon dissolution of the relationship. Partners considering a cohabitation agreement should think carefully about their goals and about how they would want property divided if their relationship ends. An agreement to divide property, once signed, cannot be revoked by one party alone. Partners should consider:

- Whether property brought into the relationship should remain the separate property of each owner or be considered cohabitant property.
- Whether gifts and inheritances received during the relationship should remain the separate property of each owner or be considered cohabitant property.
- Whether assets to which both parties contribute financially should belong to the person who holds title, or be considered cohabitant property. They might also want to consider whether assets should be divided equally or in some other manner, such as contribution percentages.
- Whether income earned by one partner, and assets bought with that income, during the cohabitation should belong to the person who holds title, or be considered cohabitant property.
- Whether specific debts are separate or joint, regardless of who incurred the debt.
- Whether property deemed cohabitant property should be divided equally or according to a specific formula.
- Whether any dispute should be submitted to mediation or arbitration as a prerequisite to filing suit.

In Mississippi, prenuptial agreements are enforceable if they are in writing, are voluntary, fair at the time of execution, and are based on full disclosure about the partners’ assets, debts, and income. *Mabus v. Mabus*, 890 So. 2d 806, 821 (Miss. 2003); *Smith v. Smith*, 656 So. 2d 1143, 1147 (Miss. 1995). It would seem wise to follow these requirements for cohabitant property agreements.

PROPERTY RIGHTS AT DEATH

I. Passing Property Outside of the Estate

A. Joint Bank Account

When opening a bank account or even after setting up a bank account, an individual may put the names of both partners on the bank account. This is called being a joint tenant. If something happens to one of the partners, the other partner will automatically be granted sole possession of the bank account.

B. Payable-on-Death Designation

In Mississippi, an individual can add a "payable-on-death" (POD) designation to bank accounts such as savings accounts or certificates of deposit. An individual still controls all of the money in the account. A POD beneficiary has no rights to the money while the owner is alive. At one's death, the beneficiary can claim the money directly from the bank, without probate court proceedings. (This does not include real estate or vehicles in Mississippi.)

C. Living Trust

In Mississippi, a living trust can be created to avoid probate on the assets, which are put into the trust. A trust document needs to be created which is similar to a will. Then the assets, which are to be in the trust, must be named into the trust. The person setting up the trust may then name a trustee for when he or she dies and the assets will pass according to the living trust.

D. Transfer-on-Death Registration for Securities

Mississippi allows an individual to register stocks and bonds in transfer-on-death (TOD) form. People commonly hold brokerage accounts this way. If an individual registers an account in TOD (also called beneficiary) form, the named beneficiary will inherit the account automatically at one's death. No probate court proceedings will be necessary; the beneficiary will deal directly with the brokerage company to transfer the account.

E. Life Insurance Beneficiaries

When setting up Life Insurance, an individual names a beneficiary of the policy. An individual can name any person as a beneficiary when the policy is created and can change the beneficiary at any time. One thing to always have is an alternative beneficiary. If the primary beneficiary dies before the individual does and another person is not named then the policy payment will just go into the estate.

F. Rights of Survivorship

When multiple people own a piece of real property, a non-owner is prevented from asserting a claim to that property if the property is titled with rights of survivorship. The owners of the land with the help of an attorney can have the property titled and sign the deed as “joint tenants with full rights of survivorship”. If one of the owners dies, her interest in the land goes to the other owners instead of going into probate.

G. Deed with a Reservation of a Life Estate

An individual may pass real property to a partner upon his or her death by a present transfer of title to the partner, but reserving a life estate for herself. Another option is to grant the partner a life estate after the owner's death, with the property going to someone else after the partner's death.

During her life, the owner of a life estate has all of the property rights and duties of an owner, except the ability to sell the property outright. **WARNING:** A life estate has a number of benefits and drawbacks which should be thoroughly discussed with an attorney on a case by case basis.

II. Estate of the Person

A. Wills

1. Mississippi law governs the inheritance of Mississippi residents' estates, both by a will and without a will. Robert Weems, *Wills and Administration of Estates in Miss.* §§ 1:2, 3:1 (3d ed. 2014). If a couple is married under federal law, but not under state law, the estate will be treated as a single person's property, and not a married couple's property. *Id.*
2. If the deceased person did not leave a will, the estate will be divided up equally between the surviving spouse, if any, and children, if any. Debbie H. Bell, *Bell on Mississippi Family Law* 31 (2d ed. 2005 & Supp. 2011). If the deceased person has no spouse under state law or any children, the estate will

pass on to other relatives, and if no other relatives, to the State of Mississippi. Weems, at § 1:2.

3. For this reason, it is recommended that persons have a will when they die. A will gives a person the freedom to give property when he or she dies to anyone he or she chooses. If a person is unmarried, he or she has virtually no limitations on what or how he or she transfers the property. *Id.*
4. If a person is married under state law, there are some limitations. A surviving spouse who receives less than his or her legal share from the will's distribution of the estate may renounce the will. If a spouse wishes to renounce the will, he or she must do that within 90 days. Weems, at § 6:9. If a will makes no provision at all for the surviving spouse, the court will automatically renounce the will. On the other hand, if the will provides anything at all for the surviving spouse, the surviving spouse will receive nothing more than what the will provided unless he or she renounces the will. *Id.* at § 6:3. Successfully renouncing the will give the surviving spouse no more than one-half of the estate, or what he or she would have gotten had there been no will at all. *Id.* at § 6:9.
5. By executing a will, an individual can provide his or her partner at death in exactly the same manner as a couple married under Mississippi. A partner can leave all of his or her assets to his or her partner, and vice versa, or can leave a child's share to his or her significant other.
6. While executing a will provides the same inheritance rights as a married couple, a disadvantage is that wills can be revoked by the author or challenged by a family member and even an individual's significant other. So, a partner may revoke a will without the other's knowledge prior to his or her death. If that were to happen, the surviving partner would not have the right that would be available to a married couple which is to set aside the will and take a child's share.

