

Recent Changes to Missouri Guardianship Law: An Analysis of 2018 S.B. 806

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I. Background

Trends

- Guardianship is becoming a subject of increasing importance
 - Between 2005 and 2017, the number of pending adult guardianship/conservatorship cases increased from 24,007 to 31,209
- Similar increases have occurred for minors' guardianship but S.B. 806 mostly changes provision for adults, which will be the focus here
- Guardianship is also receiving much more attention nationally, particularly in the media

Why Change the Law

- Last major revision was in 1983-over 35 years ago
- Since 1983, there have been lots of changes,
 - Durable Power of Attorney Law, 1989
 - Health Care Durable Power of Attorney, 1991
 - Uniform Trust Code, 2004
 - Various alternative to conservatorship created
 - Midwest Special Needs Trust, 1989
 - Special needs trusts, 1985 (Tidrow v DFS); OBRA 1993
 - Various alternatives to guardianship
 - Adaptive technologies
 - More emphasis on supports to avoid guardianship
 - Estate planning now very different

Why Change the Law (continued)

- More persons diagnosed with dementia
 - Progressively needing more support
- Seldom used limited guardianship/conservatorship
 - Although on books
- Overuse of public administrators
 - Intended as last resort
 - Resulting in large caseloads and inadequate staffing
- Little guidance for guardians
 - More guidance for conservators

Standards of 3 National Summits

- Prior Mo law met some but not all standards of
 - Wingspread (1988)-1st National Guardianship Summit, held at Wingspread conference center in Racine, Wisconsin
 - Wingspan (2001)-2nd National Guardianship Summit held at Stetson University in Florida
 - Third National Guardianship Summit (2011)-held at University of Utah
- Gaps in Chapter 475 identified, particularly
 - Rights of ward
 - “Best interests” instead of substituted judgment
 - Lack of person-centered planning
 - More emphasis on money and property than on person

Primary Legislative Author

- Revisions drafted primarily by Missouri Interdisciplinary Network of Guardianship Stakeholders (Mo-WINGS)
 - Creation of WINGS groups based on Recommendation #5.2 of 3rd National Guardianship Summit
- Stakeholders in Mo-WINGS include representatives of
 - Persons with disabilities, parents, family members, service providers, AARP, NAMI, Alzheimer's Association, Mo Planning Council on Developmental Disabilities, Mo Bar Probate and Trust and Elder Law Committees, Public Administrators, social workers, nurses, psychologists, lay guardians, long-term care ombudsmen, Departments of Mental Health and Health and Senior Services, Area Agencies on Aging

Other Legislative Authors

- In addition to Mo-WINGS, many provisions were added upon recommendation of:
 - MAPA, Missouri Association of Public Administrators
 - Legislators themselves or other groups

Other Resources

- 2019 Supplement, Missouri Practice, Vol. 4A-B, Probate and Surrogate Laws Manual, and Vol. 5-5D, Probate Law and Practice-will be available in April, 2019
- St. Louis County Probate Division summary available at
 - <http://wp.stlcourtscourts.com/2018/08/30/legislative-changes-effective-august-28-2018/>

S.B. 806 General Themes

- General updating
- Increased emphasis on alternatives to guardianship
- Increased acknowledgment of ward's preferences
- Civil rights of ward
- Introduction of guardianship, conservatorship plans
- Estate planning powers
- Interests of public administrators

Terms Modified by SB 806 [RS Mo 475.010]

- Incapacitated person-adds reference to “cognitive” condition to and makes clear that not incapacitated if can manage with “appropriate services and assistive technology”
- Habilitation-updated to match current practice
- Least restrictive alternative-changed from less restrictive environment and updated to match current practice
- Interested person-new to Chapter 475 but copies definition in Chapter 472
- Conservator ad litem-definition in Chapter 475 new but same definition as in general probate chapter-Chapter 472

Minor's Provisions

- All of the provisions applying to guardians or conservators without distinction also apply to minors
- Significant provisions applicable only to minors include:
 - Petition must state whether the petitioner knows of any other court having jurisdiction over the minor-[RS Mo 475.060.2(14)]
 - Parent whose parental rights have not been terminated may petition the court for visitation-[RS Mo 475.084]
 - Probate Division has jurisdiction to appoint a guardian for a disabled adult whose parents have a pending matter for child custody or visitation. Intended to overturn *In the Matter of S.J.M.*, 453 S.W. 3d 340 (Mo. Ct. App. E.D. 2015)-[RS Mo 475.357]

2. Appointment Process

Appointment Priority [RS Mo 475.050]

- Removes restriction on considering nominations in durable powers of attorney that are more than 5 years old
- Emphasizes family priority by requiring that court appoint suitable relative before appointing unrelated 3rd party

Background Checks [RS 475.050]

- Provision not part of Mo-WINGS or MAPA recommendations
- Proposed guardian/conservator must submit to background check at own expense. Proposed conservator must submit to a credit check. Results must be filed 10 days prior to hearing
- Big exceptions to background check requirement:
 - Public administrators
 - Respondent's spouse, parents, adult children and adult siblings
 - Guardians certified by national accrediting organization

