

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

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. When the estate of a minor is derived from a natural parent, that parent may manage the estate without court order. Otherwise, except as set out at § 475.330, RSMo, dispensing with conservatorship, it is necessary to appoint a conservator to handle the minor's estate.

Reference: Form 10320

29.30 Who May File - Who May Serve

29.30.1 In General

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

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

29.30.2 Adults

The Court will give first consideration to the appointment of:

- (1) A qualified person or, for conservatorship only, a qualified organization or corporation, designated by the respondent, if the respondent is able to make a reasonable choice;
- (2) A nominee designated in a written instrument pursuant to § 475.050(2), RSMo, or in a durable power of attorney; or
- (3) Qualified blood relatives of the respondent.

References: § 475.050

29.30.3 Minors

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

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 has not signed the consent to the petition, Exhibit C to Form 10194.

References: §§ 473.743, 475.055.2

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 10179 and 10320 (and attachments) respectively. These are available from the New Estates Clerk. All forms in the packet should be filled out completely and accurately. In addition to the contents required by 475.060, RSMo, the petition should include the following:

29.40.2 Adults

- (1) The respondent's social security number;
- (2) The nominated guardian's and conservator's social security numbers;

- (3) A list of social service benefits to which respondent may be entitled, including VA benefits; and
- (4) The names and addresses of respondent's spouse, children and other close adult relatives. See Form 10319 for additional definition of "close relatives."

Reference: Form 10179, Form 10193
§ 475.060

29.40.3 Minors

- (1) The minor's social security number;
- (2) The nominated guardian's and conservator's social security numbers;
- (3) The sources and amount of public support and all other income and property to which the minor may be entitled;
- (4) The status of both of the minor's parents;
- (5) The minor's marital status; and
- (6) The names and addresses of the minor's close adult relatives. This information is necessary for the Court to give notice to the minor's parents and any other relatives involved in the minor's care or with an interest in the minor.

References: Form 10193, Form 10320
§ 475.060, 475.061

29.40.4 Successor Guardian/Conservator

- (1) A 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. All other relatives listed on the petition will be notified by ordinary mail.

When criminal charges are pending against an adult respondent, the Court will require that notice of hearing be given to the appropriate prosecuting official.

Reference: § 475.075

29.50.2 Minors

(a) Contested Hearings.

The *Uniform Child Custody Jurisdiction Act* governs service of process in minor guardianships. §§ 452.445(2) and 452.455.2 RSMo.

Thus, if a parent 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

If the custodian of the minor is not the petitioner and the custodian does not consent to the appointment of the guardian, the custodian must also be served with a summons and the petition in the manner provided by the Rules of Civil Procedure.

Notice to both parents is mandatory, regardless of the provisions of any custody order or of the fact that the minor is illegitimate. Where the identity of the natural parent is unknown, the petitioner must so allege. Where the identity of the natural parent is known, but the parent's whereabouts is unknown, a request for service by publication should be made consistent with Civil Rule 54.17b.

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.

(b) Transfer to the Family Court Division.

In the event the petition is contested, this court will determine whether or not there are other family/juvenile court proceedings pending and, if so, will order the guardianship proceedings transferred to the family court division.

(c) Appointment of Guardian Ad Litem.

In the event the court determines that the proceeding should not be transferred to the family court, the court will, pursuant to § 452.490.4 RSMo, appoint a guardian ad litem for the minor.

(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 may also require notice to any person or agency which has custody of or provides benefits to the minor.

Notice to both parents is mandatory, regardless of the provisions of any custody order or of the fact that the minor is illegitimate. Where the identity of the natural parent is unknown, the petitioner must so allege. Where the identity of the natural parent is known, but the parent's whereabouts is unknown, a request for service by publication should be made consistent with Civil Rule 54.17b.

Reference: § 475.070
Civil Rule 54.17b

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 or others he 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. As in mental health proceedings, mental health coordinators may be of assistance in emergency situations. See Section 39, Mental Health Proceedings, generally and section 39.30.1 regarding contact of a Mental Health Coordinator.

References: Form 10188
Chapters 632 & 633, RSMo

29.70 Prehearing Procedures

29.70.1 Adults

29.70.1 (a) Appointment of Attorney for Respondent

Immediately upon filing the petition, the Court shall appoint a lawyer to represent the respondent. While the lawyer must act as an advocate for the respondent, he also must act in his client's best interest. See § 475.075.3, RSMo, 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 § 208.180, RSMo. 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 official capacity. Where the respondent is eligible for public assistance, the attorney's fees and other costs will be paid by the county.

References: §§ 208.180, 475.075

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.

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 the initial setting.

The petitioner has no right to demand a jury trial.

Where the respondent desires to waive his 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 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).

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. §§ 452.335(2), 452.490.4 RSMo.

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 qualifications.

