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## **You Can Have My Gun When You Pry It from My Hands Which Are Incapable of Managing My Own Estate by Reason of Advanced Age, Physical Incapacity, or Mental Weakness: Firearms Rights of Wards in Mississippi Guardianships and Conservatorships**

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# YOU CAN HAVE MY GUN WHEN YOU PRY IT FROM MY HANDS WHICH ARE INCAPABLE OF MANAGING MY OWN ESTATE BY REASON OF ADVANCED AGE, PHYSICAL INCAPACITY, OR MENTAL WEAKNESS: FIREARMS RIGHTS OF WARDS IN MISSISSIPPI GUARDIANSHIPS AND CONSERVATORSHIPS\*

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## I. INTRODUCTION

For many Mississippians, hunting and recreational shooting are integral parts of their lives as elements of a tradition of outdoor sportsmanship that is handed down from generation to generation. There is often a multi-generational aspect to this tradition. A grandparent's hunting rifle becomes a treasured family heirloom. Grandparents take their grandchildren out before dawn to sit in a duck blind or a deer stand as they teach a younger generation the fine points of the sport. Hunting is held so dear to Mississippians that a recent ballot measure to make hunting a Constitutional right<sup>1</sup> was approved by an overwhelming majority,<sup>2</sup> making Mississippi one of only nineteen states with a constitutionally recognized right to hunt and fish.<sup>3</sup> Shooting sports other than hunting are also very popular in Mississippi, as evidenced by the existence of more than 75 active

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\* Nothing in this Article should be construed as advocating for the retention of firearms rights by or the return of firearms rights to violent offenders or those who have been adjudged or have been demonstrated to be a danger to themselves or others outside of the normal procedures in place for those purposes.

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1. The bill, HRC 30, was styled as the Mississippi Right to Hunt and Fish Amendment, and proposed to amend Article 3 of the Mississippi Constitution of 1890 by creating a new Section, 12A, which would read, "The people have the right to hunt, fish[,] and harvest wildlife, including by the use of traditional methods, subject only to laws and regulations that promote wildlife conservation and management and that preserve the future of hunting and fishing, as the Legislature may prescribe by general law. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. This section may not be construed to modify any provision of law relating to trespass, property rights, the regulation of commercial activities or the maintenance of levees pursuant to Article 11." MISS. CONST. art. III, § 12A (2012).

2. Mississippi Election Results, MISSISSIPPI ELECTION RESULTS (2014), <http://elections.nytimes.com/2014/mississippi-elections>. The measure was on the statewide ballot in November of 2014 as a legislatively referred constitutional amendment, originating from a bill introduced during the legislature's 2012 session, MISSISSIPPI LEGISLATURE, 2012 SESSION, HOUSE CONCURRENT RESOLUTION 30, <http://billstatus.ls.state.ms.us/2012/pdf/history/HC/HC0030.xml> (text of the bill as sent to the Governor <http://billstatus.ls.state.ms.us/documents/2012/pdf/HC/HC0030SG.pdf>). The measure passed with 87.97 percent of the votes cast favoring the amendment. *2014 General Election Results*, MISSISSIPPI SECRETARY OF STATE, <http://www.sos.ms.gov/Elections-Voting/Pages/2014-General-Elections.aspx>.

3. *State Constitutional Right to Hunt and Fish*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx>.

shooting ranges and clubs across a relatively sparsely populated state.<sup>4</sup>

At the same time Mississippians continue to treasure the role that firearms play in their recreational lives, their right to enjoy this traditional form of recreation is threatened. Recent projections postulate that over twenty-five percent of Mississippi's population will be sixty years of age or older by the year 2030.<sup>5</sup> That projected number represents a whopping thirty-nine percent increase over the proportion of the population the same demographic represented in 2012.<sup>6</sup> For an increased number of older Mississippians, recent legislation has given rise to a potential threat to their firearm rights.<sup>7</sup>

Nationally, the right of America's aging population to own and use firearms seems to be eroding. The U.S. Department of Veterans' Affairs (VA) has been reporting hundreds of thousands of veterans to the National Instant Criminal Background Check System (NICS)<sup>8</sup> in a process that results in those veterans being unable to obtain a federal firearms license. The Social Security Administration is also in the process of crafting a similar policy for a significant portion of its beneficiaries with the number of those affected ranging into the millions.<sup>9</sup> Those chosen individuals are not uniformly defined by histories of violent behavior or adjudications that they are a danger to themselves or others. Instead, what most of these individuals have in common are an inability to manage their financial affairs without help and the appointment of a fiduciary to assist them.<sup>10</sup>

4. *Mississippi Shooting Ranges and Gun Clubs*, SHOOTING.ORG., <http://www.shooting.org/Ranges/Mississippi>.

5. United States Department of Health and Human Services, Administration on Aging, POLICY ACADEMY STATE PROFILE-MISSISSIPPI, December 2012.

6. *Id.* (18.3% of Mississippi's population was projected to be 60 years old or older in 2012).

7. This legislation, most notably that which led to the enactment of MISS. CODE ANN. § 45-9-103 (2015), is discussed in greater detail below.

8. The NICS is a system of databases, maintained by the Federal Bureau of Investigation (FBI), which was created under the provisions of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 (2012). When an individual attempts to purchase a firearm from the holder of a Federal Firearm License (FFL), the provisions of the Brady Act require that the FFL initiate a background check using the FFL. *Id.* at. § 922(t)(1). The background check involves a check of the name and descriptive information for the prospective transferee against the information contained in the databases that make up the NICS. *Id.* at. § 922(t)(1)(C). If the name and descriptive information does not match one of the entries for a prohibited person within the database, the transfer is approved. U.S. Department of Justice, Federal Bureau of Investigation, National Instant Criminal Background Check (NICS) Operations 2014, May 1, 2015. If there is a match, the agency denies the transfer.

*Id.*

9. Alan Zarembo, *Obama pushes to extend gun background checks to Social Security*, L.A. TIMES (July 18, 2015), <http://www.latimes.com/nation/politics/la-na-gun-law-20150718-story.html>.

10. The veterans reported by the Department of Veterans' Affairs each had a fiduciary appointed to manage benefit payments. *Id.* This process, as noted elsewhere, was not designed to nor does it contemplate denying the veteran the right to purchase or possess firearms, as evidenced by the VA's assertion that "VA's Fiduciary Program was established to protect Veterans and other beneficiaries who, due to injury, disease, or due to age, are *unable to manage their financial affairs* (emphasis added)." *Fiduciary*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <http://benefits.va.gov/fiduciary>. Although the Social Security regulations have not yet been promulgated, the agency would be operating under the same definition of the term, "adjudicated as a mental defective." That term would include those who have their finances managed by a fiduciary (a "representative payee" within the parlance of the Social Security Administration), as well as those who are receiving disability benefits due to mental health issues.

The laws of the State of Mississippi allow the state's chancery courts to appoint a fiduciary for someone who is unable to manage his own affairs.<sup>11</sup> As detailed below, while the appointment of a fiduciary may result in the abridgement of certain civil rights of that individual, a fiduciary appointment has previously had no statutory impact on the firearms rights of Mississippians. Recent changes in state law, however, may have changed that outcome by creating a correlation between the abridgment of a veteran's firearms rights subsequent to the appointment of a fiduciary and the firearms rights of a Mississippian in a guardianship or conservatorship. This Article will examine whether, and to what extent, Mississippi's citizens who have a fiduciary appointed to manage their personal affairs can potentially lose their right to purchase or possess<sup>12</sup> firearms, while using as an illustrative example the impact that the assignment of a fiduciary has on the ownership rights of a veteran receiving disability compensation benefits from the VA.