Additional Petition Requirements [RS Mo 475.060]

- Petition for appointment of guardian for adult must now state factual basis for petitioner's conclusion of incapacity, including incidents and specific behaviors of respondent that support why the appointment of a guardian or limited guardian is sought.
- At request of MAPA, petition that requests appointment of co-guardian must now include: (1) reasons for co-appointment; (2) whether the co-guardians are to act independently or jointly; and (3) statement that written consent has been obtained from proposed co-guardian

Notice (Petition for Adult)

- Adds following to be given notice of the petition: (1) proposed guardian or conservator; (2) co-tenants and co-depositors with respondent-[RS Mo 475.075.2]

Public Administrators

- Public administrator (if nominated) must now receive petition and any accompanying documents, including exhibits and medical opinions, and have opportunity to attend the hearing and be heard-[RS Mo 475.075.3]
- Court may not appoint public administrator as guardian/conservator unless public administrator has opportunity to participate in hearing, including right to cross-examine witnesses and to offer witnesses and evidence-[RS Mo 475.079]

Respondent's Attorney [RS Mo 475.075.4-5, 10]

- Adds that respondent's attorney:
 - Has right to obtain respondent's medical and financial information
 - Except upon a finding of good cause, must visit the respondent at least 24 hours before the hearing and must advise respondent of the respondent's rights
 - Updates language on duty to assist respondent if "respondent is so impaired that the respondent cannot communicate or participate in the proceedings"
 - If appointed by the court, may withdraw in favor of private counsel only if court finds cause for the withdrawal
 - Cannot also serve as guardian or conservator ad litem and cannot be nominated by the petitioner
 - Must inform respondent of the respondent's rights

Professional Evaluation [RSMo 475.075.6-8]

- Adds that:
 - Professional appointed to examine respondent must have experience or training in the alleged mental, physical, or cognitive impairment
 - Professional no longer required to explain to respondent legal definitions of incapacity or disability
 - If objection made to report, court may hold hearing to determine whether evaluation report is admissible
 - Report may not be used in any other civil action or criminal proceeding without the consent of person holding evidentiary privilege

Less Restrictive Alternatives [RS Mo 475.075.13]

- Emphasizes that before appointing a guardian or conservator, the court must consider whether respondent's needs may be met by a less restrictive alternative than the appointment of a guardian or conservator. Lists common alternatives:
 - Durable power of attorney
 - Trust
 - Representative payee
 - Supported decision-making agreements
 - Appropriate services or assistive technology
 - Temporary guardian or conservator ad litem
 - Limited guardian or conservator

Specific Findings Required [RS Mo 475.075.14]

- Requires that court make seven (up from four) specific findings. The three new required findings are:
 - Whether respondent retains the right to vote;
 - Whether respondent may drive if respondent meets DMV requirements
 - Whether respondent retains the right to marry

Retention of Rights [RS Mo 475.078]

- Consistent with RS Mo 475.075.14, order of adjudication must state whether respondent retains the right to vote, marry, or drive
- Order may direct that ward retain specified rights even if respondent otherwise adjudicated totally incapacitated

Clear and Convincing Evidence [RS Mo 475.079]

- Adds that to appoint guardian, not only must there be clear and convincing evidence of incapacity but there must also be clear and convincing evidence that respondent's identified needs cannot be met by a less restrictive alternative

Emergency Appointments [RS Mo 485.075.15]

- Increases maximum appointment period from 30 to 90 days
- Requires that hearing be held within 5 days of petition
- Provides that if petition for guardianship/conservatorship not filed within the 90-day period, court may terminate appointment upon finding that termination would not be manifestly contrary to the respondent's interests

Voluntary Conservatorship [RS Mo 475.062]

- Adds that court-appointed attorney must advise the respondent of the respondent's rights and of the consequences of having a conservator appointed by the court

3. Conservatorship Administration

Estate Planning Powers [RS Mo 475.094]

- Draws extensively from the Uniform Guardianship and Protective Proceedings Act Section 411 (1997). Largely replaces prior section
- With court approval, conservator may:
 - Make gifts the protectee might have been expected to make, including gifts that qualify for government benefits or reduce federal estate taxes
 - Convey interests in property
 - Exercise a power of appointment
 - Create a revocable or irrevocable trust
 - Change beneficiaries under insurance policies or surrender policies
 - Exercise a right to an elective share

Estate Planning Powers (continued)

- In fashioning order, court must consider primarily the decision the protectee would have made. Court must also consider:
 - Financial needs of protectee, dependents, and creditors
 - Possible reduction of tax liabilities
 - Eligibility for governmental assistance
 - Protectee's previous pattern of giving or level of support
 - Existing estate plan
 - Protectee's life expectancy
 - Other factors court considers relevant

Support Allowance [RS Mo 475.125]

