

Section 7 – Adversary Proceedings

7.10 History of the Jurisdiction of the Probate Division and Applicability of Civil Rules

Prior to 1980, Missouri Probate Courts were courts of limited jurisdiction and the Civil Rules and the Code of Civil Procedure did not apply to probate proceedings. *See* 5A John A. Borron, Jr., Missouri Practice, Probate Law and Practice §511 (3d ed.1999). The adoption of the 1976 Amendment to Article V of the Constitution created a uniform court system in Missouri. The Circuit Courts have jurisdiction over all cases and matters, civil and criminal. MO Const. Art. V, §14; *Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. 2009). The Court Reform and Revision Act of 1978 created the Probate Division of the Circuit Court effective in 1980. As a division of the Circuit Court, the Probate Division was granted authority to hear probate proceedings as well as certain civil proceedings. *See generally Unnerstall v. Berkemeyer*, 298 S.W.3d 513 (Mo. 2009). Only certain Civil Rules are made applicable to probate proceedings in the Probate Division unless the judge of the Probate Division orders otherwise. Rule 41.01(b). All of the Civil Rules are applicable to civil actions not governed by the probate code. Rule 41.01(a)(2).

References: 5A John A. Borron, Jr., Missouri Practice, Probate Law and Practice §511 (3d ed. 1999); MO Const. Art. V., §14; *Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. 2009); *Unnerstall v. Berkemeyer*, 298 S.W.3d 513 (Mo. 2009); Rule 41.01(b); Rule 41.01(a)(2).

7.20 Jurisdiction of the Probate Division

Section 472.020 provides:

The probate division of the circuit court may hear and determine all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and conservators of minors and incapacitated and disabled persons, settling the accounts of personal representatives and conservators, and the sale or leasing of lands by personal representatives and conservators, including jurisdiction of the construction of wills as an incident to the administration of estates, of the determination of heirship, of the administration of testamentary and inter vivos trusts, of disability and incapacity proceedings as provided by law and of such other probate business as may be prescribed by law.

Examples of other probate business prescribed by law include:

- 1) Durable Power of Attorney Law of Missouri (§§404.700 et. seq.; *See* §404.731);
- 2) Missouri Transfers to Minors Law (§§404.005 et. seq.; *See* §404.091);
- 3) Missouri Personal Custodian Law (§§404.400 et. seq.; *See* §404.640);
- 4) Durable Power of Attorney for Health Care Act (§§404.800 et. seq.; *See* §404.731 made applicable by §404.810);

- 5) Missouri Prudent Investor Act (§§469.900 et. seq.);
- 6) Principal and Income Act (§§469.401 et. seq.);
- 7) Nonprobate Transfers Law of Missouri (§§461.001 et. seq.; See §461.076, §461.300.7);
- 8) Uniform Fiduciaries Law (§§469.350 et. seq.); and
- 9) Missouri Uniform Powers of Appointment Act (§§456.970 et. seq.).

The Missouri Uniform Trust Code provides for venue of trusts that can or could be registered in Missouri in the probate division of the appropriate circuit court. § 456.2-204. For trusts that are not and cannot be registered in Missouri, venue is as provided by the civil rules. *Id.*

The probate division may have concurrent jurisdiction with other divisions of the circuit court in certain actions. *See, e.g., Lynch v. Lynch*, 260 S.W.3d 834 (Mo. 2008) (circuit court jurisdiction to determine constructive trust cause of action concurrent with jurisdiction of probate division in discovery of asset proceedings). *Accord, Taylor-McDonald v. Taylor*, 245 S.W.3d 867 (Mo. App. S.D. 2008). If two concurrent actions are pending simultaneously, the matters should be transferred to one division and consolidated for hearing so conflicting judgments over the same subject matter are avoided. *Kelly v. Kelly*, 245 S.W.3d 308 (Mo. App. W.D. 2008) (minor guardianship action pending in probate division should be consolidated with modification of dissolution judgment pending in family court division).

If a cause of action is filed in the wrong division of the circuit court, the remedy is to transfer the action to the proper division rather than dismissal. *Kleim v. Sansone*, 248 S.W.3d 599 (Mo. 2008). *See also, State ex. Rel. Bank of America v. Kanatzar*, 413 S.W.3d 22 (Mo. App. W.D. 2013) (trust action transferred from general circuit division of Jackson County to probate division of St. Louis City).

