

## **Section 29 - Guardianship and Conservatorship Proceedings**

### **29.10 In General**

In addition to this Section of the Manual, see also Sections 30 through 37 on various matters affecting conservatorships and fees allowed in guardianships and conservatorships.

For information regarding minors' estates, including personal litigation and alternatives to guardianships and conservatorships, see Section 38.

### **29.20 Nature of Proceeding**

#### **29.20.1 Adults**

An adjudication of incapacity and disability results in a deprivation of an individual's civil rights. Therefore, the appointment of guardian/conservator requires full due process for the person for whom the guardian/conservator is sought, the respondent. It is a special adversary proceeding and should be approached as such despite intentions of petitioners to act in the respondent's best interest. See In re Link, 713 S.W.2d 487 (Mo. banc 1986) and Chapter 475, RSMo, generally.

Reference: Form 10193  
§ 475.075

#### **29.20.2 Minors**

It may be necessary to appoint a guardian or conservator for a minor on the death of both parents or one parent, or upon their consent, or if the parents are unfit, unwilling or unable to serve as guardian or conservator. When the estate of a minor is derived from a natural parent, that parent may manage the estate without court order; however, if the minor's estate is derived from a deceased parent or any other source, a conservator is required unless dispensed with as provided in § 475.330.

Reference: Form 10320  
§§ 475.025, 475.030, 475.330

### **29.30 Who May File - Who May Serve**

#### **29.30.1 In General**

Any person may file a petition for the appointment of himself/herself or another as guardian/conservator of a minor or incapacitated/disabled adult. Qualifications are set out at § 475.055. A guardian and/or conservator may be a non-resident of the State of Missouri, but a Missouri resident must be appointed as resident agent for any such non-Missouri fiduciary. The attorney for the guardian/conservator may be the resident agent, if a resident of Missouri.

On August 28, 2018, considerable changes to Chapter 475 went into effect, including those detailed in § 475.050.4, setting forth requirements for certain types of background and credit history screening for those seeking appointment as a guardian or conservator.

1. Requirement for those seeking guardianship or conservatorship to submit, at their own expense, to a background screening that includes the disqualification lists of the Departments of Mental Health, Social Services, Health and Senior Services, the abuse and neglect registries for adults and children, a Missouri Criminal Records review, and the sexual offender registry. (Required for anyone seeking to be appointed guardian and/or conservator, with the exception of public administrators, the incapacitated and/or disabled person's spouse, parents, children or siblings over the age of 18).
2. Additional requirement for those seeking conservatorship to submit, at their own expense, to a Credit History investigation. (Required for anyone seeking to be appointed conservator, with the exception of public administrators, the incapacitated and/or disabled person's spouse, parents, children or siblings over the age of 18).

References: Form 10020a, Form 10193, Form 10320  
§§ 473.117, 473.689, 475.050, 475.055, 475.338

**Practice Tip:** An attorney who serves as the fiduciary's resident agent remains the designated resident agent, notwithstanding the cessation of the attorney's representation of the fiduciary.

#### 29.30.2 Adults

When appointing a guardian and/or conservator for an adult, the Court shall follow the provisions of § 475.050 in determining who to appoint as the fiduciary.

References: § 475.050  
Matter of Weisinger, 720 S.W.2d 430 (Mo. Ct. App. 1986)  
Keyser v. Keyser, 81 S.W.3d 164 (Mo. Ct. App. 2002)

#### 29.30.3 Minors

The Court will appoint qualified persons in the order stated in § 475.045.

Reference: § 475.045

#### 29.30.4 The Jackson County Public Administrator

If there is no qualified person to serve as guardian/conservator of a minor or incapacitated/disabled adult, the Jackson County Public Administrator may be nominated to so serve even where he/she has not signed the consent to the petition, Exhibit C to Form 10194.

References: §§ 473.743, 475.055.2

**Practice Tip:** If the Jackson County Public Administrator is nominated, the attorney should notify the Jackson County Public Administrator's office of the filing of the petition.

## 29.40 Petition - Contents

### 29.40.1 In General

The Court prefers the use of its own forms when petitioning for appointment of a guardian or conservator of an adult or minor, forms 10193(adults), 10320(minors), and attachments, respectively. These are available on the Court's website. All forms should be filled out completely and accurately.