The first section will provide historical background on the VA disability compensation benefit and will incorporate a brief discussion of the mental health issues facing veterans returning from combat operations in Iraq and Afghanistan, coupled with an overview of the process and purported authority by which the aforementioned veterans are being reported to the NICS. The second section will provide a brief overview of the rights Mississippians enjoy with regard to firearms. The third section will explain the range of actions, including the appointment of a fiduciary through a guardianship or conservatorship, available through the Mississippi court system to protect those who are no longer able to care for themselves. The penultimate section will analyze recent applicable law and regulations to establish that, under the current scheme, Mississippians who have guardians or conservators appointed for them under certain circumstances will soon be in similar situations to the veterans who have had fiduciaries appointed through the VA. The final section will demonstrate that although a similar reporting scheme should be in place for some Mississippians in a conservatorship or guardianship, one does not yet exist and the section will additionally propose a potential planning avenue for elder law attorneys whose clients may soon be entering a conservatorship.

## II. THE INCOMPETENT REPORTING PROCESS RELATIVE TO THE DEPARTMENT OF VETERANS' AFFAIRS DISABILITY COMPENSATION BENEFIT

America's history of providing for its disabled veterans dates back to a provision in the code passed by Plymouth Colony in 1636, which established financial support for soldiers who were injured in defense of the colony.<sup>13</sup> That tradition of support for those wounded in defense of their homeland continued

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11. *See generally*, MISS. CODE ANN. § 93-13 (2015).

12. The term "possess" can be construed so broadly as to include being in a space where an individual even has access to a firearm, absent any evidence that the individual has ever actually touched the firearm via the doctrine of "constructive possession," which has a history in Mississippi jurisprudence dating back to the Court of Appeals' holding in *Gavin v. State*, 785 So. 2d 1088 (Miss. Ct. App. 2001).

13. United States, Army War College. *THE PENSION ROLL AS AFFECTED BY THE WAR IN SPAIN IN 1898*. War Department, 1915.

through the Revolutionary War and through the drafting and ratification of the U.S. Constitution.<sup>14</sup> The first United States Congress passed legislation providing for a federal pension for disabled soldiers in 1789.<sup>15</sup>

In his Second Inaugural Address, delivered in March of 1865 as the Civil War was drawing to a close, President Abraham Lincoln famously called on the nation “to care for him who shall have borne the battle.”<sup>16</sup> By the end of the Civil War, the number of Union veterans alone had reached almost two million.<sup>17</sup> At the time of Lincoln’s speech, Congress had already passed the General Pension Act that anticipated the disability compensation structure in force today by establishing a scale in which the amount of compensation was figured based on the veteran’s military rank and degree of disability.<sup>18</sup> After World War II, another huge increase in America’s veteran population prompted Congress to enact a vastly increased scheme of benefits for war veterans.<sup>19</sup> That scheme has been revised and expanded through the years.<sup>20</sup> Today, veterans of America’s armed forces who meet legislatively established eligibility criteria<sup>21</sup> have a substantial array of VA benefits available to them, including disability

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14. A law, the first national law of its kind, providing for half pay for life or for the duration of a disability was passed by the Continental Congress on August 26, 1776. *Supra*.

15. *VA History In Brief*, U.S. DEPARTMENT OF VETERANS’ AFFAIRS, 3 (1997), [http://www.va.gov/opa/publications/archives/docs/history\\_in\\_brief.pdf](http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf). Although the Continental Congress provided for a pension for soldiers who fought in the Revolution, as noted above, because it had neither funding nor the authority to make cash payments to individuals, each individual state bore the cost of providing pensions for their own soldiers. The pension legislation passed by the first Congress shifted the financial responsibility to the newly formed federal government.

16. President Abraham Lincoln, Second Inaugural Address (March 4, 1865) (transcript available at the Library of Congress).

17. *VA History In Brief*, *supra* note 15, at 4.

18. The General Pension Act, 12 Stat. 566 (July 14, 1862). This Act represented a vast expansion in the eligibility for military pensions, providing a pension for all those in military or naval service since March 4, 1861 as well as their widows, orphans, and even their surviving dependent mothers and sisters. This expansion was viewed with apprehension and even alarm from some officials within the Lincoln administration. The Secretary of the Interior, in that year’s annual report to Congress, reported a large increase in the business of the Pension Office (then situated within the Department of the Interior) and further communicated word from its Commissioner that some believed the new provisions had created, “an extravagant, if not unsupportable, annual burden” though the Commissioner himself viewed the new system as “certainly no more liberal than simple justice demands toward the armed defenders of the country in this day of trial.” 1862 Dept. of the Int. Ann. Rep. 15. The pensions administered under this Act anticipated other aspects of the VA system, as well: at the time of the Secretary’s report in mid-November of the year it was passed, only 685 of the nearly 11,000 applications for pensions under the new scheme had been approved due to necessary reliance on records of the Adjutant General’s Office and the Navy Department to confirm the bona fides of the deaths or disabilities which were the basis of the applications. *Id*.

19. *See generally*, *VA History In Brief*, *supra* note 15, at 15-17.

20. Among the noteworthy post-World War II expansions of veterans’ benefits are the creation of the Department of Medicine and Surgery within the Veterans’ Administration pursuant to Pub. L. 79-293 which, after the elevation of the Veterans’ Administration to the Cabinet-level Department of Veterans Affairs, eventually became the Veterans Health Administration, and the Post-9/11 Veterans Education Assistance Improvements Act of 2010 (Pub. L. 111-377), commonly known as the Post-9/11 G.I. Bill, which significantly both the eligibility for veterans’ educational benefits and the scope of those benefits.

21. These eligibility criteria are specifically designed to provide benefits for those who have served on active duty, and not in the Reserve forces or National Guard, although those who serve in the Reserve and National Guard may be eligible for some VA benefits if they were called to active duty and completed a full period of federal service. 38 U.S.C. § 1110 (2012).

compensation distributed directly to the veteran in the form of a monthly payment.<sup>22</sup>

In order to qualify for benefits through the VA, an individual must first be a veteran who has met the criteria established in 38 U.S.C. § 101(2). Section 101(2) provides the following definition of the term: “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”<sup>23</sup> When a servicemember’s<sup>24</sup> period of service ends, whether through the natural expiration of his contracted term of service or as a result of an involuntary separation or the sentence of a court-martial that person’s service is evaluated according to a number of factors and the servicemember is given what is referred to as a “characterization of service.”<sup>25</sup> Although there are a number of distinct characterizations of service, Section 101(2)’s term “other than dishonorable” does not correspond to any of them,<sup>26</sup> and is instead reflective of the VA’s complex “character of discharge” determination process, in which the service-designated characterization of service is but one element among many. This “character of discharge” determination will control which, if any, of the benefits offered by the VA a veteran will be eligible to receive.<sup>27</sup> Once eligibility as a veteran is established, an individual must either have a disease, an injury

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22. *Id.*

23. 38 U.S.C. § 101(2) (2012).

24. “Servicemember” is a broad term which may be used for one who serves or served in any of the Armed Forces of the United States. The term is defined in much the same way by various federal agencies; the VA currently defines the term as, “a member of the ‘uniformed services’, consisting of the armed forces (Army, Navy, Air Force, Marine Corps, and Coast Guard), the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) and the Commissioned Corps of the Public Health Services.” I AM AN ACTIVE DUTY SERVICEMEMBER, [http://www.va.gov/opa/persona/active\\_duty.asp](http://www.va.gov/opa/persona/active_duty.asp); see also, 38 U.S.C. § 101(2) (2012) (defining veteran as “one who served in the active military, naval air, or air service”).

25. 10 U.S.C.; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) as revised; U.S. DEP’T OF DEFENSE INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, (January 27, 2014); U.S. DEP’T OF DEFENSE INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (November 25, 2013). The characterization of service a servicemember receives will have a direct impact on the benefits for which he or she is eligible, not only from federal and state governmental agencies but also potentially from civilian employers. See generally, Major John Booker, Major Evan Seamone, and Ms. Leslie C. Rogall, *Beyond “T.B.D.”*, 214 MIL. L. REV. 1 (2012) and Major Joshua Smith, *Staying Abreast of Separation Benefits*, ARMY LAW, (September 2013). Performance of duty and personal conduct are factors that are considered when determining the characterization of service for both officers and enlisted soldiers who are being discharged from active duty. See, U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, para. 1-22 (13 Sep. 2011); see also, U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS, para. 3-5 (6 Sep. 2011) (hereinafter “AR 635-200”). AR 635-200 contemplates additional factors that may be considered in enlisted separations including age, length of service, grade, aptitude, physical and mental condition. The factors considered in the separation of officers and enlisted soldiers from the U.S. Army Reserve are similar. See, U.S. DEP’T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (4 Aug. 2011); see also, U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (18 Mar. 2014).