- Adds that in setting the amount of a support allowance for the protectee or other entitled persons, the court must consider the previous standard of living of the spouse, family, composition of the estate, income and other assets, and expenses

Conservator Powers [RS Mo 475.130]

- Drawing on recommendations made by the Third National Guardianship Summit, adds that conservator must use reasonable efforts to:
 - Ascertain the income, assets, and liabilities of the protectee
 - Ascertain the needs and preferences of the protectee
 - Coordinate with the guardian and consult with others close to the protectee
 - Prepare a plan for the management of the protectee's income and assets
 - Provide oversight to any income and assets of the protectee

Conservator Powers (continued) [RS Mo 475.130]

- Increases from \$1,000 to \$5,000 claims conservator may settle or assets conservator may exchange without court approval
- Adds several items to list of miscellaneous powers conservator may exercise without prior court approval

Inventory [RS Mo 475.145]

- Adds that inventory must list nonprobate transferees designated to receive nonprobate transfers after the death of the protectee

Sale of Real/Tangible Personal Property [RS Mo 475.230]

- Adds that protectee must be given 10 days prior notice of a hearing on a petition for the sale of the protectee's real or tangible personal property

Annual Settlements [RS Mo 475.270]

- Increases annual settlement filing from 30 to 60 days after the anniversary of the appointment. Requires that final settlement include additional items, some of which are similar to required items in the guardian's annual report. These added items are:
 - An opinion on the continued need for conservatorship
 - Compensation requested
 - Plan for the coming year
 - Present address of protectee
 - Present address of conservator
 - Services being provided to the protectee
 - Significant actions taken by the conservator
 - Any recommended changes in the scope of the conservatorship
 - Expenses incurred by the conservator
 - Any other information requested by the courts
 - Any other information useful in the opinion of the conservator

Waiver of Settlement [RS Mo 475.276]

- Expands indigency exception to include individuals whose assets are under the control of another fiduciary, including a Social Security representative payee or VA fiduciary

Conservator Fiduciary Duties [RS Mo 475.341, -.342]

- Adds provision derived from Section 802 of the Uniform Trust Code addressing conflict of interest
- Adds provision derived from Section 810 of the Uniform Trust Code addressing earmarking of conservator assets and prohibiting commingling

4. Guardianship Administration

Guardian Powers [RS Mo 475.120.10]

- Provides that guardian shall make decisions regarding the adult ward's support, care, education, health, and welfare
- Copying language from the Uniform Guardianship and Protective Proceedings Act (1997), provides that “[a] guardian shall exercise authority only as necessitated by the adult ward's limitations and, to the extent possible, shall encourage the adult ward to participate in decisions, act on the adult ward's own behalf, and develop or regain the capacity to manage the adult ward's personal affairs”

Annual Reports [RS Mo 475.082]

- Adds several new required statements in report:
 - Plans for future care
 - Summary of the guardian's visits with ward and activities on ward's behalf
 - Extent to which the ward has participated in decision making
 - Any changes in the ward's condition since the last report
 - A summarized plan for the coming year
- Provides that individual support, treatment, or care plan may be submitted in lieu of a summarized plan
- Provides that as part of its review of the plan, court may contact department of health and senior services or other appropriate agencies to investigate conduct of the guardian and report its findings to the court

Rights of the Ward [RS Mo 475.361]

- A new provision but drawing from precedents in Florida, Georgia, and Texas
- Contains two parts (1) rights of a ward under guardianship, and (2) personal rights an adult ward may petition the court to restore

Rights of the Ward (continued)

- An adult ward under guardianship has the right to:
 - A guardian who acts in the ward's best interests
 - A guardian who is reasonably accessible to the ward
 - Communicate freely and privately with family, friends, and other persons but guardian may for good cause limit right as necessary to ensure ward's condition, safety, habilitation, or sound therapeutic treatment
 - Bring an action relating to the guardianship, including right to bring action to modify or terminate the guardianship
 - The least restrictive form of guardianship assistance
 - Be restored to capacity at the earliest possible time
 - Receive information from the court that describes the ward's rights, including rights may petition the court to restore
 - Participate in any health care decision-making process

Rights of the Ward (continued)

- An adult ward may petition the court to grant the ward the right to:
 - Contract to marry or to petition for dissolution of marriage
 - Make, modify, or terminate other contracts or ratify contracts made by the ward
 - Consent to medical treatments
 - Establish a residence or dwelling place
 - Change domicile
 - Bring or defend any action at law or equity other than an action relating to the guardianship
 - Drive a motor vehicle if the ward can pass the required driving test

5. Termination/Modification

Termination/Modification [RS Mo 475.083]

- Adds that
 - Inability to provide guardianship/conservatorship services due to absence from state or other particular circumstances of ward as basis for termination
 - Petition from ward or protectee may be by an informal letter to the court
 - Court may set hearing on its own motion if court concludes that the powers of the guardian/conservator or rights of the ward or protectee should be increased or decreased
 - Court may require an evaluation report by an appropriate professional