B. Challenges to the Will

Anyone who has a direct interest in the estate (that is, could be a recipient of property from the estate) can challenge (or "contest") the will. *Id.* at §8:2. If a contest of the will is successful, the estate of the deceased person will be inherited as if there were no will to the surviving spouse, if any, and any children, if any, and then any relatives, according to Mississippi law. If the deceased leaves a

surviving spouse and no other descendants, the surviving spouse will receive the entire estate. Id.

III. Health Care Directives

- A. Mississippi law is based on the Uniform Health Care Directives Act, which provides statutory authorizations for spouses and other family members to assert the wishes of an incompetent patient. BELL, at 31. Under the Act, an individual may execute a healthcare directive stating specific wishes regarding medical treatment and appointing an agent for medical decisions. If the agent is a spouse, divorce or annulment automatically revokes the directive unless the divorce decree or healthcare directive provides otherwise. Authority typically begins when the maker becomes incapacitated as determined by the maker's physician and revoked automatically when incapacity ends. The agent is to make health care decisions based on the patient's best interests, considering the patient's values, and no judicial approval is needed. In the absence of a directive, the Act provides as a list of surrogates in order of preference with the patient's spouse as the first choice. In addition, an individual may disqualify certain persons in his directive.
- B. An individual has the right to give instructions about his or her own health care and also has the right to name his or her significant other to make health-care decisions for him or her. Power of attorney for health care enables an individual to name his or her significant other as the agent to make health-care decisions for the individual if he or she becomes incapable of making his or her own decisions or if he or she wants someone else to make those decisions now even though the individual is still capable. An alternate agent can act for an individual if his or her first choice is not willing, able, or reasonably available to make decisions. Id.
- C. Unless the directive limits the authority of a significant other, an individual's partner may make all health-care decisions. Id. The healthcare directive can be drafted to limit the authority of one's agent. If an individual chooses not to limit the authority of his or her partner, the agent will have the right to:
1. Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition;
 2. Select or discharge health-care providers and institutions;
 3. Approve or disapprove diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and

4. Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care. Id.

D. Advantages and Disadvantages

1. A major advantage is that by executing Health Care Directives, partners can achieve the exact same equal decision-making authority as a married couple has in this state.
2. The caveat is that an individual needs to be comfortable having his or her partner make these decisions. An individual may want to add a provision stating that his or her partner's authority terminates if the couple is no longer living together. Also, a few practical tips are to give a copy of the HCD to your physician, provide one to your family members, and keep one close at hand in your home to be provided to emergency responders.

IV. Power of Attorney

- A. A power of attorney is a written instrument by which one person, the principal, appoints another person, the attorney in fact, as his/her agent. The attorney in fact is then given the authority to perform certain specific acts on behalf of the principal in matters relating to property and/or personal matters.

A power of attorney is a planning tool to arrange for a trusted person to assist an individual with his or her financial affairs as needed. The law assumes that the individual has the capacity to make his or her own healthcare and financial decisions.

If an individual loses the capacity to make decisions, a durable power of attorney adds the provision that the attorney in fact has the ability to make healthcare and/or financial decisions for the individual.

- B. Two important provisions to consider including in a power of attorney are when an attorney in fact gains authority, and how long he or she maintains authority over the individual's affairs.

Mississippi allows for the instrument to become effective only when, and if, the individual becomes incapacitated. The instrument should also set the standard to

determine at what point an individual is deemed to have lost capacity to handle his or her own affairs.

A power of attorney can have a time of termination included where the authority given to the authority in fact ceases.

C. Advantages and Disadvantages

1. A major advantage is that by executing a power of attorney, partners can achieve similar financial authority over one another's affairs as a married couple has in this state.
2. The caveat is that an individual needs to be comfortable having his or her partner maintaining this authority. An individual may want to add a provision stating that his or her partner's authority terminates if the couple is no longer living together.

V. Steps to alleviate problems with a will challenge and other legal documents

- A. A will and other legal documents can be contested and considered void if a court finds the will or other document was written under duress or undue influence.
- B. Partners can use separate attorneys to draft individual wills. Attend the appointments alone or with a friend/witness who is not a beneficiary.
- C. Have a physician's certificate or affidavit executed immediately before the signing of the will stating that you are competent and understand what you are doing.
- D. Videotape the signing, where the signer states that he or she understands the legal import of the will.
- E. Have the witnesses to the will sign affidavits stating the signer is of sound mind and understands what he or she is doing.
- F. Upon execution of a Power of Attorney or Healthcare Directive, file the document in the miscellaneous documents index at the Chancery Court.

VI. Burial

- A. Pre-plan your death and instructions with a funeral home.
- B. Include your burial instructions in your will giving authority to your executor to take whatever steps may be necessary to enforce your burial wishes.