26. Although it bears a close enough resemblance to the “Other than Honorable” characterization of service to cause confusion and dismay among the uninitiated.

27. An Honorable Discharge or a Discharge Under Honorable Conditions is binding on the VA. 38 C.F.R. 312(a) (2014). However, the VA will apply statutory bars to receiving benefits under 38 U.S.C. § 5303(a), 38 C.F.R. § 3.12(c), as well as regulatory bars found at 38 C.F.R. § 3.12(d), to every application for benefits. For more on this topic and a thorough examination of the character of discharge process, see Booker, Seamone, and Rogall’s excellent article Booker, Seamone, & Rogall, *supra* note 25.

incurred, or an injury aggravated by military service in order to qualify for disability compensation. These establish what is termed a “service connection” for the disability and form the basis to receive disability compensation from the VA.<sup>28</sup> An eligible veteran who has any one of the several pre-established presumptive diseases or conditions<sup>29</sup> will also qualify for disability compensation.

The recent period of prolonged combat operations has created a boom in the number of disabled veterans. A study in 2004—three years after the initial invasion of Iraq by U.S.-led coalition forces—identified a troubling issue.<sup>30</sup> The study estimated that 18% of soldiers and Marines<sup>31</sup> newly redeployed from Iraq had a mental health condition known as Post-Traumatic Stress Disorder (PTSD).<sup>32</sup> In 2008, the Director of Compensation and Pension Service at the Veterans Benefits Administration<sup>33</sup> testified before a House of Representatives Subcommittee that the number of claims for disability compensation for PTSD alone had grown from 120,000 in 1999 to 345,520 in 2008.<sup>34</sup> The prevalence of PTSD among those returning from the Iraqi and Afghan theaters of operation led to an expansion in the role of the National Center for PTSD,<sup>35</sup> and the establishment of special criteria for determining service-connection for PTSD.<sup>36</sup>

One can argue it was perhaps inevitable that the rise of PTSD and other mental health issues among the growing population of combat veterans would also lead to an increase in the number of those veterans whom the VA deems incompetent to handle their financial affairs.<sup>37</sup> Under federal law, as a rating

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28. 38 U.S.C. § 1110 (2012).

29. A number of diseases and conditions are to have a service connection. If a veteran who files a claim presents with one of these conditions and meets applicable criteria related to dates and locations of service, the condition is presumed to have resulted from the veteran’s service and the veteran is granted the service connection and need not prove it. 38 C.F.R. § 3.309 (2013).

30. Hoge, C.W., Castro, C.A., Messer, S.C., McGurk, D., Cotting, D.I. & Koffman, R.L. *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13-22 (2004).

31. Airmen and sailors were not a part of the study. *Id.*

32. The study reported a strong relation between combat experiences common to the Iraq and Afghanistan conflicts (such as multiple deployments, being shot at, handling dead bodies, and knowing someone who was killed) and the prevalence of PTSD. *Id.*

33. An agency of the VA, along with the Veterans Health Administration and the National Cemetery Administration, each of which are administered by the Under-Secretary for Benefits. U.S. Department of Veterans’ Affairs, *Functional Organizational Manual – Version 3.1*, 77 (2016), [https://www.va.gov/ofcadmin/docs/VA\\_Functional\\_Organization\\_manual\\_Version\\_3-1.pdf](https://www.va.gov/ofcadmin/docs/VA_Functional_Organization_manual_Version_3-1.pdf).

34. GPD, *House Subcommittee Reviews Combat PTSD VA Process Overly Burdensome, Adversarial to Prove War Zone Injuries and Illnesses*, VETERANS TODAY (Mar. 30, 2009), <http://www.veteranstoday.com/2009/03/30/house-subcommittee-reviews-combat-ptsd/>.

35. The National Center for PTSD was created within the VA in 1989 as a result of the Congressional directive to improve the VA’s ability to care for veterans with the condition. The Center was tasked to work with the Department of Defense in developing a treatise that became the *Iraq War Clinician Guide*. *Iraq War Clinician Guide*, U.S. DEPARTMENT OF VETERANS’ AFFAIRS (2004), <http://www.ptsd.va.gov/professional/materials/manuals/iraq-war-clinician-guide.asp>. The Guide, now in its Second Edition, provides guidance for clinicians in dealing with the unique assessment and treatment needs of veterans returning from Iraq and Afghanistan.

36. 38 C.F.R. § 3.304(f) (2008).

37. In the course of determining whether a veteran who has submitted a claim for disability benefits is eligible for disability compensation, that veteran may undergo what is termed a claim examination, also called a “Compensation and Pension Examination,” which is designed to aid in the determination of the appropriate

agency the VA has the sole authority to make determinations of competency and incompetency for purposes of insurance and distribution of benefits.<sup>38</sup> The federal law which grants the VA that sole authority defines a “mentally incompetent person” as, “one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.”<sup>39</sup> As a result, it must be viewed as somewhat extraordinary that the VA’s own webpage on the Fiduciary Program offers the soothing assurance that “[t]he determination that you are unable to manage your VA finances does not affect your non-VA finances, or your right to vote or contract.”<sup>40</sup>

It is from this determination—that a veteran lacks mental capacity to handle their financial affairs—that the abridgment of the veteran’s firearms rights arises. The Gun Control Act of 1968<sup>41</sup> prohibits the possession of a firearm by any person who has been “adjudicated as a mental defective[.] . . .”<sup>42</sup> and also prohibits the sale or transfer of a firearm to any such person.<sup>43</sup> The term “adjudicated as a mental defective[.] . . .” as defined within the federal regulations drafted to implement the provisions of the Gun Control Act means “[a] determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.”<sup>44</sup>

The Brady Handgun Violence Prevention Act<sup>45</sup> mandated a federal background check for firearms purchases in the United States and directed the creation of the National Instant Criminal Background Check System, or NICS.<sup>46</sup> As originally passed, the law provided that the Attorney General “may secure

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disability rating and compensation level for the veteran. *VA Claim Exam Frequently Asked Questions*, U.S. DEPARTMENT OF VETERAN’S AFFAIRS, <http://www.benefits.va.gov/COMPENSATION/docs/claimexam-faq.pdf>. However, these exams have a somewhat notorious reputation in some sectors for including seemingly innocuous questions about budgeting and household finance that can lead to the veteran being determined to be incompetent. (Some of the (admittedly not objective) reports on this aspect of the exam are reported at <https://www.vawatchdog.org/fiduciary-appointments/html> and [http://vets.yuku.com/topic/80901#\\_V\\_cTuugrLIU](http://vets.yuku.com/topic/80901#_V_cTuugrLIU)). The VA may rely on the opinion of the doctor who conducted this examination to find that a beneficiary is incompetent. *M21-1, Adjudication Procedures Manual III.iv.8.A.1.a*, U.S. DEPARTMENT OF VETERAN’S AFFAIRS, [http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ss/#!/portal/554400000001018/article/554400000014211/M21-1-Part-III-Subpart-iv-Chapter-8-Section-A-Evaluating-Competency](http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/554400000001018/article/554400000014211/M21-1-Part-III-Subpart-iv-Chapter-8-Section-A-Evaluating-Competency).

38. 38 C.F.R. § 3.353(b) (2014).

39. 38 C.F.R. § 3.353(a) (2014).

40. While it is true that the fiduciary appointed through this process only manages those benefits the veteran receives from the VA, this language appears directly above a straight-faced assertion conflating the VA’s incompetence determination with an adjudication “as a mental defective” and that the agency accordingly reports the names of incompetent beneficiaries to the FBI so that they may be added to the NICS in compliance with the requirements of the Brady Handgun Violence Prevention Act. *Fiduciary*, U.S. DEPARTMENT OF VETERAN’S AFFAIRS, <http://www.benefits.va.gov/fiduciary/beneficiary.asp>.