Practice Tip: The nominated guardian/conservator should be asked under oath at the hearing, if he has ever been convicted of a crime and if he has read, understands and agrees to perform the duties of the guardian/conservator listed on the Court's form 10194a.

References: Form 10194(a)

29.80.2 Expert Medical Evidence

The examining physician for petitioner must appear in person and testify unless his appearance is waived by agreement of respondent's attorney. If the Physician's appearance is waived, medical evidence may be adduced a written report in letter form. The report must conform to the requirements specified in the Memorandum entitled "Medical Reports For Guardianship Proceedings," Appendix 3, *infra*. 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 mental condition, 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 and a copy should be provided to respondent's attorney. 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.

References: Form 10194(a)
§ 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 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 financial resources. Section 475.975.10, RSMo. See § 475.010(9), RSMo for a definition of "least restrictive environment." 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(9), 475.075.10, 475.078, 475.120.3(1)

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. §§ 452.445(2) and 452.490.2 RSMo. Evidence must be adduced in support of petitioner's qualifications to serve and petitioner's plan of custody and care. As in other custody proceedings, the primary issue to be determined is the "best interests of the minor."

Section 475.045.1, RSMo 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 conservator only and both parents, or the surviving parent, consents to the appointment of the conservator.

Reference: § 475.045

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 475.075.11, RSMo, provides that a guardian or conservator ad litem may be appointed for an alleged incapacitated or disabled for 30 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 or conservator as prescribed by §§ 475.060 and 475.061, RSMo, and notice of hearing must be served upon the respondent and his attorney. Petitioner must adduce medical evidence of respondent's incapacity or disability. After the original appointment, the Court may extend the appointment for additional 30 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, RSMo 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, the procedures specified in § 475.075.11, RSMo. will not be employed. Instead, the Court, after notice and hearing, will appoint a guardian or conservator ad litem when it appears that the respondent's mental or physical condition may respond to treatment and respondent may regain his capacity or ability within the foreseeable future.

References: §§ 475.075.2, 475.075.11, 475.091

29.90.2 Adults or Minors - Where Existing

Section 475.097, RSMo, 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 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, the Probate Division will issue the letters of guardianship or conservatorship. See Section 30, Bond.

References: §§ 475.100, 475.105

29.100.1 Adults

The original letters are usually sent to the attorney for the guardian/conservator. However, when respondent is indigent, the original is sent directly to the guardian/conservator.

In 1993, the General Assembly amended § 475.210 RSMo to repeal the six months non-claim period. Accordingly, the court no longer requires the publication of notice of issuance of letters of conservatorship.

Reference: § 475.140

29.100.2 Minors

When an order to proceed in forma pauperis has been entered, the original letters are sent directly to the guardian/conservator. In all other cases, the original letters are sent to the attorney for the guardian/conservator.

29.110 Annual Report of Guardian

29.110.1 In General

Every guardian must file an annual report concerning the personal status of his 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 35.170 for waiver of settlement through no further process.

Reference: Form 10198, Form 10199
§ 475.082

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 continuance stating that unless the report is filed within two weeks, an order for citation will issue to show cause why the guardian should not be removed. If a citation issues, the guardian and his 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.

However, in estates which have 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 35,170.1, No Further Process.

References: Form 10602, Form 10198, Form 10199
§§ 475.270, 475.276

29.110.4 Corrections - Exception Letter - Extension

Each annual report is reviewed by the Court. In an asset estate where a settlement is filed, the Chief Auditor reviews the report. If the annual report is not filed with the settlement, an auditor's exception will issue.

The reviewer 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 30 days within which to satisfy the requirements. Requests for additional time should be directed to the reviewer.

29.110.5 Show Cause Order

Failure to comply with the exception letter within the time prescribed will result in the issuance of a warning letter stating that unless the requirements are met within 15 days a show cause order will issue to show cause why the guardian should not be removed and to set a date certain for hearing. If a show cause order issues, both the guardian and his 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 must meet with the reviewer to clear exceptions before requesting the dismissal from the Judge, Commissioner or Deputy Commissioner. The attorney must allow sufficient time prior to the hearing date to meet with the auditor for this purpose 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, RSMo.

The conservator must file a Suggestion of Death of Protectee and Petition That No Letters of Administration be granted. They may be filed without a filing fee in the conservatorship estate.

References: Form 10190 (pages 1,2 & a)
§ 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 (pages 1, 2 & a)
§ 475.320

29.120.3 Order to Proceed

If the Court determines that the requirements of § 475.320, RSMo, 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, RSMo, 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. If the ward is not represented by an attorney, an attorney shall be appointed to represent him. 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 opinion that the ward has regained his capacity and is able to manage his affairs. If restoration is ordered, the Court shall also direct the conservator, in asset cases, to file his final settlement within 60 days, and upon approval thereof, shall direct the delivery of the protectee's assets to him.

References: Form 10210
§§ 475.082.4, 475.083

[END OF SECTION]