LIMITED POWER OF ATTORNEY

1. I, [insert name], an adult resident of the State of Mississippi, County of [insert county name], am over the age of twenty-one and of sound mind. I reside at [insert address.]
2. I am the [mother/father] of [insert child's name], born on [insert date of birth] in [insert place of birth.]
3. [Insert partner's name] is an adult resident of the State of Mississippi, County of [insert county name], and is over the age of twenty-one and of sound mind. She/he resides at [insert address].
4. I hereby appoint [insert name] as my Agent and attorney-in-fact ("my Agent") with respect to the exercise of parental rights in all matters related to or concerning my child **[name]** on the following terms and conditions.
5. **Authority to act.** My Agent is authorized to act as a fiduciary for me under this power of attorney and to exercise all powers granted by this document effective immediately.
6. **Durability.** This power of attorney and the authority granted hereunder shall not be affected by my subsequent disability or incapacity, or by the lapse of time, and it shall continue in effect until my death or until I revoke it in writing.
7. **Powers of Agent.** My Agent may perform any act and exercise any power with regard to **[insert child's name]** that I could do personally as my child's legal parent, including without limitation all of the specific powers set forth below:

A. Medical care:

- i. Consent, refuse consent, or withdraw consent to any care, treatment, service or procedure being performed in order to diagnose or treat a physical or mental condition of [insert child's name]
- ii. Make all necessary arrangements for [insert child's name] care or treatment at any medical facility, and to employ, discharge, replace or obtain reassignment of such health care personnel (including physicians, psychiatrists, psychologists, dentists, nurses, therapists, or any other person who is licensed, certified, or otherwise authorized or permitted by applicable laws to administer health care) as my Agent shall deem appropriate for [insert child's name] physical, mental and emotional well-being.
- iii. Request, receive and review any information, whether verbal, written or otherwise, regarding [insert child's name] physical or mental health, including medical and hospital records, and to execute any release that may be requested in order to obtain such information or provide it to others. In addition, I authorize any HIPAA Covered Entity to disclose [insert child's name] Protected Health Information to my Agent, as a person involved with [insert child's name] care under 45 CFR 164.510(b)(i), to enable her to assist in treatment decisions.
- iv. Visit [insert child's name] and observe her medical treatment to the fullest extent possible in any health care facility.
- v. Execute on my behalf a waiver or release from liability, and other documents required by a hospital, physician, other health care facilities or health care personnel, in order to provide services to [insert child's name]

B. Educational matters:

- i. Enroll [insert child's name] in any school or educational facility,
- ii. Arrange for her transportation, including picking her up whenever needed,
- iii. Sign permissions,
- iv. Discuss her performance and behavior with school personnel, and
- v. Participate as her parent in school meetings and functions.

C. Insurance:

- i. Apply for or renew health insurance covering [insert child's name] communicate with health insurers regarding her coverage, make claims for benefits, and
- ii. Deal with all other insurers, including health, life, disability or otherwise, that may provide benefits to [insert child's name]

D. Governmental agencies:

- i. Deal with any federal, state or local agency or court having jurisdiction over [insert child's name] and
- ii. Apply for any governmental benefits to which [insert child's name] may be entitled, and designate the payee of any such benefits.

8. Appointment of Guardian. In the event I become incapacitated, I hereby appoint my Agent to serve as Guardian over [insert child's name] and conservator over her estate. It is my intent that my Agent be given priority over any other person who may seek to be appointed [insert child's name] guardian, regardless of that person's relationship to [insert child's name]

9. Ratification and reliance by third parties. All acts done hereunder in good faith by my Agent – prior to receipt by my Agent or the party with whom my Agent is dealing of actual notice of revocation, whether by my death or otherwise – shall be binding on me and my heirs. No person relying on this power of attorney in good faith and without actual notice of revocation of this authority shall incur any liability to me or my heirs as a result of permitting my Agent to exercise any power granted herein. Any person dealing with my Agent may rely on my Agent's certification that this power of attorney has not been revoked.

10. No duty to act. Without regard to the powers conferred by this document or any of the above provisions, my Agent shall have no duty to act and shall incur no liability to me or to my heirs for failing to take any action authorized under this power of attorney.

11. Effect on powers of principal: Execution of this document in no way affects my rights as legal parent and guardian of [insert child's name] with full power and authority to undertake all of the rights enumerated and granted to the Agent in this Limited Power of Attorney.

12. Governing law. This document shall be governed by the laws of the State of MISSISSIPPI.

8. Original counterparts. Photocopies or facsimile reproductions of this signed power of attorney shall be treated as original counterparts.

I hereby voluntarily execute this Limited Power of Attorney on the date set forth below, with full knowledge of its contents and the legal consequences thereof.

PRINCIPAL

STATE OF _____)
_____ COUNTY)

Subscribed and sworn to before me on
this ____ day of _____, 201_:

NOTARY

Notary public, State of _____, County of _____.

My commission expires _____

Acting in the County of _____, _____.

**APPOINTMENT OF GUARDIAN
For child care and custody**

1. I, [insert name], an adult resident of the State of Mississippi, County of [insert county name], am over the age of twenty-one and of sound mind. I reside at [insert address.]