41. Gun Control Act of 1968, Pub. L. No. 90-617, 82 Stat. 1968.

42. 18 U.S.C. § 922(g)(4) (2012).

43. 18 U.S.C. § 922(d)(4) (2012).

44. 27 C.F.R. § 478.11 (2014).

45. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

46. 18 U.S.C. § 922 (2012).



directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate” the prohibitions contained in other sections of the Act.<sup>47</sup> The Brady Act was amended by the NICS Improvement Amendments Act of 2007,<sup>48</sup> a section of which<sup>49</sup> fundamentally altered the means by which the Attorney General obtained information on prohibited persons from other federal departments and agencies.<sup>50</sup> Specifically, it shifted from a permissive scheme that allowed the Attorney General to gather the information to a mandatory reporting scheme, requiring the agencies to submit the information in quarterly reports to the Attorney General.<sup>51</sup>

If the VA deems a veteran incompetent, the VA will then review the veteran’s circle of relatives to determine who shall serve as a fiduciary for the veteran and appoint someone to serve in that capacity.<sup>52</sup> This process occurs regardless of whether the veteran agrees that he or she needs assistance with her financial affairs and often without the veteran having a neutral third party to serve as his or her advocate or make a recommendation as to what would be in the veteran’s best interests.<sup>53</sup> Once a veteran has been deemed incompetent and a fiduciary has been appointed, the VA will then forward the beneficiary’s name to the FBI as an individual who has been adjudged to be mentally defective.<sup>54</sup> The veteran’s name is then included in two databases within the NICS: the Interstate Identification Index (III) and the NICS Index.<sup>55</sup> Thereafter, these database entries bearing the veteran’s name will result in a denial of the transfer if a veteran attempts to purchase a handgun from a Federal Firearms License (FFL) holder.<sup>56</sup> The VA incompetency process, therefore, results in veterans

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47. 18 U.S.C. § 922 (prior to 2008 amendment).

48. NICS Improvement Amendments Act of 2007, Pub. L. 110-180, 122 Stat. 2559 (2008) (codified as amended at 18 U.S.C. § 922 (2012)).

49. NICS Improvement Amendments Act of 2007, Pub. L. 110-180, § 101, 122 Stat. 2559, 2662 (2008).

50. This shift was deemed necessary because many federal agencies were not providing data to the Attorney General. This trend continued into 2011, with agencies not complying with the reporting requirement even after the passage of the NICS Improvement Amendments Act, potentially as the result of a policy memorandum issued by then-Attorney General Janet Reno prohibiting some federal agencies (including the military) from reporting to the FBI. As of 2011, the vast majority of the records submitted to the NICS from federal agencies had come from the VA.

51. The text of the relevant section reads: “If a Federal department or agency under subparagraph (A) has any record of any person demonstrating that the person falls within one of the categories described in subsection (g) or (n) of section 922 of title 18, United States Code, the head of such department or agency shall, not less frequently than quarterly, provide the pertinent information contained in such record to the Attorney General.” 18 U.S.C. § 922 (as amended).

52. *FIDUCIARY PROGRAM MANUAL*, U.S. DEPARTMENT OF VETERAN’S AFFAIR, [http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ss/#!/portal/55440000001018/topic/55440000004378/Fiduciary-Program-Manual](http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/55440000001018/topic/55440000004378/Fiduciary-Program-Manual).

53. In some instances, the VA will determine that there is no suitable relative and will appoint as fiduciary someone that the veteran has never met. 38 C.F.R. § 13.59 (2016). This allows for the nomination of a court-appointed fiduciary and the subsequent certification to receive payments of the veteran’s benefits. *Id.* These are often attorneys who serve as professional fiduciaries and who collect a fee for their services, up to 4% of the veteran’s monthly benefits. *VA’s Fiduciary Program*, THE AMERICAN LEGION, <https://www.legion.org/legislative/testimony/161484/va’s-fiduciary-program>

54. Privacy Act of 1974; System of Records, 76 Fed. Reg. 14119, 14122 (Mar. 15, 2011).

55. U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations*, 2014.

56. 28 C.F.R. § 25.10 (2016).

being adjudicated as mental defectives solely on the basis of a purported inability to handle one aspect of their finances and without a judicial determination that they represent a danger to themselves or others.

Writings elsewhere have addressed the constitutional implications of the VA's incompetency process,<sup>57</sup> as well as the problematic vagueness of the term "mentally defective" within the Brady Act.<sup>58</sup> When considering the meaning of the term the Eighth Circuit has stated, "[a] mental defective . . . as has often been said, is a person who has never possessed a normal degree of intellectual capacity . . . ."<sup>59</sup>

Increased attention to the inequity of the VA's application of this law has led to a movement within the Congress to amend the Brady Act's definition of "mentally defective" to require that any individual who is deemed mentally incompetent must be the subject of a judicial determination that the individual is a danger to himself or others before he may be considered to have been "adjudicated as a mental defective."<sup>60</sup> There does exist an appellate process if an individual feels he has been wrongly denied a transfer or sale, as there exist means for a veteran who has been determined to be an incompetent to have his firearms rights restored.<sup>61</sup> Both processes require that the veteran who has been

57. See, e.g., Joshua Flynn-Brown, *Analyzing the Constitutional Implications of the Department of Veterans Affairs' Process to Determine Incompetency: Is the Federal Government Violating the Second Amendment and Due Process?*, 41 Hastings Const. L.Q. 521 (2014); Benjamin Krause, *Confusion on Constitution* (Oct. 6, 2016), <http://www.disabledveterans.org/2013/02/25/mmqb-confusion-on-constitution/>.

58. See, e.g., Jana R. McCreary, "Mentally Defective" Language in the Gun Control Act, 45 Conn. L. Rev. 813 (2013); Clare Priest, *When a Stopgap Measure Triggers a Permanent Proscription*, 80 WASH. U. L. REV. 359 (2002).

It is worth noting, particularly in the context of incompetency determinations for veterans, that those who qualify for disability compensation benefits must be assumed to have qualified for and served at least some period on active duty in our nation's armed forces and be entitled to the VA's own presumption of sound condition. 38 U.S.C. § 1132 (2012). This presumption, applied during the process of determining service connection, holds that "every person who was employed in the active military, navy, or air services . . . shall be taken to have been in sound condition when examined, accepted and enrolled for service." *Id.*

59. U.S. v. Hansel, 474 F.2d 1120, 1124-25. (8th Cir. 1973) (citation omitted). The lengthy discussion of the meaning of term "mentally defective" in the opinion predates the expansive definition propounded by the Bureau of Alcohol, Tobacco, and Firearms. Perhaps weary of the attacks on this definition, last year's notice of proposed rulemaking from ATF related to an amendment of that definition (an amendment which expands the definition even further) contains this somewhat petulant statement: "(t)he Department recognizes that the term 'mentally defective' is outdated, but it is included in the statute and cannot be amended by regulation." "Amended Definition of 'Adjudicated as a Mental Defective' and 'Committed to a Mental Institution,'" Notice of Proposed Rulemaking. 79 *Federal Register* 4, 7 January 2014, pp. 774-777.

60. See, e.g., S. 572, 113th Cong. (2013-2014); H.R. 577, 113th Cong. (2013-2014); H.R. 602, 113th Cong. (2013-2014). This bill, proposed in both houses of Congress and referred to as the "Veterans 2<sup>nd</sup> Amendment Protection Act," is informed and bolstered by the report of a hearing conducted by the House Committee on Veterans Affairs on the House version of the prospective law. H.R. REP. NO. 113-159 (2013-2014). The report of the Committee's hearings, put forward by Representative Jeff Miller of Florida's First Congressional District, contains the following crucial language, "The Committee believes that a determination that a veteran cannot handle financial affairs is not a determination that they are a danger to themselves or to the public and hence should be prohibited from purchasing or possessing firearms. Since such a determination implicates a specific right granted under the Constitution, the Committee believes that a specific determination is required." *Id.* at 3. Although this bill, or one like it, has yet to be successfully passed, incorporation of this language within the definition would offer relief on this issue not only to veterans, but those who stand to be affected by the proposed Social Security Administration Regulations who have had a fiduciary appointed under similar circumstances.