References: §§ 472.020, 404.700 et. seq., 404.731, 404.005 et. seq., 404.091, 404.400, 404.640, 404.800 et. seq., 404.810, 469.900 et. seq., 469.401 et. seq., 461.001 et. seq., 461.076, 461.300.7, 469.350 et. seq., 456.970 et. seq., 456.2.204, *Lynch v. Lynch*, 260 S.W.3d 834 (Mo. 2008), *Taylor-McDonald v. Taylor*, 245 S.W.3d 867 (Mo. App. S.D. 2008), *Kelly v. Kelly*, 245 S.W.3d 308 (Mo. App. W.D. 2008), *Kleim v. Sansone*, 248 S.W.3d 599 (Mo. 2008), *State ex. Rel. Bank of America v. Kanatzar*, 413 S.W.3d 22 (Mo. App. W.D. 2013).

7.30 Authority to Assign Cases to Probate Division

Circuit Judges have general jurisdiction. Art. V, §27 Const. Amend. 1976. The Judge of the Probate Division may be assigned cases or classes of cases by order of the presiding judge, § 478.240, or by local court rule, § 478.245, except as may be limited by the Constitution or by specific statute. See Section 9.70 on will contests.

A civil action may be transferred from a regular division to the probate Division of the circuit court by agreement of the judges of the respective divisions. Jackson County Circuit Court Rule 6.8.2.

References: Art. V, §27 Const. Amend. 1976, §§ 478.240, 478.245, Jackson County Circuit Court Rule 6.8.2.

7.40 Probate Proceedings

A. NON-ADVERSARIAL PROBATE PROCEEDINGS

“Probate Code” is defined as chapters 472, 473, 474 and 475. § 472.010(5). These are the chapters that the probate court traditionally had jurisdiction to hear prior to the Court Reform and Revision Act of 1978. Rule 41.01(a)(2) does not apply to actions that are governed by the probate code. Instead, Rule 41.01(b) is applicable, which states:

Rules 41, 54.18(service), 55.03(attorney signing pleadings), 56(discovery), 57(interrogatories and depositions), 58(production of documents), 59(admissions), 60(examination of parties), 61(discovery sanctions), 62(pre-trial conferences), and 67.03¹ (effect of involuntary dismissal) apply to proceedings in the probate division of the circuit court. The judge of the probate division may order that any or all of the other Rules 41 through 101 or specified subdivisions of the rules shall be applicable in a particular matter. Any such order shall specify the rules or subdivisions to be applied and a time for compliance with the order. The order shall be served upon all of the parties. (summary added)

Notably absent is rule 55, which governs pleadings and motions. The reason for this absence is for practical necessity to reduce the time and expense in administering estates in non-controversial areas. Thus, orders that can be entered ex-parte are non-adversarial probate proceedings.

Additionally, § 472.140.2 specifically states that:

...except that proceedings to sell real property or to make final settlement, and except that notices that letters have been granted, for unknown heirs, to file interim settlements, of the right of the surviving spouse to elect to take against the will and in guardianship estates in which the Veterans Administration is a party in interest as to petitions by the conservator to disburse funds and as to settlements of conservators shall not be deemed to be adversary unless and until an interested person files objections to the action proposed or the account stated.

Thus, all these matters are non-adversarial probate proceedings and not all of the rules of civil procedure apply, notably the pleading requirements of Rule 55. However, the probate judge has discretion to make any of these matters adversary and apply all of the rules of civil procedure. §472.140.2 (... “An ‘adversary probate proceeding’ shall also mean any other probate proceeding determined by the judge of the probate division to be an adversary proceeding.”)

References: §§ 472.010(5), 472.140.2, 472.141.1 Rules 41.01(a)(2), 41.01(b)

¹ Civil Rule 67.03 was made applicable to probate proceedings in response to In re Klauber, 59 S.W.3d 512 (Mo. 2001).

B. ADVERSARY PROBATE PROCEEDINGS

1) GENERALLY

Section 472.140.2 states, in part:

‘Adversary probate proceedings’ as used in this section and in §472.141 means any proceeding brought pursuant to any provision of chapters 472, 473, 474 and 475, RSMo, which requires, as a condition precedent to an entry of an order or judgment on the merits, notice of hearing to persons interested in the proceeding
....

Section 472.141.1 states, in part:

An adversary probate proceeding shall be governed by the civil code of Missouri and the rules of civil procedure; except that:

(2) The provisions of chapter 509, RSMo (civil code), and civil rule 55 (pleadings) shall not apply unless specifically made applicable by a provision in the probate code or unless the court enters an order designating all or specific provisions of chapter 509, RSMo, or civil rule 55 applicable to a particular adversary probate proceeding.