2. I am the [mother/father] of [insert child's name], born on [insert date of birth] in [insert place of birth.]

3. [Insert partner's name] is an adult resident of the State of Mississippi, County of [insert county name], and is over the age of twenty-one and of sound mind. She/he resides at [insert address.]

4. In the event of my death, I nominate [insert name] to be appointed as the legal guardian of the person and property of [insert child's name].

5. In the event that I am unable to care for my child physically or mentally, I nominate [insert name] as the legal guardian of [insert child's name].

6. This election is made because [insert partner's name] has [insert facts – for example – has acted as a parent in fact to the child for six of the ten years of his life and had provided care and financial support for him as a parent. They share a close parent-child bond. To deprive him or her support at a time when he has lost a parent would be damaging to him and not in his best interest.]

7. [Explain the circumstances regarding the child's other legal parent if any: for example, *'s father is deceased; his whereabouts are unknown; he has had no relationship with * for six years].

8. [Explain why other relatives were not elected: for example, I have chosen not to elect my parents or brothers and sisters as legal guardian in the event of my death or lack of capacity because they have not provided support, do not have a close relationship, is not in the child's best interests.]

Executed this * day of * ,

Name

Date

STATE OF _____)
_____ COUNTY)

Subscribed and sworn to before me on
this ____ day of _____, 201_:

NOTARY

Notary public, State of _____, County of _____.

My commission expires _____

Acting in the County of _____, _____.

PARENTING AGREEMENT CHECKLIST

The materials suggest several reasons why a parenting agreement may be useful to an LGBT family. Clinic attorneys may advise clients in general about parenting agreements as part of the Clinic. However, the Clinic services do not include drafting these agreements, for several reasons. These documents are more complex and require more time than is available in the Clinic setting. In addition, while there is no conflict in providing a couple with general advice about parenting agreements, the actual drafting may involve conflicts of interest between the couple that require that an attorney represent only one of the parties.

If you discuss parenting agreements with clients, be sure you emphasize to them that these agreements are not binding on a court and that courts may refuse to recognize or enforce them.

A parenting agreement should explain the couple's agreement in detail, including

- the couple's legal status (who is the child's legal parent or parents), the relationship of the unrelated partner to the parent and to the child
- the actual relationship of the child and unrelated partner in detail (how long they have lived in the same household, the care and support provided by the de facto parent)
- whether the partners intend to share parenting duties of child care and custody equally
- whether the partners intend to share financial responsibility for the child equally
- Whether the partners intend that both should be treated as equal parents if their relationship ends
- Whether the partners intend that both should share equal decision-making authority with regard to the child's medical treatment, education, religious training, and other significant decisions
- Whether the legal parent nominates her partner as the child's guardian in the event of her death or incapacity (this should be accompanied by a separate Nomination of Guardian form)
- Whether the legal parent authorizes her partner to consent to medical treatment and/or communicate with schools and other institutions regarding the child (this should be accompanied by a separate Power of Attorney)
- Whether any disputes regarding the agreement will be submitted to mediation

The document should be signed by both parties before a notary.

LAST WILL AND TESTAMENT OF John Doe

Be It Known This Day That I, John Doe, of Leflore County, Mississippi, being of legal age and sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person, do make, declare and publish this to be my Will and hereby revoke any Will or Codicil that I may have made.

I.

I am married to Jane Doe. Jane and I have the following children:

Name: _____ Date of Birth: _____

Name: _____ Date of Birth: _____

Name: _____ Date of Birth: _____

I was previously married to Janet Doe. Janet and I have the following children:

Name: _____ Date of Birth: _____

Name: _____ Date of Birth: _____

Name: _____ Date of Birth: _____

II.

Debts and Expenses

I direct my Executor, named herein or appointed by a court of law, to pay all costs and expenses of my last illness and funeral expenses. I further director my Executor to pay all of my just debts that may be probated, registered and allowed against my Estate. However, this provision shall not extend the statute of limitations for the payment of debts, or enlarge upon my legal obligation or any statutory duty of my Executor to pay debts.

III.

Specific Bequests of Real and/or Personal Property

I will, give, and bequeath unto the persons named below, if he or she survives me, the Property described below:

NAME
ADDRESS
RELATIONSHIP
PROPERTY DESCRIPTION

NAME
ADDRESS
RELATIONSHIP
PROPERTY DESCRIPTION

NAME
ADDRESS
RELATIONSHIP
PROPERTY DESCRIPTION

In the event that I have named a person in this Article III and said person predeceases me, the bequest to such person shall lapse and the property shall pass under the other provisions of this Will. In the event that I do not possess or own any property as listed above on the date of my death, the bequest of that property shall lapse.

**IV.
Homestead or Primary Residence**

I will, devise and bequeath all my interest in my homestead or primary residence, if I own a homestead or primary residence on the date of my death that passes through this Will, to my Wife, Jane Doe, if she survives me, and pursuant to the deed that expressly reflects the rights of survivorship so that the property shall pass outside of my Estate. If my Wife does not survive me, then my homestead or primary residence shall pass under the residuary clause of this Will.

**V.
All Remaining Property - Residuary Clause**

I will, devise and bequeath and give all the rest and remainder of my property and estate of every kind and character, including, but not limited to, real and personal property in which I may have an interest at the date of my death and which is not otherwise effectively disposed of, to my Wife, Jane Doe.