In addition to the contents required by §§ 475.060 and 475.061, the petition should include the following:

### 29.40.2 Adults

- (1) The last four digits of the respondent's social security number; \*
- (2) The last four digits of the nominated guardian's and conservator's social security number(s); \*
- (3) A list of social service benefits to which respondent may be entitled, including VA benefits; and

\*When entering the case parties during electronic filing, please include the full social security number; otherwise an additional Probate Party Information Sheet will be required.

Reference: Form 10193  
§§ 475.050, 475.060, 475.061

### 29.40.3 Minors

- (1) The last four digits of the minor's social security number; \*
- (2) The last four digits of the nominated guardian's and conservator's social security number(s); \*

(3) The sources and amount of public support and all other income and property to which the minor may be entitled;

\*When entering the case parties during electronic filing, please include the full social security number; otherwise an additional Probate Party Information Sheet will be required.

References: Form 10320  
§§ 475.050, 475.060, 475.061

#### 29.40.4 Successor Guardian/Conservator

(1) Completed form 10192, in addition to the information listed in Section 29.40.2 or 29.40.3.

Reference: Form 10192

#### 29.50 Personal Service and Notice of Hearing

##### 29.50.1 Adults

Notice of hearing on the petition shall be personally served on the respondent; substituted service on the respondent is not sufficient. If the respondent has executed a power of attorney, or durable power of attorney, the nominated attorney-in-fact must be personally served with a copy of the petition. All other relatives listed on the petition will be notified by ordinary mail.

When criminal charges are pending against an adult respondent, the petitioner must give notice of hearing to the appropriate prosecuting official.

Reference: § 475.075

##### 29.50.2 Minors

###### (a) Contested Hearings.

The *Uniform Child Custody Jurisdiction and Enforcement Act* governs service of process in minor guardianships. See §§ 452.700 and 452.930.

Thus, if a parent (natural or adoptive) does not consent to the appointment of the guardian, that parent must be served with a summons and the petition in the manner provided by the Rules of Civil Procedure. Notice to both parents is mandatory, except where a parent's parental rights have been terminated, regardless of the provisions of any custody order or of the fact that the minor is illegitimate. A natural parent whose rights have been terminated is not entitled to notice of the

proceeding. Where the identity of the natural parent is unknown, or is known, but his/her whereabouts are unknown, the petitioner must so allege and a request for service by publication on the unknown parent should be made under the applicable rules of civil procedure.

Any party served by summons has thirty days from the date of service within which to file an answer or other responsive pleading. If service is by publication, the party so served has forty-five days within which to file an answer. Consequently, no hearing will be set on a guardianship petition until after the time for filing an answer to the petition has expired and the affidavit of publication has been filed.

**Practice Tips:**

- 1) Any request for service by publication must be filed as provided in Mo. Ct. R. 54.12(c). The request must include an affidavit describing the steps taken to locate the natural parent. See, Metmor Financial Inc. v. Leggett, 787 S.W.2d 733
- 2) If the identity of the father is unknown, that fact shall be stated on the petition.
- 3) No hearing will be set until the affidavit of publication has been filed.

**(b) Transfer to the Family Court Division.**

The petition should state if there is an existing custody order and/or a pending case a pending case from any family/juvenile court proceeding regarding the minor. If so, the Court will order the transfer of the guardianship proceeding to the family court division, unless the family court judicial officer has consented to the guardianship.

**(c) Appointment of Guardian Ad Litem.**

In the event the court determines that the proceeding should not be transferred to the family court, in a contested minor guardianship, the court will, pursuant to § 452.785.4, appoint a guardian ad litem for the minor.

**Practice Tip:** The attorney should make the parties aware that the fee of any court appointed guardian ad litem could be assessed against them in whole or in part.

**(d) Pre-Trial Conference.**

In contested guardianships, after the guardian ad litem has completed an investigation of the facts, the court will order a pre-trial conference to narrow the issues and to set a trial date.