61. Both of these procedures are outlined within the NICS Improvements Amendments Act of 2007,

deemed incompetent file and litigate a petition with the Department of Veterans' Affairs—a lengthy and legendarily complex process—while access to his disability compensation benefits (possibly his only source of income) is controlled by another person.<sup>62</sup> In addition to being complicated, the process looks to be very unlikely to bear fruit: as of April of 2013, the VA had only granted seven requests for relief from NICS reporting.<sup>63</sup>

### III. FIREARMS RIGHTS OF MISSISSIPPI CITIZENS

Like the overwhelming majority of other states,<sup>64</sup> Mississippi has a provision in its Constitution safeguarding the rights of its citizenry to keep and bear arms,<sup>65</sup> echoing the Second Amendment to the Constitution of the United States. The initial version of that state constitutional provision stated: “Every citizen has a right to bear arms in defence of himself and of the State.”<sup>66</sup> That provision was only cosmetically amended before the enactment of the post-Civil War state constitution of 1868, that changed the language of the provision to read, “All persons shall have a right to keep and bear arms for their defence.”<sup>67</sup> The current constitutional right of Mississippians to keep and bear arms arises from the following provision in the state’s most recent constitution, ratified in 1890: “The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned,

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approved by the House in January of 2007, and subsequently approved by the Senate in December of that same year before being signed into law by President George W. Bush in 2008. See NICS Improvements Amendments Act of 2007, Pub. L. No. 110–180 121 Stat. 2559 (amended at 18 U.S.C. § 922 (2012)) and associated legislative history.

62. The massive backlog of pending appeals to the Board of Veterans' Affairs and the resulting attenuated timeline of the average appeal has been cause for concern for at least the last ten years, as evidenced by the pointed questioning documented in *BATTILING THE BACKLOG: CHALLENGES FACING THE VA CLAIMS ADJUDICATION AND APPEAL PROCESS: HEARING BEFORE THE SENATE COMMITTEE ON VETERANS' AFFAIRS*, 109<sup>th</sup> Cong. 1 (2005). Statements from the current Presidential administration also indicate a recognition of the problem. The “Statement of Administration Policy” issued by the Executive Office of the President contains the assertion that, “[t]he current appeals process – [sic] built up over 80 years of overlapping laws and regulations – [sic] is broken and is failing both veterans and taxpayers.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 5620 – VA ACCOUNTABILITY FIRST AND APPEALS MODERNIZATION ACT OF 2016 (2016). This echoed Department of Veterans Affairs Secretary Robert McDonald’s statement from January of this year that, “the appeals process we currently have set in law is failing veterans - and taxpayers.” *Statement from VA Secretary on the Need to Reform the Veterans' Appeals Process*, IDAHO DIVISION OF VETERANS SERVICES, <http://veterans.idaho.gov/news/statement-va-secretary-need-reform-veterans-appeals-process>.

63. H.R. REP. NO 113-159, at 4 (2013-2014). The Report does not indicate how many requests for relief were filed, but instead frames the very small number of requests in terms of the 143,000 veterans subject to the policy. *Id.*

64. As of 2006, forty-four out of the fifty United States had in their state constitution some provision which guaranteed the citizens of those states the right to keep and bear arms. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006).

65. The various other firearm related rights, such as the so-called “Castle doctrine,” also known as the “stand your ground” doctrine, which removes the duty of retreat before using force and permits a person to use deadly force to defend themselves inside their home, are not addressed here.

66. MISS. CONST. of 1817, art. 1, § 23.

67. MISS. CONST. of 1868, art. 1, § 15.

shall not be called in question, but the Legislature may regulate or forbid carrying concealed weapons.”<sup>68</sup>

The importance the framers of the Mississippi constitution placed on the right of the citizen to keep and bear arms may be inferred from the prominent position the right holds in the document, located as it is in the constitution’s first Article. A commitment to that right has endured in subsequent generations of Mississippi legislators, as evidenced by the fact that Mississippi has no laws that require a permit for the purchase of rifles and shotguns or handguns, no requirement to register firearms with a state authority, and no licensing of gun owners.

This is not to say that firearm ownership in the state is completely unregulated. Mississippi’s laws do require an individual to obtain a permit in order to carry a handgun,<sup>69</sup> and no one under the age of 18 may possess a handgun outside of engaging in hunting or sport shooting activities except in very limited circumstances.<sup>70</sup> Mississippi’s criminal law includes a felony-level offense that prohibits attempts to persuade any person, licensed firearm dealer or not, to sell or transfer a firearm in a way that the person knows would violate the law.<sup>71</sup>

One area of firearms rights in which Mississippi is somewhat unique is the ability to carry a concealed weapon. While the State has long allowed for the carrying of a concealed weapon with a permit,<sup>72</sup> a bill signed into law last year by Mississippi Governor Phil Bryant significantly expanded the rights of Mississippians to carry a concealed firearm.<sup>73</sup> The bill allows Mississippians to now carry a concealed weapon in a purse, briefcase, or other fully-enclosed satchel without the requirement of a license.<sup>74</sup> The same bill lowers the fee to obtain a permit to carry a concealed weapon, and exempts disabled veterans,

68. MISS. CONST. art 3, § 12.

69. MISS. CODE ANN. § 97-37-7(1) (2015).

70. MISS. CODE ANN. § 97-37-14 (2015).

71. MISS. CODE ANN. § 97-37-105 (2015). The offense—“solicit[ing], persuad[ing], encourage[ing] or entic[ing]” the illegal sale of firearms or ammunition—is punishable by up to three years’ imprisonment and/or the imposition of up to a \$5,000.00 fine. *Id.*

72. MISS. CODE ANN. § 45-9-101 (2015).

73. Geoff Pender, *How to carry a gun in Mississippi: New Gun Laws Explained*, CLARION-LEDGER (Jun. 16, 2016), <http://www.clarionledger.com/story/news/politics/2016/05/14/mississippi-gun-laws/84164140/>. Prior to the enactment of the new law, Mississippi’s permitting law directed that the state “shall issue” concealed carry permits to qualified applicants. MISS. CODE ANN. § 45-9-101 (2015). This distinguishes Mississippi, and other states whose laws follow what is called the “shall issue” model from other states, whose laws provide that the state issuing authority “may issue” licenses to qualified applicants. As of this writing, eight states (Alaska, Arizona, Idaho, Kansas, Maine, Vermont, West Virginia, and Wyoming) are “unrestricted states” and allow those persons who are not otherwise prohibited from owning a firearm to carry a concealed firearm without a permit in places where doing so is not specifically prohibited, regardless of whether or not those persons are citizens of that state. *Concealed Weapons Permitting*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/concealed-weapons-permitting/>.

74. MISS. CODE ANN. § 45-9-101(24) (2015), “A license under this section is not required for a loaded or unloaded pistol or revolver to be carried upon the person in a sheath, belt holster or shoulder holster or in a purse, handbag, satchel, other similar bag or briefcase or fully enclosed case if the person is not engaged in criminal activity other than a misdemeanor traffic offense, is not otherwise prohibited from possessing a pistol or revolver under state or federal law, and is not in a location prohibited under subsection (13) of this section.”

active duty servicemembers, and current or honorably retired law enforcement officers from any fees associated with obtaining or renewing a permit to carry a concealed weapon.<sup>75</sup> Another recent Mississippi law also created an “enhanced carry” endorsement, which allows certain concealed carry permit holders to carry their weapons anywhere in the state regardless of the presence of “gun-free zone” signage, except for police stations, jails, courtrooms, and federal property.<sup>76</sup> To qualify for this endorsement, a permit holder must undergo an eight-hour training course,<sup>77</sup> although active-duty military members, veterans, and honorably retired law enforcement officers may obtain the “enhanced carry” endorsement without undergoing the eight-hour training, pursuant to another bill signed into law by Governor Bryant last year.<sup>78</sup> These measures clearly indicate the continued importance the government of the state places on the firearms rights of Mississippians.