**VI.
Contingent - All Remaining Property - Residuary Clause**

In the event that my Wife shall predecease me, I will, devise and bequeath and give all the rest and remainder of my property and estate of every kind and character, including, but not limited to, real and personal property in which I may have an interest at the date of my death and

which is not otherwise effectively disposed of, to my children XXX, XXX, and XXX, and each is to share equally in the residual property. That is, after the Specific Bequests are distributed pursuant my wishes as set out in Article III, then all remaining property shall be shared equally among my children.

VII.

Appointment of Executor or Executrix

I hereby appoint my Wife, Jane Doe, as the Executor of my estate and this Will. In the event that my wife shall predecease me, or, for any reason, shall fail to qualify or cease to act as my Executrix, then I hereby appoint XXX to serve as the Executor of my Estate and Will.

VIII.

Waiver of Bond, Inventory, Accounting, Reporting and Approval

My Executor shall serve without any bond, and I hereby waive the necessity of preparing or filing any inventory, accounting, appraisal, reporting, approvals or final appraisalment of my Estate.

IX.

Simultaneous or Near-Simultaneous Death

In the event that my Wife and I die under circumstances where it is difficult to determine who died first, or in the event that my Wife dies within thirty (30) days of my own death, I direct that I be deemed to have survived her and the terms of my Will shall take precedence over any Will or Codicil that she may have made, notwithstanding any provisions of the law to the contrary.

X.

Miscellaneous Provisions

I direct that this Will and the construction thereof shall be governed by the Laws of the State of Mississippi.

Any and all debts of my estate shall first be paid from my residuary estate. Any debts on any real property left herein shall be assumed by the person to receive such real property and not paid by my Executor.

EXECUTION

I, John Doe, having signed this Will in the presence of Witness 1 and Witness 2 who

attested it at my request on this the _____ day of _____, 2013 at 401 River Road, Greenwood, MS, 38930, declare this to be my last will and testament.

John Doe

The above and forgoing Will of John Doe was declared by John Doe in our view and presence to be his Will, and was signed by the said John Doe in our view and presence and at his request and in the view and presence of Notary, and in the view and presence of each other, we, the undersigned, witnesses and attested the due execution of the Will of John Doe on this the _____ day of _____, 2013.

Witness 1

Witness 2

Print Name Witness 1

Print Name Witness 2

Street Address

Street Address

City, State, Zip

City, State, Zip

Phone

Phone

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

PERSONALLY, appeared before me, the undersigned authority in and for the county and state aforesaid, Witness 1, who, being by me first duly sworn, makes oath to the following:

1. The undersigned as subscribing witness was requested by John Doe to attest the Last Will and Testament of John Doe, that certain instrument of writing dated _____, _____, which is the true and original Last Will and Testament of John Doe.
2. That said _____ signed, published, and declared said instrument as his Last Will and Testament on the _____ day of _____, _____, the date of said instrument, in the presence of two (2) subscribing witnesses, _____ and _____.
3. The said John Doe was then and there of sound and disposing mind, memory, and understanding and was over eighteen (18) years of age.
4. Affiant, _____, a competent adult, subscribed and attested said instrument as a witness attests to the signature, publication, and declaration thereof by the said John Doe, at the special instance and request of said John Doe, in his or her presence and in the presence of _____ and _____.

Witness

Street Address

City, State, Zip

SWORN TO AND SUBSCRIBED before me, this the _____ day of

_____, _____.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

PERSONALLY, appeared before me, the undersigned authority in and for the county and state aforesaid, Witness 1, who, being by me first duly sworn, makes oath to the following:

1. The undersigned as subscribing witness was requested by John Doe to attest the Last Will and Testament of John Doe, that certain instrument of writing dated _____, _____, which is the true and original Last Will and Testament of John Doe.
2. That said _____ signed, published, and declared said instrument as his Last Will and Testament on the _____ day of _____, _____, the date of said instrument, in the presence of two (2) subscribing witnesses, _____ and _____.
3. The said John Doe was then and there of sound and disposing mind, memory, and understanding and was over eighteen (18) years of age.
4. Affiant, _____, a competent adult, subscribed and attested said instrument as a witness attests to the signature, publication, and declaration thereof by the said John Doe, at the special instance and request of said John Doe, in his or her presence and in the presence of _____ and _____.

Witness

Street Address

City, State, Zip

SWORN TO AND SUBSCRIBED before me, this the _____ day of

_____, _____.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

LAST WILL AND TESTAMENT OF _____

Be It Known This Day That I, _____, of _____ County, Mississippi, being of legal age and sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person, do make, declare and publish this to be my Last Will and Testament and hereby revoke any Will or Codicil that I may have made.

I.

I am not married and have no children.

II. Instructions Before and Upon My Death

Prior to my death, I have pre-arranged and pre-paid for my cremation. My wishes concerning my cremation shall be strictly followed. Prior to my death, I have retained legal services and representation which shall be evidenced by a written contract. My attorneys by and through my Co-Executrixes shall take whatever necessary steps with any government agency or law enforcement agency or in any competent court of jurisdiction in Mississippi to enforce my instructions.

Prior to my death, I have inventoried my personal property including but not limited to my personal property located at my home. I instruct my attorneys and Co-Executrixes to secure both my real property and my personal property until such time as this Will shall be probated and executed and all of my property distributed as expressed in this Will. My attorneys by and through my Co-Executrixes shall take whatever necessary steps with any government agency or law enforcement agency or in any competent court of jurisdiction in Mississippi to bar entrance onto my real property by anyone who does not have express permission of my Co-Executrixes to be located on my real property.