**(e) Uncontested Hearings.**

Notice of hearing on the petition shall be served on:

- (1) The minor, if over fourteen years of age; (However, the minor may consent to appointment in which case notice of hearing to the minor will not be given. To consent, the minor's signature must appear on the application and be witnessed.)
- (2) The parents of the minor, unless they consent to the appointment; and
- (3) The spouse of the minor, if any.

The Court requires mailed notice to the minor's parents and all persons listed on the petition. The Court may also require notice to any person or agency which has custody of or provides benefits or services to the minor. The Court will prepare the required notices. It is the attorney's responsibility to print the notices, mail them as indicated, and file the certificate of mailing seven days prior to the hearing.

Notice to both parents is mandatory, regardless of the provisions of any custody order or of the fact that the minor is illegitimate. A request for service by publication should be made consistent with Civil Rule 54.12(c) where the identity of a natural parent is unknown, a fact which the petitioner must so allege, or where the identity of a natural parent is known, but the parent's whereabouts is unknown.

**Practice Tip:** The attorney should file the required motion, affidavit, and a proposed order when requesting publication.

Reference: § 475.070  
Civil Rule 54.12(c)  
Metmor Financial Inc. v. Leggett, 787 S.W.2d 733

#### 29.60 Temporary Emergency Detention Procedures

When a petition for the appointment of a guardian/conservator is filed, if the respondent, by reason of mental disorder or mental retardation, presents a likelihood of serious physical harm to himself/herself or others he/she may be detained by use of the procedures in Chapter 632 or Chapter 633, RSMo. Generally, a hearing must be held on the guardianship/conservatorship petition within 96 hours after detention or, if that is not feasible, a hearing on the need for continued detention must be held unless respondent's counsel waives the hearing. See Section 39, Mental Health Proceedings, generally.

References: Form 10188  
Chapters 632 & 633, RSMo  
§ 475.355

#### 29.70 Prehearing Procedures

## 29.70.1 Adults

### 29.70.1 (a) Appointment of Attorney for Respondent

Upon filing a complete petition, the Court shall appoint an attorney to represent the respondent. While the attorney must act as an advocate for the respondent, he/she also must act in his/her client's best interest. See § 475.075.4 and In re Link, 713 S.W.2d 487 (Mo. 1986). If the respondent is found to be incapacitated and disabled, the appointed attorney's fee will be taxed as costs to be paid by the respondent's estate unless the respondent is eligible for public assistance pursuant to § 208.010. However, if the respondent is found not to be incapacitated, costs, including respondent's attorney fees, will be paid by the petitioner, unless the petitioner is a public employee acting in his/her official capacity. Where the respondent is eligible for public assistance, the attorney's fees and other costs will be paid by the county.

**Practice Tip:** Respondent has the right to hire counsel of his/her choosing, if the Court determines Respondent has the capacity to do so. See, In re Link, 713 S.W.2d 487 (Mo. 1986).

References: §§ 208.010, 475.075, 475.085

### 29.70.1(b) Appointment of Examining Physician

The Court may order a medical or mental examination of the respondent and tax the physician's fees as costs to be paid in the same manner as are the appointed attorney's as set out above.

References: § 475.075.6 See also, Section 29.80.2.

### 29.70.1(c) Jury Trial Request or Waiver

The respondent in any guardianship or conservatorship proceeding is entitled to a trial by jury, request for which may be made at any time prior to the commencement of the hearing.

The petitioner has no right to demand a jury trial.

Where the respondent desires to waive his/her right to a jury trial, a specific waiver will be taken on the record prior to the commencement of the hearing. The respondent's attorney may waive the respondent's right to be present and his/her right to a jury trial only under certain limited circumstances to be determined by the Court on a case by case basis. See In re Link, 713 S.W.2d 487 (Mo. 1986).

**Practice Tip:** If a jury trial is requested, the probate commissioners cannot hear the matter. Consequently, the matter must be calendared for jury trial with the Probate Judge.

## 29.70.2 Minors

The Court may appoint a guardian ad litem to represent the interest of the minor during the pendency of a proceeding to appoint a guardian for the minor. Where two or more parties seek appointment as guardian, with the right to custody, or where a natural parent alleged to be unfit is contesting the petition, the Court will appoint a guardian ad litem for the minor. §452.785.4.