#### IV. PROTECTIVE ACTIONS IN MISSISSIPPI

As noted previously, Mississippi’s population is aging rapidly.<sup>79</sup> With the increase in the aged population comes a potential increase in the number of Mississippians who may need assistance managing their financial affairs or other aspects of their lives. A 2007 Boston College study indicates that two-fifths of Americans will have less income at the age of 80 than they did at the age of 67, which will necessarily lead to issues with money management without sufficient prior planning.<sup>80</sup> This is supported by 2013 figures compiled by the U.S. Department of Health and Human Service’s Administration on Aging that indicate that 12% of surveyed older Americans have difficulty with at least one Instrumental Activity of Daily Living, one of which is money management.<sup>81</sup> A variety of services are available to older Mississippians and their families through state and local agencies, including life skills training, but there are instances<sup>82</sup> when those services may not be enough to adequately address the issues of some older Mississippians. In those cases, Mississippi law provides

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75. MISS. CODE ANN. § 45-9-101(5)(c), (12) (2015).

76. MISS. CODE ANN § 97-37-7(2) (2015); 18 U.S.C. § 930 (2012).

77. *Id.*; Pender, *supra* note 73.

78. The term “veteran” is not defined within the bill itself. The applicable provision states that “a member or veteran of any active or reserve component branch of the United States of America Armed forces having completed law enforcement or combat training with pistols or other handguns as recognized by such branch after submitting an affidavit attesting to have read, understand and agree to comply with all provisions of Mississippi enhanced carry law.” The affidavit reprints that language and asks the applicant to certify that they qualify for the enhanced carry permit under the applicable provision.

79. See *Mississippi Shooting Ranges and Gun Clubs*, *supra* note 4; *supra* Introduction.

80. The economic issues facing the elderly, many of whom are living with less income than when they were working, are addressed in the figures published by the National Council on Aging, which reflect that millions of older adults struggle to meet their monthly expenses. *Economic Security for Seniors*, NATIONAL COUNCIL ON AGING, <https://www.ncoa.org/news/resources-for-reporters/get-the-facts/economic-security-facts/>.

81. U.S. Dep’t of Health and Human Servs., Admin. on Aging, *A Profile of Older Americans: 2013*, 14 (2013). Instrumental Activities of Daily Living are tasks that allow a person to live independently in the community, such as housework, preparing meals, using the telephone, and taking medication. *Id.*

82. When, for example, an individual is incapable of managing their own estate, as contemplated by the provisions of MISS. CODE ANN. § 93-13-121 (2015).

avenues to protect those who are no longer capable of managing their own affairs. These measures are not specifically limited to use in the protection of older Mississippians, but they are often utilized in that context.

In addition to traditionally less-restrictive protective measures such as mobilization of an extended family network to support an individual or the creation of planning documents such as a power of attorney or health care directive,<sup>83</sup> a Mississippi statute provides for the establishment of a guardianship or conservatorship when necessary and after certain criteria have been met.<sup>84</sup> Mississippi also allows for the involuntary commitment of individuals who pose a danger to themselves or others, but this is a short-term solution and not one that should generally be considered a viable choice as a protective measure absent circumstances of true emergency.<sup>85</sup>

Guardianships and conservatorships are legally created relationships, established by the courts between someone who needs a degree of assistance or protection and someone identified by the court who will provide that assistance or protection. In Mississippi, both guardianship and conservatorship actions are initiated through petitions in the Chancery Court where the prospective ward resides.<sup>86</sup> Recently, Mississippi enacted a law in part to clarify the distinction between the roles of the guardian and the conservator. As defined by the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, a Guardian is a person appointed by the court to make decisions regarding the person of an adult<sup>87</sup> and a Conservator is a person appointed by the court to administer the property of an adult.<sup>88</sup>

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83. In keeping with the Aspirational Standards propounded by the National Academy of Elder Law Attorneys (NAELA), protective measures should be taken on behalf of a client only “when the attorney reasonably believes that the client: (1) has diminished capacity, (2) is at risk of substantial physical, financial, or other harm unless action is taken, and (3) cannot adequately act in the client’s own interest.” Nat’l Acad. of Elder Law Attorneys, *Aspirational Standards for the Practice of Elder Law with Commentaries*, 23–25 (Nov. 21, 2005); *see also* MODEL RULES OF PROF’L CONDUCT r. 1.14(b) (AM. BAR ASS’N. 2005). Even when protective action is necessary, an attorney should take care to use the least restrictive measures necessary to safeguard the client from harm and minimize intrusion on the client’s decision-making autonomy. *Id.* at 23–25.

84. MISS. CODE ANN. § 93-13 (2015). As will be discussed further below, the distinction between a Guardian and a Conservator was only recently clarified by State Bill 2240, which defined a Conservator as “a person appointed by the court to administer the property of an adult,” a role distinct from that of the Guardian, who is appointed by the court to “make decisions regarding the person of an adult.” S.B. 2240, 2014 Leg., Reg. Sess. (Miss. 2014).

85. MISS CODE ANN. § 41-21-73(4) (2015). Truly an emergency short-term solution, the involuntary commitment is designed and structured to be a solution of last resort, as evidenced by the language in the statute which allows for involuntary commitment only after consideration of available alternatives and only in cases where “there is no suitable alternative.” *Id.* This is best viewed as an emergency measure not only because of the strict criteria to secure the commitment, but because the commitment has a maximum duration of three months.

86. MISS. CODE ANN. § 93-13-13, 93-13-251 (2015).

87. MISS. CODE ANN. § 93-14-102(3) (2015).

88. MISS. CODE ANN. § 93-14-102(2) (2015). The duties and powers of a conservator are the same as those of a guardian of a minor. MISS. CODE ANN. § 93-13-259 (2015). Those duties include the duty to improve the estate of the ward and to apply the estate’s income as necessary for the “comfortable maintenance and support of the ward and his family.” MISS. CODE ANN. § 93-13-38(2) (2015). If it seems likely that the ward will be incompetent for the remainder of his life, the conservator may, after a hearing and upon the order of the court, the conservator may, “to apply such principal or income of the ward’s estate as is not required for the support of the ward during his lifetime or of his family towards the establishment of an estate plan,” and

Despite their distinctions, the powers and duties of the guardian and the conservator are the same,<sup>89</sup> and both the guardian and the conservator have an obligation to provide an inventory of the ward's assets to the court in short order after the appointment.<sup>90</sup> Both the guardian and the conservator have duties identical to those of an executor or conservator of an estate, which include the often-overlooked requirements to provide notice to known creditors of the ward, to publish notice to unknown creditors of the ward, and to probate and register claims against the estate of the ward.<sup>91</sup> Annual accountings are required of both the guardian and the conservator as a means of protecting the ward's estate from an unscrupulous fiduciary.<sup>92</sup>

While the term guardianship is generally understood as used in the context of minors, Mississippi law also makes provision for guardianships of adults.<sup>93</sup> An adult guardianship is most often sought where the adult has some form of legal disability that renders him or her incompetent to manage his or her own person and estate.<sup>94</sup> The statutes further allow for the appointment of a guardian of an adult who is a drunkard or a habitual user of morphine, opium, or cocaine.<sup>95</sup> In any event, guardianships are appropriate under Mississippi law when the prospective ward is an incompetent adult or subject to an unsound mind. The appointment of a guardian is expressly an adjudication of the ward to be mentally defective.<sup>96</sup>

In contrast, the underlying need for the appointment of a conservator will arise from the prospective ward's lack of capability to manage his own estate "by reason of advanced age, physical incapacity or mental weakness," but expressly does not result in a determination of the ward as being mentally

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make to make gifts on behalf of the ward. MISS. CODE ANN. § 93-13-38(4) (2015).

89. MISS. CODE ANN. § 93-13-259 (2015) (stating if the court appoints a conservator, "the said conservator shall have the same duties, powers and responsibilities as a guardian of a minor, and all laws relative to the guardianship of a minor shall be applicable to a conservator").

90. MISS. CODE ANN. § 93-13-33 (2015) (establishing that every guardian (and, by operation of § 91-13-259, every conservator), shall, "within three months after his appointment, return to the court, under oath, a true and perfect inventory of the estate, real and personal, and of all money or other things which he may have received as the property of his ward").

91. MISS. CODE ANN. § 93-13-38 (2015).

92. MISS. CODE ANN. § 93-13-67(1) (2015).

93. See MISS. CODE ANN. §§ 93-13-121 and 93-13-121 (2015). As noted above, the definition of "Guardian" in § 93-13-121 is "a person appointed to administer the property of an adult," going on to reference those guardians appointed under § 93-13-121 and Sections 93-13-11 through 93-13-135 (2015).

94. MISS. CODE ANN. § 93-13-121 (2015).

95. MISS. CODE ANN. § 93-13-131 (2015).

96. The Mississippi Code defines the term "person with an intellectual disability" at § 41-21-61(f), a definition that, in its essentials, refers to a person with limitations in their ability to perform skills analogous to IADLs as a result of below-average intellectual functioning. See MISS. CODE ANN. § 41-21-61(f) (2015). Code § 93-13-111 and Sections 93-13-121 through 93-13-135 all specifically refer to varying degrees of mental incompetence without referring to the term "person with an intellectual disability" as defined above, although § 93-13-111 does make use of "person in need of mental treatment," a companion term of sorts whose definition may be found at § 41-21-61(e) (2016). Rather than using "person in need of mental treatment" throughout or defining and using the more common terms "mental defective" or "mentally defective," these Code sections use a variety of terms, including "incompetent adult" in Sections 93-13-121 and 93-13-122, and the term "persons of unsound mind" in Sections 93-13-11 through 93-13-133, without defining any of them or providing a reference to another Code section that does.

defective.<sup>97</sup> A petition for the appointment of a conservator requires certification of two physicians of established practice who have each conducted an examination and who certify to the court that the appointment of a conservator is appropriate.<sup>98</sup> The prospective ward may join in the petition to have a conservator appointed.<sup>99</sup> In the case of an unwilling ward, the court will appoint a Guardian Ad Litem to safeguard the ward's interests,<sup>100</sup> thereby affording the prospective ward in a Mississippi conservatorship action more protection than a veteran facing the appointment of a fiduciary by the VA. The primary role of the Guardian Ad Litem in the conservatorship appointment process is, after all, to "look after the interest of the person in question"<sup>101</sup> and to represent the prospective ward's interests at any hearing during that process. The right to contract and to convey property is the only right of a potential ward specifically identified for abridgement in the applicable statutes.<sup>102</sup> Conversely, the VA fiduciary process, where the potential second-order effects include the loss of firearms rights, contemplates no analogue for the Guardian Ad Litem's role.

#### V. REPORTING OF CERTAIN FIDUCIARY APPOINTMENTS UNDER CURRENT MISSISSIPPI LAW AND AGGREGATE CONSEQUENCES REGARDING FIREARMS RIGHTS OF MISSISSIPPIANS

In keeping with the traditional interpretation of the Tenth Amendment, there is no requirement under the Gun Control Act or the Brady Act for states to report the identities of individuals who are prohibited from purchasing or possessing firearms under the terms of the Act.<sup>103</sup> Although Congress has established a number of financial incentives for states who participate in reporting, any reporting of state information to the NICS remains entirely voluntary.<sup>104</sup> In 2007 and 2011, high profile shooting incidents<sup>105</sup> were

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97. According to Justice Prather, writing for the majority in *Harvey v. Meador*, 459 So. 2d 288 (Miss. 1984), this was by design. Noting the increase in the number of adults in the state with assets who needed protection similar to that afforded by a guardianship, the Mississippi legislature incorporated conservatorship into the code to provide "a new procedure . . . for supervision of estates of older adults with physical incapacity or mental weakness, without the stigma of legally declaring the person non compos mentis." This additional procedure was intended to encompass a broader class of people than just the incompetent." 459 So. 2d 288 at 292.

98. MISS. CODE ANN. § 93-13-255 (2015).

99. MISS. CODE ANN. § 93-13-253 (2015).

100. MISS. CODE ANN. § 93-13-255 (2015).

101. *Id.*

102. *See* MISS. CODE ANN. § 93-13-261 (2015).

103. *See* *United States v. Printz*, 521 U.S. 898, 935 (1997) (holding unconstitutional provisions in the interim version of the Brady Bill which mandated reporting of certain information by state and local law enforcement agencies).

104. *See* 28 C.F.R. 25.5 (2016), which contemplates the search only of material that has been "contributed voluntarily by . . . state . . . criminal justice agencies."

105. The 2007 incident took place at Virginia Tech. *See* Ian Shapira and Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, N.Y. TIMES (Apr. 17, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/16/AR2007041600533.html>. The 2011 incident in Tucson resulted in serious injury to Congresswoman Gabrielle Giffords. *See* Shailagh Murray and



committed by individuals who should have been prohibited from purchasing or possessing a firearm based on mental illness or a history of drug abuse but who had nonetheless passed background checks to obtain the weapons used in the shootings.<sup>106</sup> The 2007 incident was directly responsible for the drafting and swift passage of the NICS Improvement Amendments Act<sup>107</sup> and the subsequent enactment of a number of state laws that created an internal requirement to report information to the FBI concerning individuals who are or who later become prohibited persons within the meaning of the Gun Control Act. This led to a 700% increase in the number of mental health records between 2007 and the end of 2014.<sup>108</sup>

Mississippi drafted its own laws implementing a requirement to report information regarding prohibited persons to the FBI in 2013.<sup>109</sup> One of these laws directs the Mississippi Department of Public Safety to establish a procedure to provide what it terms “federal prohibited-person” information to the FBI.<sup>110</sup> The Mississippi law’s definition of “federal prohibited person” is much narrower than the list contained in 18 U.S.C. § 922(g)(1)–(9). Several of the categories of prohibited individuals are absent from the list in the Mississippi law, most notably the “person who has been adjudicated as a mental defective.” The law does, however, require reporting of information identifying an individual as a “[person] for whom a court has appointed a guardian or conservator,” but only in those instances in which the appointment was “based on the determination that the person is incapable of managing his own estate due to mental weakness.”<sup>111</sup> A companion law requires the clerk of the appropriate court to report the appointment of a guardian or conservator in the instance of mental weakness to the Department of Public Safety no later than thirty days after that appointment.

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Sari Horwitz, *Rep. Gabrielle Giffords shot in Tucson rampage; federal judge killed*, WASH. POST (Jan. 9, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010802422.html>. The perpetrator of the 2007 incident was previously determined to be mentally ill by a judge. See Ian Urbina, *Va.Tech Gunman’s Mental Health records found*, N.Y. TIMES (July 22, 2009), <http://www.nytimes.com/2009/07/23/us/23vtech.html>. The perpetrator of the 2011 incident had a history of drug abuse. See John Cloud, *The Troubled Life of Jared Loughner*, TIME (Jan. 15, 2011), <http://content.time.com/time/magazine/article/0,9171,2042358,00.html>.

106. See MAYORS AGAINST ILLEGAL GUNS, FATAL GAPS: HOW MISSING RECORDS IN THE FEDERAL BACKGROUND CHECK SYSTEM PUT GUNS IN THE HANDS OF KILLERS (2011). This widely circulated report postulates lax reporting of mental health and substance abuse information by the individual states as one reason the individuals responsible for the two incidents were able to obtain firearms.

107. The drafting and swift passage of the Act is evidenced by the lengthy reference to it in the Committee findings included in the law. See NICS Improvements Amendments Act of 2007, Pub. L. No. 110–180 121 Stat. 2559 (amended at 18 U.S.C. § 922 (2012)). The Bureau of Justice Statistics makes reference to the unavailability of the Virginia Tech shooter’s mental health to NICS in its page on the Act, see *Fatal Gaps How Missing Records in the Federal Background Check System Put Guns in the Hands of Killers*, EVERYTOWN (Nov. 25, 2011), <https://everytownresearch.org/reports/fatal-gaps/> (the NICS Improvements Act of 2007).

108. U.S. Department of Justice, F.B.I., *Active Records in the NICS Index as of January 13, 2014* (May 1, 2015).

109. The law began life as Senate Bill 2647, and both the version of the bill as introduced and the revised version passed in the Senate. MISSISSIPPI LEGISLATURE 2013 REGULAR SESSION SENATE BILL 2467, (2013), <http://billstatus.ls.state.ms.us/2013/pdf/history/SB/SB2467.xml>.

110. MISS. CODE ANN. § 45-9-103(2) (2015).

111. MISS. CODE ANN. § 45-9-103(1)(c) (2015).

<sup>112</sup> The law also provides the ward with multiple means of pursuing the restoration of their firearms rights, including the ability to obtain judicial relief from firearms disability.<sup>113</sup>

What emerges, then, is that the newly created reporting requirement as it relates to certain wards of a fiduciary appointment differs from the VA's reporting process in terminology only. As discussed above, the Mississippi Supreme Court has established that the Mississippi conservatorship process was specifically drafted to avoid declaring the prospective ward to be non compos mentis and requires no showing that the ward is a danger to himself or others, nor did that appointment previously have any statutory effect on the personal rights of the ward. The new result, however, is a second-order effect which yields the same result as the procedure followed by the VA: the Chancery Clerk will report the appointment of the guardian or conservator to the Department of Public Safety that will in turn report it to the FBI, resulting in the ward's name being placed in the Interstate Identification Index (III) and the NICS Index.<sup>114</sup> The ward will then be in the same situation as the veteran for whom a fiduciary has been appointed and will be unable to purchase or possess a firearm unless he or she manages to have his or her rights restored.

As yet, the Department of Public Safety has published no procedures for the reporting of this information, and there are no published statistics detailing the number of reports of fiduciary appointments that the Department has received from county chancery clerks. Once those procedures have been established and implemented, however, it is clear that the ward of a fiduciary appointment on the appropriate basis will have their rights to possess or purchase a firearm removed, even if the Chancellor who appointed the conservator did not find that abridgment of personal rights to be necessary or appropriate.

## VI. A POTENTIAL PLANNING AVENUE FOR MISSISSIPPIS WHO MAY BECOME WARDS

An untested, but potentially viable, planning tool for older Mississippians who may soon be wards of a guardianship or conservatorship is seen in the example of the NFA Trust. The NFA Trust, also called a "gun trust" or a "Title II Trust," was created in response to the requirement in Title II of the National Firearms Act that individuals who wanted to purchase certain categories of firearms, now commonly called "NFA firearms," and accessories must undergo a background check, and that only the individual whose name is associated with the purchase of the NFA item is entitled to possess it.<sup>115</sup> This provision also

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<sup>112</sup> MISS. CODE ANN. § 9-1-49(1) (2015).

<sup>113</sup> The term "firearms disability" refers to a prohibition for certain categories of Mississippians to possess or purchase firearms by virtue of being convicted of a felony under the laws of Mississippi, another state, or the United States, or commitment to a mental health facility. See MISS. CODE ANN. § 97-37-5 (2015). See MISS. CODE ANN. § 97-37-5(4) (2015) (allowing Mississippians to obtain relief from firearms disability imposed by virtue of the person's commitment to a mental health facility); MISS. CODE ANN. § 45-9-103(5) (2015).

<sup>114</sup> MISS. CODE ANN. § 45-9-103(2) (2015).

<sup>115</sup> See Erica Goode, *Trusts Offer a Legal Loophole for Buying Restricted Guns*, N.Y. TIMES (Feb. 25,

applies to other transfers of the same items, such as transfers through a will to a decedent's lawful heir.<sup>116</sup> Although the Bureau of Alcohol, Tobacco, and Firearms (ATF) acknowledges that NFA firearms, "may be transferred on a tax-exempt basis to a lawful heir[.]" even interstate, that heir would be required to submit their fingerprints on the appropriate form (FBI Form FD-258), along with their ATF Form requesting approval of the transfer, so that a background check can be conducted on the heir as prospective transferee of the weapon.<sup>117</sup>

By creating an NFA Trust, an individual would go through a background check once and then name beneficiaries of the trust who could "inherit" the items without themselves having to undergo a background check.<sup>118</sup> As with any other trust, transfer of firearms (or any other property) to an NFA Trust vests legal ownership of the firearms, as well as the attendant requirements of registration and compliance with applicable federal, state, and local laws, with the Trustee while allowing beneficial enjoyment of the Trust property by the Trust's beneficiaries.<sup>119</sup>

Like Special Needs Trusts, the creation and proliferation of NFA trusts attracted the attention of the federal agency whose regulations it was designed to address. Soon, the Bureau of Alcohol, Tobacco and Firearms issued regulations specifically aimed at these trusts that required submission of the proposed trust to the Bureau for a review, a process that takes several months. A new set of Regulations, ATF Regulation 41F, took effect in July requiring every settlor, trustee, or other "responsible person" of a new NFA trust to establish that he is entitled to possess firearms through the submission of fingerprints, photographs, and the notification of the chief law enforcement officer in their jurisdiction.<sup>120</sup>

Before becoming the ward of a guardianship or a conservatorship, provided he or she is otherwise eligible to purchase and possess firearms, a party could conceivably establish a trust to hold those firearms. If none of the firearms or associated items were NFA items, there would be no requirement to submit the trust for NFA approval or notify the highest-ranking local law enforcement officer, and the initial Certificate of Trust and accompanying schedule A could list the usual nominal amount as the trust's corpus. A successor trustee not facing the appointment of a fiduciary could be identified so that, should the initial settlor/trustee become ineligible to purchase or possess firearms by virtue of the appointment of a conservator or guardian, the original trustee could resign and the office of trustee could pass to the successor. If the ward was listed as a beneficiary of the trust, he could then continue to enjoy the use of the firearms

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2013), <http://www.nytimes.com/2013/02/26/us/in-gun-trusts-a-legal-loophole-for-restricted-firearms.html>.

116. *Transfers of National Firearms Act Firearms in Decedents' Estates*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS (Sept. 5, 1999), <https://www.atf.gov/firearms/docs/transfers-national-firearms-act-firearms-decedents-estates/download>.

117. *Id.*

118. See Goode, *supra* note 115.

119. See Lee-Ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743 (2014).

120. See generally 27 C.F.R. 479.62 and 27 C.F.R. 479.84; see also *General 41F Questions and Answers*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS (June 28, 2016), <https://www.atf.gov/resource-center/docs/general41fquestionsandanswersupdated-6-28-16pdf/download>.

while they remained the property of and in the possession of the Trust and the Trustee.

This is only a possible planning avenue, and any attorney who contemplates or recommends this course of action should conduct his or her own research to determine if this course of action is viable in the applicable jurisdiction and should take all possible precautions to avoid assisting clients in violating any provision of local, state, or federal law. Above all, no attorney should take any steps to provide access to firearms to those who pose a danger to themselves or others.

## VII. CONCLUSION

The laws recently enacted in Mississippi requiring the development of procedures to report prohibited person information to the FBI do not refer to the wards of fiduciaries appointed as a result of inability to manage their finances as having been “adjudicated as a mental defective,” but the end result is the same as regards the ward’s firearms rights.<sup>121</sup> When the procedures for the Mississippi Department of Public Safety to report the relevant information to the FBI have been developed and implemented, some Mississippians who have not been determined to be a danger to themselves or to others will have their right to possess and purchase firearms removed. The proposed planning solution above is but one of many possible solutions to this issue, including the revision of the applicable policies at the national agency level, a clarification of the long-reviled definition of key terms, or, closer to home, the revision of these recently enacted policies.

It is certainly possible that the categories of individuals identified for reporting will change in the interim between now and the as-yet undetermined date when those procedures go into effect, or that the law will be amended to allow a chancery judge the discretion to determine whether reporting is appropriate on a case-by-case basis. As the law currently stands, however, regardless of the intention of the Petitioner who seeks the appointment or the considered opinion of the Chancery judge—whose determinations in other weighty matters are afforded such deference – absent any demonstration or evidence presented that would establish that he presents any danger to himself or anyone else, an adult ward in Mississippi may soon find himself at home while his granddaughter sits in a deer stand without him because he has trouble balancing his checkbook.

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121. 18 U.S.C. § 922(g)(4) (2012).