Prior to my death, I have executed certain legal documents to allow my Co-Executrixes the authority to carry out my wishes related to my health and end-of-life care and also to maintain the estate of my person. This Last Will and Testament shall be evidence of my intent that my Co-Executrixes have the exclusive authority to take whatever steps necessary to ensure that my wishes are honored and that my best interests are protected. No member of my family shall have any right or authority to make any decisions in any way related to my health or end-of-life care. No member of my family shall have any right or authority to make any decisions in any way related to the possession and disposal of my body at death. No member of my family shall have any right or authority to challenge the distribution of any and all of my real and personal property as stated in this Will.

III. Appointment of Co-Executrices

I hereby appoint _____ of _____, and _____ of _____, as the Co-Executrices of my estate and this Will. In the event that either _____ or _____ shall predecease me, or, for any reason, shall fail to qualify or cease to act as my Executrix, then the other shall act singly as my Executrix.

IV. Debts and Expenses

I direct my Co-Executrices to pay all costs and expenses of my last illness and death expenses, if any. I further direct my Co-Executrices to pay all of my just debts that may be probated, registered and allowed against my Estate. However, this provision shall not extend the statute of limitations for the payment of debts, or enlarge upon my legal obligation or any statutory duty of my Executor to pay debts.

V. Disposition of All of My Personal Property and Real Property

I will, give, and bequeath equally to my Co-Executrices as named herein, that is, _____ of _____, and _____ of _____, the entirety of my estate and any and all of my personal property and real property, of any kind or nature, to share equally.

It is my intent that my Co-Executrices have the authority and flexibility to choose to take possession of certain portions of my personal property for sentimental reasons. If any item of my personal property is sought to be possessed by both of my Co-Executrices then that item shall be liquidated by my attorneys and the proceeds shared equally between my Co-Executrices.

In taking possession of any of my personal property, those items taken for possession shall be valued and each of my Co-Executrices given an offset so that my Co-Executrices shall share as equally as possible in the value each receives from the entirety of my estate. In dividing my personal property, valuation of any items sought to be taken and possessed by my Co-Executrices shall be made by my attorneys who shall make a best estimation of value. My attorneys are charged with making sure that my Co-Executrices divide my estate so that each receives as equal value to the other as possible.

After my Co-Executrices have taken possession and title of any of my personal property as described above, and after values of the personal property and any offset have been determined, my Estate and my Co-Executrices shall then proceed to sell and liquidate to cash proceeds the remainder of my Estate, selling any and all of my remaining personal property and my real property. After the sale of all of my property, the proceeds shall then be divided and distributed to my Co-Executrices. This provision shall not prevent the court from making partial distributions to my Co-Executrices.

In the event that either of my Co-Executrices shall predecease me, the bequests that I have made in this Will of all my real and personal property divided equally between my Co-Executrices shall not lapse, that is, the real and personal property or the proceeds from the sale thereof that I have directed that each shall receive, shall then instead pass to her heirs, devisees, legatees, or heirs-at-law under the provisions of her Will or by the laws of the state in which she resides.

I have a life insurance policy. It is my intent that the beneficiary or beneficiaries named in the life insurance policy on the date of my death shall immediately have right, upon my death, to take the proceeds of the life insurance to have and enjoy without the life insurance proceeds being considered as part of my estate.

VI. Waiver of Bond, Inventory, Accounting, Reporting and Approval

My Co-Executrixes shall serve without any bond, and I hereby waive the necessity of filing any inventory, accounting, appraisal, reporting, approvals or final appraisalment of my Estate.

VII. Miscellaneous Provisions

I direct that this Will and the construction thereof shall be governed by the Laws of the State of Mississippi.

EXECUTION

I, _____, having signed this Will in the presence of _____ who attested it at my request on this the _____ day of _____, 20__ at _____, declare this to be my last will and testament.

The above and forgoing Will of _____ was declared by _____ in our view and presence to be his Will, and was signed by the said _____ in our view and presence and at his request and in the view and presence of Notary, and in the view and presence of each other, we, the undersigned, witnesses and attested the due execution of the Will of _____ on this the day of _____, 2014.

Signature

Date

Witness

Date

Witness

Date

PERSONALLY, appeared before me, the undersigned authority in and for the county and state aforesaid _____, who, being by me first duly sworn, makes oath to the following:

1 The undersigned as subscribing witness was requested by _____ to attest the Last Will and Testament of _____, that certain instrument of writing dated August 11, 2014, which is the true and original Last Will and Testament of _____.

2 That said _____ signed, published, and declared said instrument as his Last Will and Testament on the 11th day of August, 2014, the date of said instrument, in the presence of two (2) subscribing witnesses, _____ and _____.

3 The said _____ was then and there of sound and disposing mind, memory, and understanding and was over eighteen (18) years of age.

4 Affiant, _____, a competent adult, subscribed and attested said instrument as a witness attests to the signature, publication, and declaration thereof by the said _____, at the special instance and request of said _____, in his presence and in the presence of _____.

SWORN TO AND SUBSCRIBED before me, this the _____ day of _____, 20__.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

STATE OF MISSISSIPPI COUNTY OF _____

ADVANCE HEALTH-CARE DIRECTIVE

GENERAL EXPLANATION

You have the right to give instructions about your own health care. You also have the right to name someone else to make health-care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

PART 1: Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health-care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may name an alternate agent to act for you if your first choice is not willing, able or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator, or employee of a residential long-term health-care institution at which you are receiving care.