## 29.80 Hearing

### 29.80.1 In General

The nominated guardian/conservator of an adult or a minor must be present at the hearing to testify as to his or her qualifications. If the public administrator is nominated, they are not required to appear at the hearing and/or testify as to their qualifications.

**Practice Tip:** The nominated guardian/conservator should be asked under oath at the hearing, whether they have ever been convicted of a crime and whether they have read, understood and agreed to perform the duties of the guardian/conservator listed on the Court's form 10194a.

Reference: Form 10194a

### 29.80.2 Expert Medical Evidence

The examining physician must appear in person and testify unless the physician's appearance is waived by agreement of respondent's attorney. If the Physician's appearance is waived, medical evidence may be adduced by a written report in letter form. Notwithstanding the fact that respondent's attorney waives the hearsay objection to a written medical report, such report must nevertheless constitute clear and convincing evidence of respondent's incapacity and/or disability; otherwise, the Court may not find the respondent to be incapacitated or disabled to some degree.

If petitioner desires to adduce medical evidence by written report, the report should be filed with the petition. It is petitioner's responsibility to determine whether or not respondent's attorney will waive the hearsay objection. If the objection will not be waived, it is incumbent upon petitioner's attorney to produce the examining physician as a witness.

It is not necessary to produce a psychiatrist or psychologist as petitioner's expert medical witness. However, the examining physician must have performed an adequate mental status evaluation.

**Practice Tip:** All medical reports must be signed by a M.D., D.O., or a licensed psychologist and should be dated within six months of the date of filing. A medical report signed by a nurse practitioner will not meet the requirement.

References: Form 10194a  
§ 475.010

### 29.80.3 Adults - Evidence

Petitioner must prove incapacity and/or disability by clear and convincing evidence. In order to establish a *prima facie* case of incapacity or disability, petitioner must adduce evidence of mental incapacity or disability, evidence as to whether or not the incapacity or disability is treatable, and, if so, the nature and probable duration of the treatment, and evidence as to the placement of respondent taking into consideration the respondent's mental and physical condition and his/her financial resources.

The statute imposes an affirmative duty upon the Court not to impose any greater restraints upon the respondent's liberty than is necessary to protect the respondent and his/her financial resources. Section 475.075.11. See § 475.010(13) for a definition of "least restrictive alternative." When the Court finds that respondent is incapacitated or disabled to some extent, but not totally, the Court may appoint a limited guardian or conservator, whose powers will be limited as is consistent with the respondent's capacities or abilities.

References: §§ 475.010(13), 475.075.11, 475.078, 475.120.3(l)

#### 29.80.4 Minors - Evidence

Notwithstanding that a petition for appointment of a guardian or conservator for a minor is uncontested, the proposed guardian/conservator must appear and testify as to the nominee's qualifications and the nominee's plan of custody and care.

The appointment of a guardian for a minor entitles the guardian to the minor's custody. Where a petition for appointment of a guardian is contested, the Court will appoint a guardian *ad litem* to represent the minor's interest. § 452.785.4. Evidence must be presented to establish the need for the appointment of a guardian under the statute.

Section 475.045.1 specifies the classes of persons who may be appointed guardian or conservator for a minor.

A hearing is not necessary where the application is for the appointment of a natural parent as the minor's conservator only and the other parent, if living, consents to the appointment of the petitioning parent as conservator.

**Practice Tip:** Minors over the age of fourteen (14) years must appear in Court, even if they have consented to the petition.

Reference: §§ 475.030, 475.045, 475.060, 475.070

#### 29.90 Guardian or Conservator Ad Litem - Emergencies

The emergency procedures set forth below may be conducted on an expedited basis for good cause shown. A telephone conference with the Judge or Commissioner in advance of filing a

petition seeking emergency relief is advisable for the purpose of demonstrating that an emergency, in fact, exists and for the purpose of fixing the time for the hearing and expediting service on respondent and the appointment of respondent's attorney.