Thus, in entering adversary orders in probate proceedings, the probate judge or commissioner must decide whether to make all of Civil Rule 55 applicable.

2) ABBREVIATED ADVERSARY ORDERS

The court may wish to set a motion for hearing with notice to parties pursuant to §472.100, but may not want to invoke all the pleading requirements of Civil Rule 55. An option for the court is to issue an abbreviated adversary order.

In Jackson County, the following language is used in ABBREVIATED adversary orders (AB):

That, in addition to the provisions of §472.141.1 RSMo, this proceeding shall be governed by the applicable provisions of Civil Rules 41 through 103 except that only the following provisions of Civil Rule 55 shall apply: 55.03, 55.12, 55.25(c) and 55.26 through 55.30. This proceeding shall also be governed by the applicable provisions of the Rules of the Circuit Court of Jackson County, Missouri relating to trials of adversary civil proceedings.

The Abbreviated Adversary Matter will be assigned a new case number and all subsequent pleadings in such adversary matter shall bear that case number. See Instruction Sheet for Filing Probate Proceedings beginning January 1, 2017.

In general, an AB order is used when service is by certified mail and where no answer is required to be filed.

Below is a list of adversary probate proceedings for which typically abbreviated adversary orders are entered:

- Petition to require administration
- Claim against estate
- Objections to final settlement
- Petition for determination of heirship (when no administration has commenced)
- Application for letters
- Application for compensation
- Application for exempt property, family or homestead allowances
- Petition to admit will to probate
- Petition to invade multiple party accounts in conservatorship
- Petition to terminate adult guardianship consented to by guardian
- Petition to compromise controversy
- Petition to set aside refusal of letters or certificate of clerk in small estate
- Petition for instructions concerning pro rata payment of claims
- Petition for authority to continue business of decedent
- Petition to abandon property
- Petition for specific execution of contract of decedent

3) FULL ADVERSARY ORDERS

If an in personam judgment is being sought in an adversary probate proceeding, then a FULL adversary order should be entered. A helpful rule to remember is that a FULL order is always used when service is by summons and a summons is always issued when a FULL order is entered.

In Jackson County, the following language is used for FULL adversary orders:

That, in addition to the provisions of §472.141.1 RSMo, this proceeding shall be governed by the applicable provisions of Civil Rules 41 through 103 inclusive together with the applicable Rules of the Circuit Court of Jackson County, Missouri relating to trials of adversary civil proceedings.

Below is a list of adversary probate proceedings that a FULL adversary order would be entered (Please note this list is not comprehensive of all adversary probate proceedings that would require a full adversary order.):

- Petition for determination of heirship (when administration has commenced)
- Petition for discovery of assets
- Petition for declaratory judgment (construe will)
- Petition to appoint guardian for minor
- Any case in which a jury trial will be conducted (except adult guardianships and civil commitments)

- Petition to determine liability of fiduciary
- Petition to remove fiduciary
- Petition to terminate minor guardianship not consented to by guardian
- Petition to bar statutory allowances of spouse (divorce, ante nuptial agreement, misconduct)

The foregoing list is not exclusive. The Court may enter a FULL order for any adversary proceeding. §§472.140.2, 472.141.1(2).

To determine if the initial pleading should be filed under the case number with the open administration or as a new case, see the Instructions Sheet for Filing Probate Pleadings beginning January 1, 2017.

References: §§ 472.010(5), 472.140.2, 472.141.1 Rules 41.01(a)(2), 41.01(b)

7.50 Civil Proceedings in Probate Division

Prior to the Court Reform and Revision Act of 1978, the probate court was a court of limited jurisdiction. After 1980, the probate division of the circuit court was vested with concurrent jurisdiction to hear and determine certain matters that were heard in the circuit court prior to 1980.

These matters include:

- 1) Missouri Durable Power of Attorney Act (404.700 et. seq.)
- 2) Missouri Transfer to Minors Law (404.005 et. seq.)
- 3) Missouri Personal Custodian Law (404.400 et. seq.)
- 4) Durable Power of Attorney for Health Care Act (404.800 et. seq.)
- 5) Missouri Prudent Investor Act (469.900 et. seq.)
- 6) Principal and Income Act (469.401 et. seq.)
- 7) Non-probate transfers (461.001 et. seq.).