Unless the form you sign limits the authority of your agent, your agent may make all health-care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health-care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition;
- (b) Select or discharge health-care providers and institutions;
- (c) Approve or disapprove diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
- (d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care.

PART 2: Part 2 of this form lets you give specific instructions about any aspect of your health care. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief. Space is provided for you to add to the choices you have made or for you to write out any additional wishes.

PART 3: Part 3 of this form lets you designate a physician to have primary responsibility for your health care. After completing this form, sign and date the form at the end and have the form witnessed by one of the two alternative methods listed below. Give a copy of the signed and

completed form to your physician, to any other health-care providers you may have, to any health-care institution at which you are receiving care, and to any health-care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility. You have the right to revoke this advance health-care directive or replace this form at any time.

PART 1

POWER OF ATTORNEY FOR HEALTH CARE

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health-care decisions for me:

(name of individual you choose as agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

(name of individual you choose as first alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health-care decision for me, I designate as my second alternate agent:

(name of individual you choose as second alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

(2) AGENT'S AUTHORITY: My agent is authorized to make all health-care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration, and all other forms of health care to keep me alive, except as I state here:
(Insert "none" if no restrictions are intended.)

I trust my agent to make such health care decisions as are in my best interests. If my state of health declines to the point that I am no longer able to respond to my surroundings, recognize my loved ones or experience life in any meaningful way; and within a reasonable degree of medical certainty, it is unlikely that I will ever improve, I request that no extraordinary means be taken to prolong my life. I request that in those circumstances, artificial nutrition and hydration and other mechanical means of prolonging my life be withheld or withdrawn.

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health-care decisions unless I mark the following box. **If I mark this box [], my agent's authority to make health-care decisions for me takes effect immediately.**

(4) AGENT'S OBLIGATION: My agent shall make health-care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health-care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN: If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as guardian, I nominate the alternate agents whom I have named, in the order designated.

PART 2 INSTRUCTIONS FOR HEALTH CARE

If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, **you need not fill out this part of the form.** If you do fill out this part of the form, you may strike any wording you do not want.

(6) END-OF-LIFE DECISIONS: I direct that my health-care providers and others involved in my care provide, withhold or withdraw treatment in accordance with the choice I have marked below (Choose one):

(a) **CHOICE NOT TO PROLONG LIFE** - - I do not want my life to be prolonged if: (i) I have an incurable and irreversible condition that will result in my death within a relatively short time, (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, **OR** (iii) the likely risks and burdens of treatment would outweigh the expected benefits, or

(b) **CHOICE TO PROLONG LIFE** - - I want my life to be prolonged as long as possible within the limits of generally accepted health-care standards.

(7) **ARTIFICIAL NUTRITION AND HYDRATION:** Artificial nutrition and hydration must be provided, withheld or withdrawn in accordance with the choice I have made in paragraph (6) **unless I mark the following box.**

If I mark this box , artificial nutrition and hydration must be provided regardless of my condition and regardless of the choice I have made in paragraph (6).

(8) **RELIEF FROM PAIN:** Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

(Insert "none" if no limitations are intended.)

(Use additional sheets if needed.)

(9) **OTHER WISHES:** (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.)

(Insert "none" if no additional instructions are intended.)

I DIRECT THAT: _____

(Use additional sheets if needed.)

PART 3:

PRIMARY PHYSICIAN
(OPTIONAL)

(10) I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

(11) EFFECT OF COPY: A copy of this form shall have the same effect as the original.

(12) SIGNATURES: Sign and date the form here:

(date) (sign your name)

(address) (print your name)

(City) (State) (Zip)

(13) WITNESSES: **This power of attorney will not be valid for making health-care decisions UNLESS IT IS EITHER**

(a) signed by two (2) qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature (Alternative No. 1);

OR

(b) acknowledged before a notary public in the state (Alternative No. 2).

ALTERNATIVE NO. 1

Witness #1

I declare under penalty of perjury pursuant to Section 97-9-61, Mississippi Code of 1972, that the principal is personally known to me, that the principal signed or acknowledged this power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud or undue influence, that I am not the person appointed as agent by this document, and that I am not a health-care provider, nor an employee of a health-care provider or facility. I am not related to the principal by blood, marriage or adoption, and to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

(date) (signature of witness)

(address) (printed name of witness)

(city) (state) (zip)

Witness #2

I declare under penalty of perjury pursuant to Section 97-9-61, Mississippi Code of 1972, that the principal is personally known to me, that the principal signed or acknowledged this power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud or undue influence, that I am not the person appointed as agent by this document, and that I am not a health-care provider, nor an employee of a health-care provider or facility.

(date) (signature of witness)

(address) (printed name of witness)

(city) (state) (zip)

ALTERNATIVE NO. 2

State of _____

County of _____

On this _____ day of _____, in the year _____, before me,

(insert name of notary public)
appeared _____, personally known to me
(or proved to me on the basis of satisfactory evidence) to be the person whose name is
subscribed to this instrument, and acknowledged that he or she executed it. I declare under the
penalty of perjury that the person whose name is subscribed to this instrument appears to be of
sound mind and under no duress, fraud or undue influence.