#### 29.90.1 Adults - Prior to Adjudication

Section 475.075.15 provides that a guardian or conservator ad litem may be appointed for an alleged incapacitated or disabled for 90 days where an emergency exists that places the respondent's person or property at risk. Before such an appointment can be made, petitioner must file a petition for an adjudication of incapacity or disability and for the appointment of a guardian and/or conservator as prescribed by §§ 475.060 and 475.061. The Court must also appoint counsel for respondent. Notice of hearing must be personally served upon the respondent. Petitioner must adduce medical evidence of respondent's incapacity or disability and present evidence establishing the need for an emergency appointment. After the original appointment, the Court may extend the appointment for additional 90-day periods upon a further showing of continuing emergency need. Employment of this procedure should only be used when the required notice of hearing to other interested persons pursuant to § 475.075.2. is not immediately possible.

Because the Court is capable of conducting a hearing on the merits of a petition in a very short period of time on an emergency basis, when all appropriate interested persons can be promptly notified, and the underlying petition is not contested, the procedures specified in § 475.075.15. need not be employed. Instead, the Court, can proceed with a hearing on the merits of the underlying petition.

References: §§ 475.075.2, 475.075.15, 475.091

#### 29.90.2 Adults or Minors - Where Existing Guardian and/or Conservator Removed or Suspended

Section 475.097, allows a guardian ad litem or conservator ad litem to be appointed with or without notice when the Court finds a guardian or conservator of a minor or adult is not adequately performing his/her duties. The appointment of the guardian ad litem or conservator ad litem must be limited in duration to the period preceding the hearing on an appointment or removal of a permanent guardian or for a specified period not to exceed six months. The order appointing a guardian ad litem and/or conservator ad litem will usually provide for the suspension of the authority of the permanent guardian and/or conservator.

Reference: § 475.097

#### 29.100 Issuance of Letters Granted

Once the judgment is entered and the bond, if required, is filed and approved, the Probate Division will issue the letters of guardianship and/or conservatorship. See Section 30, Bonds.

References: §§ 475.100, 475.105

29.100.1 Adults

A certified copy of the original letters is sent to the attorney for the guardian/conservator.

Reference: § 475.140

29.100.2 Minors

A certified copy of the letters is sent to the attorney for the guardian/conservator.

29.110 Annual Report of Adult Guardian

29.110.1 In General

Every guardian must file an annual report concerning the personal status of his or her ward. The statement is due on the anniversary date of the issuance of letters. Approximately 40 days prior to the due date, a notice to file an annual report form will be sent to the guardian for completion. Failure to receive notice does not excuse the filing of the report when due. See Section 35.10 regarding the conservator's requirement to file settlement and 35.180 for waiver of settlement through no further process.

Reference: Form PR530, Form PR535  
§§ 475.082, 473.557

29.110.2 Citation

Failure to timely file an annual report in an estate which has been placed on no further process or where there is a guardian only will result in the issuance of a notice of delinquent filing stating that unless the report is filed within fourteen days, an order for citation will issue to show cause why the guardian should not be removed. If a citation issues, the guardian and his/her attorney must appear at the hearing unless it is continued. The citation will be dismissed upon:

- (1) the filing of the report;
- (2) the payment of the citation costs; and
- (3) obtaining the dismissal from the Judge, Commissioner, or Deputy Commissioner.

The costs of the citation may not be paid from the assets of the estate.

References: §§ 473.560, 473.563

### 29.110.3 Contents of Annual Report

In estates where a guardian only has been appointed, and in asset estates where a guardian and conservator have been appointed, the annual report form requests information about the placement and personal condition of the ward and is separate from the financial accounting due from the conservator. See Section 35, Settlements. The form used is: Guardian's Annual Status Report – Incapacitated Person (Form PR530).

In adult estates where a guardian and conservator has/have been appointed and has been placed on no further process status so that no annual settlement is required, the annual statement of affairs requests general information regarding income and expenditures on behalf of the ward. See Section 35.180.1, No Further Process. The form used is: Guardian and Conservator Annual Status Report and Statement of Affairs – Incapacitated/Disabled Person (Form PR535).

In minor estates where a conservator has been appointed and has been placed on no further process status so that no annual settlement is required, the annual statement of affairs requests general information regarding income and expenditures on behalf of the ward. See Section 35.180, No Further Process. The form used is: Annual Statement of Affairs of Conservator (No Further Process) (Form 10602).

References: Form PR530, Form PR535, Form 10602  
§§ 475.270, 475.276

### 29.110.4 Corrections - Exception Letter - Extension

Each annual report is reviewed by the Court. If the annual report is not filed with the settlement, an auditor's exception will issue.

The auditor will issue an exception letter enumerating errors to be corrected or requesting additional information to be provided before the report can be approved. The exception letter grants 60 days within which to satisfy the requirements. To request additional time, an application must be filed along with a proposed order.

### 29.110.5 Show Cause Order

Failure to comply with the exception letter within the time prescribed will result in the issuance of an order to show cause why the fiduciary should not be removed and to set a date certain for hearing. If a show cause order issues, both the fiduciary and his or her attorney must appear at the hearing unless the hearing is continued or the show cause is dismissed prior to the hearing.

The order will be dismissed when the exception letter is cleared and the costs of the show cause order are paid. The exception letter will not be cleared from the bench. The filing of documents and/or pleadings in response to the exception letter does not automatically result in dismissal of the show cause. The attorney may consult with the auditor to clear exceptions before requesting the dismissal from the judicial officer. The attorney must allow sufficient time prior to the hearing

date to meet with the auditor and not wait until the morning of the hearing date. The costs of the show cause may not be paid with estate assets.

### 29.120 Death of Protectee - Distribution Without Administration

#### 29.120.1 In General

If a protectee dies intestate, leaving no debts incurred before adjudication, the estate may be distributed by the conservator in the manner set forth in § 475.320.

The conservator must file a Suggestion of Death of Protectee and Petition That No Letters of Administration be granted. There will be a filing fee in the conservatorship estate.

References: Form 10190  
§ 475.320

#### 29.120.2 Suggestion of Death - Form and Contents

As in an application for letters of administration, the names, relationship to the decedent and residence address of the surviving spouse and heirs must be adequately shown in the Suggestion of Death since it is the foundation upon which the order of distribution is predicated. The Suggestion of Death should also indicate those believed by the applicant to be mentally incapacitated and the birth dates of those who are minors and should state so far as is known to applicant, the names and addresses of the guardians and conservators of those who are minors or disabled.

Reference: Form 10190  
§ 475.320

#### 29.120.3 Order to Proceed

If the Court determines that the requirements of § 475.320, have been met, it may in its discretion order the conservator to make distribution to the heirs in the same manner and with the same effect as in the case of an administrator. See Section 29.120.5 on final settlement requirements.

References: Form 10191  
§ 475.320

#### 29.120.4 Publication of Notice, Bond

No publication is required for distribution without administration.

No bond in addition to that for the conservatorship estate will be required, except as set out in Section 30 on bonds. Liability on the conservator's bond continues and applies to the complete administration of the estate of a deceased protectee.

#### 29.120.5 Final Settlement

The conservator proceeding under § 475.320, shall file a final settlement in the same manner as a personal representative closing a decedent intestate estate, except that published notice is not required. However, proof of mailing or waivers of notice of the final settlement to all heirs must be filed. See Section 37.60 for a checklist of forms to be filed.

Reference: § 475.320

#### 29.120.6 Distribution and Discharge

A conservator making distribution without administration is subject in all respects and to the same extent to the liabilities of an administrator. See Section 36 on distribution and discharge.

#### 29.130 Restoration

A verified petition for restoration may be filed on behalf of any incapacitated person with or without the concurrence of the guardian/conservator. The petition shall be set for hearing and notice thereof shall be given to the guardian/conservator (if the guardian/conservator has not joined in the petition) and to any other persons who may be interested in the proceeding as determined by the Court. Even if the petition is uncontested, the evidence adduced at the hearing shall include a currently dated written report of a licensed physician stating his or her opinion that the ward has regained his or her capacity and is able to manage his or her affairs. If restoration is ordered, the Court shall also direct the conservator, in asset cases, to file his or her final settlement within 60 days, and upon approval thereof, shall direct the delivery of the protectee's assets to him or her. See Section 37 for a checklist of forms to be filed.

References: Form 10210  
§§ 475.082.4, 475.083

[END OF SECTION]