The Missouri Uniform Trust Code expressly provides for venue of most trust matters in the probate division of the circuit courts. § 456.2-204. An appellate court has held that any such action must be filed in, or transferred to, the probate division. State ex. Rel. Bank of America v. Kanatzar, 413 S.W.3d 22 (Mo. App. W.D. 2013) (trust action transferred from general circuit division of Jackson County to probate division of St. Louis City).

These civil proceedings in the probate division are subject to the rules of civil procedure as set forth in Rule 41.01:

- (a) Rules 41 through 101 shall govern the following:

- (2) Civil actions pending before a circuit judge except those actions governed by the probate code.

“Probate code” is defined as chapters 472, 473, 474 and 475, RSMo. §472.010(5).

Section 472.141.3 makes the civil code of Missouri and the rules of civil procedure applicable to these civil actions in the probate division of the circuit court.

In summary, the above-referenced actions are civil proceedings in the probate division of the circuit court and are subject to all the civil rules and code of civil procedure without any further order of the court.

7.60 Special Statutory Proceedings – Rules of Procedures

Where a statute provides for special statutory remedies, or where there are special statutory procedures, then those procedures control. § 472.141.1(1). In the probate area, the most important special statutory proceedings are the civil commitment statutes, which include the civil commitment of sexually violent predators, Chapter 631 and 632. These proceedings do not fall within the definition of adversary proceedings as contained in § 472.140.2. The detailed procedures set forth in the chapters control.

An adult guardianship action, contained in Chapter 475, is an adversary proceeding as defined in §§472.140.2 and 475.020. However, a respondent cannot be required to file an answer, and has a right to remain silent. *See State ex rel. Simanek v. Berry*, 597 S.W.2d 718, 720 (Mo. App. W.D. 1980).

As stated in §472.141.1(1):

Where the probate code or any other statute contains a provision prescribing practice, procedure or pleading, applicable to the pending proceeding, the provisions of the probate code or such statutes shall govern.

Therefore, there cannot be an order entered requiring an answer or to require the respondent to respond to discovery.

Additionally, §475.075 sets forth certain special procedural rules, such that personal service can only be had on respondent, and not on a household member as allowed by the civil rules.

7.70 Rules of the Circuit Court of Jackson County, Missouri

Rule 72 applies to all matters in the Probate Division. All other Rules of the Circuit Court apply with respect to all adversary civil and, if made applicable, in adversary probate proceedings.

7.80 Nature of Process to be Employed

Specific statutes require that certain adversary probate proceedings be commenced by summons, e.g., discovery of assets proceedings, § 473.340, and petitions for appointment of guardians of minors where the parents are living and do not consent to the appointment.

In general, other adversary probate proceedings in which an abbreviated adversary order is entered may be instituted by the issuance of notice of hearing by certified mail, return receipt requested. § 472.100.

All civil proceedings, as distinguished from probate proceedings, must be commenced by service or summons, or proper waiver of service.

No proceeding which has been commenced by service of summons will be set for hearing without the consent of the Judge or Commissioner.

Reference: § 472.100.

7.90 Demand for Jury Trial

Special arrangements must be made for jury trials. In cases where a jury trial is appropriate, the attorneys for the parties should confer with the Judge or Commissioner to set a definite trial date so that a jury panel, courtroom and court reporter may be reserved for the trial.

Practice Tip: Standard jury instructions for a guardianship or conservatorship are available for review and use by the attorneys, if desired. See Section 29.70.1 regarding the jury waiver and requesting a jury trial in a guardianship or conservatorship proceeding.

7.100 Hearings Required – When

In general, hearings must be held and notice thereof given to interested persons in the following situations:

1. Applications to require administration;
2. Applications for letters where the applicant is not the sole person entitled to letters and all persons entitled to letters have not renounced or consented to the appointment of the applicant;
3. Determination of which of two or more wills should be admitted to probate;
4. Application for letters of guardianship and conservatorship for incapacitated and disabled person;
5. Application for letters of guardianship and conservatorship of minor if parents are deceased. Application for letters of guardianship of minor regardless of whether or not parents have consented to or contest the petition. A hearing is not necessary in connection with an application for appointment of conservator of estate of minor where each parent has either petitioned or consented;

6. Claims contested by the fiduciary;
7. Discovery of assets proceedings pursuant to §§473.340 and 475.160;
8. Removal of fiduciary for failure to comply with a requirement of, the probate code or a court order;
9. Determination of liability of fiduciary and surety on bond;
10. Any matter for which a hearing is required by statute and not waived by all interested persons;
11. Any application in an estate, except for requests to extend the filing time for settlements and other similar matters, where the personal representative desires to obtain a final, appealable judgment; and
12. Any application in an independently administered estate, except for requests to extend the filing time for settlements and other similar matters, where the independent personal representative desires a court order.

The foregoing enumeration is not intended to be all inclusive. There may be exceptions to the requirement of a hearing in the discretion of the Court in a particular case.

7.110 Notice of Hearing Requested – How

Notice of hearing or summons is automatically issued by the clerk in connection with petitions for the appointment of guardians and commitment proceedings involving mental illness or substance abuse and petitions for appointment of a guardian or conservator for a minor (when a hearing is required).

Except where personal service is appropriate, request for notice of hearing on the Court's form 10370 must be filed. The request (Form 10370) is to be signed by the attorney for the party requesting the hearing. The attorney shall identify the party represented. The request shall clearly describe the matter to be heard and shall list the full name and address, including zip code, of each person to be notified. The request must be legible. If not, the clerk may not be able to act upon the request.

Upon submission of the request, the clerk shall assign a separate case number to each adversary matter to be heard and prepare an adversary proceeding order (AP order). If appropriate, the clerk will schedule the matter for hearing and generate a notice of hearing. The attorney is responsible for mailing the notice of hearing, AP order, and petition to each person to be notified. The attorney shall file their certificate of mailing of the notices, and the certified mail return receipts (if any), no later than seven days before the date of the hearing.

Unless otherwise directed by the Court, notice shall be served by certified mail. Return receipt requested. Where notice of hearing is by certified mail, the hearing will not be set earlier than three weeks after mailing the notice in order to secure return receipts proving service prior to the

date of hearing. Insofar as is feasible, the clerk shall fix the date of hearing on a date selected by the attorney requesting the hearing.

Practice Tip: Where no signed receipt is returned, the attorney may request that the person be personally served. On written application and for good cause shown, the Court will approve the appointment of a special process server named by the party if service is to be made outside of the state. No order is necessary if service is to be made within the state.

Hearing dates may be set by agreement of the attorneys with the concurrence of the Court either with or without the issuance of a notice of hearing.

A request for service of notice by publication must be accompanied by an affidavit complying with Civil Rule 54.12. In this connection, the affidavit should factually demonstrate why service by certified mail cannot be obtained.

The attorney should furnish the text of the published notice for matters that are not routine. The person requesting publication must deliver payment to the legal publication along with the notice that is to be published. The affidavit averring completion of published service will be mailed by the publisher to the attorney. It is the practice of most publishers to require payment prior to mailing. The Court may not hear the matter and, in any event, will not enter a judgment in the matter until the affidavit of completed service has been filed.

References: Form 10370
§ 472.100
Civil Rule 54.12

7.120 Personal or Mail Service by Summons - Requirements

The clerk will issue the summons. The attorney will receive eNotification of the issuance of the summons and shall prepare the service packet, which shall consist of the summons, adversary order, and pleadings. The attorney is responsible for forwarding the service packet to the process server, and for filing the return of service.

Where service is by summons, the hearing date will not be set until the case is at issue and, in any event, not until the expiration of 30 days from the date of service. The hearing date will be selected by agreement of the attorneys if possible. If the attorneys cannot agree, the party seeking the hearing may file a motion for a trial setting.

7.130 Pre-Trial Conferences

Pre-trial conferences may be requested pursuant to Civil Rule 62.01 or initiated by the Court on its own motion. Because of the problems inherent in scheduling hearings and the necessity for either the Judge or Commissioner to be available for mental health and emergency guardianship hearings, the Court may request an informal conference to determine the length of the trial, the scheduling of witnesses and the resolution of potential evidentiary disputes.

7.140 Motions

Where either party files a motion in any adversary proceeding, Civil Rule 55.25 applies. The movant should monitor filings to insure the Court considers the motion when applicable time periods run.

7.150 Appeals

Appeals are taken pursuant to Civil Rule 81. Requests for preparation of transcripts shall be made to the Probate Division.

7.160 Recording of Hearings

The record of jury-waived hearings in the Probate Division are made via audio recording. Requests for copies of the audio recording may be made to the Probate Division.

Jury trials in the Probate Division are transcribed by a court reporter. Requests for transcripts, other than for the purpose of appeal, should be made directly to the court reporter who transcribed the proceedings.

7.170 Requests for Findings of Fact and Conclusions of Law

If findings of fact and conclusions of law are requested, counsel should file a written request.

References: Supreme Court Rule 73.01

[END OF SECTION]