Notary Seal

(Signature of Notary Public)

My Commission Expires: _____

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

DURABLE POWER OF ATTORNEY

I, XXX, an adult resident citizen of the County of Leflore and State of Mississippi, do hereby make, constitute and appoint XXX, my true and lawful attorney in fact for me and in my name to act generally and for all purposes including, but not by way of limitation, the right to receive and collect all money which may be due and accrue to me from any and all sources; the right and power to make and deposit any money or funds to the credit of my account or accounts in any bank; and to withdraw sums from any of said bank accounts, including both checking and savings accounts; and to expend monies in my behalf as may be necessary from time to time, the amount of which shall be in the sole discretion of my said attorney in fact. My said attorney in fact shall also have the right and privilege to convey and sell any and all interest in the property, either real, personal, or mixed, which I may own. Said sale or conveyance shall in the in sole discretion of my said attorney in fact.

I give and grant unto my attorney in fact full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done as fully to all intents and purposes as I might or could do, if personally present and able to do so.

Having full confidence in the honesty, character and integrity of my said attorney in fact, I hereby waive and release him from any and all liabilities arising out of the execution of this Power of Attorney and that he shall not be liable for any mistake of judgment or otherwise, should the same occur.

My attorney in fact may also exercise the following powers on my behalf:

Use, operate, insure, license and register with any state of government agency, any and all vehicles of which I am presently the registered or legal owner.

To make application to any governmental agency for any benefit or government obligation to which I may be entitled.

Receive, endorse, cash or deposit money orders, checks and drafts payable to the undersigned drawn on the Treasurer or other fiscal officer or depository of the United States, of any sovereign state or authority or political subdivision or instrumentality thereof and drawn on any bank or financial institution.

To have access to any safety deposit box registered in my name alone or jointly with others, and to remove any property or papers located therein.

To borrow money, to execute promissory notes therefor, and to secure any obligation by mortgage or pledge.

Take possession and order the removal and shipment of any of my personal property, wheresoever located.

To exercise any incidents of ownership I may possess with respect to policies of insurance, except policies insuring the life of my agent.

To employ and terminate physicians and other health care providers; to consent to and contract for my admission to hospitals, nursing homes, and other treatment or residential facilities; to have access to my medical records; to execute consents and releases concerning my medical treatment; and to make decisions regarding use, refusal and discontinuation of life-sustaining procedures and technology.

Have custody, care and control over my child(ren), and empowered to authorize and order all necessary items or services for my child(ren)'s welfare and benefit, to include but not limited to medical, dental and surgical care, schooling, clothing, housing, food and other necessities of life and to otherwise act as temporary guardian.

Obtain medical care and treatment at any hospital for my child(ren) and to execute any consent and release of waiver of liability required by the hospital authorities incident to medical care and treatment for my child(ren).

Perform any and all acts and to sign, execute and endorse any instrument necessary for the issuance or re-issuance of dependent identification cards for any of my legal dependents as defined by Army Regulation.

Perform any and all acts, sign, execute and endorse any instrument necessary to arrange for travel, at government expense or otherwise, for my legal dependents as defined under Army Regulation.

Prepare, execute and file income and other tax returns as may be required.

Sign for quarters, arrange for final inspection and clear quarters, and accept responsibility for the property therein; and to sign in my name, place and stead any document whatsoever necessary under the law to accomplish the above listed powers and to make, sign, endorse, act, receive or accept any instrument of any kind or nature as may be necessary or proper to accomplish any of the above said powers.

To purchase, sell, mortgage, grant options, or otherwise deal in any way real property, tangible or intangible, or any interest therein, upon such terms as the agent considers proper, including any interest therein, including the power to buy United States Treasury Bonds that may

be redeemed at par for the payment of Federal estate tax and to sell or transfer Treasury securities.

Regardless of the above statements, my agent cannot execute a will, codicil, or any will substitute on my behalf; cannot change the beneficiary on any life insurance policy that I own; cannot make gifts on my behalf; and may not exercise any powers that would cause assets of mine to be considered taxable to my agent or my agent's estate for purposes of any income, estate or inheritance tax.

Third parties may rely upon the representations of the agent as to all matters regarding powers granted to the agent. No person who acts in reliance on the representations of the agent or the authority granted under this Power of Attorney shall incur any liability to me or to my estate for permitting the agent to exercise any power prior to actual knowledge that the Power of Attorney has been revoked or terminated by operation of law or otherwise.

No agent named or substituted in this power shall incur any liability to me for acting or refraining from acting under this power, except for such agent's own misconduct or negligence.

Photocopies of this signed Power of Attorney shall be treated as original counterparts.

This power of attorney shall not be affected by my subsequent disability or incompetency. It is my intention and desire that it shall validly and effectively continue thereafter.

I hereby further declare that this power of attorney shall continue until such time as it is terminated by me.

IN WITNESS WHEREOF, I have affixed my signature on this the ____ day of _____
_____, 2013.

SIGNATURE

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

This day personally appeared before me, the undersigned authority in and for said jurisdiction, the within named XXX known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that XXX signed and delivered the foregoing Power of Attorney on the day and year as therein mentioned and for the purpose as therein expressed.

GIVEN UNDER MY HAND AND OFFICIAL SEAL on this the ____ day of _____,
2013.

NOTARY PUBLIC

My Commission Expires:
