MEMORANDUM

TO: SENATE BILL 806

FROM: DANIEL P. WHEELER

DATE: NOVEMBER 5, 2018

RE: Summary of Significant Revisions to Adult Guardianships and Conservatorships

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I. SUMMARY – The passage of Senate Bill 806, which became effective August 28, 2018, made significant changes to Chapter 475 RSMo., Missouri's guardianship and conservatorship code.[1] The revisions include both substantive and procedural changes and impose additional requirements upon attorneys, guardians and conservators as well as the courts. This article will briefly discuss some of the new and additional requirements that attorneys should be aware of in regard to adult guardianships and conservatorships. It should be noted that many of the probate divisions in Missouri have already updated their forms and have provided information regarding the legislative changes. For an excellent summary of all of the revisions, see the Notice to Attorneys dated August 27, 2018 from the Probate Division of the Circuit Court of St. Louis County at: http://wp.stlcountycourts.com/2018/08/30/legislative-changes-effective-august-28-2018/.

II. BACKGROUND – The Third National Guardianship Summit (the "Summit") was held in October 2011. As a result of the Summit, certain standards and recommendations were made. See 2012 Guardianship Standards and Recommendations, 2012 Utah L. Rev. 1191-1205 (2012). The Conference of Chief Justices and the Conference of State Court Administrators urged each state court system to review and consider implementation of the Standards and Recommendations. The American Bar Association adopted the Standards and Recommendations and the National College of Probate Judges recommended the Standards to be considered as best practices to the extent there is no conflict with state law.

The Recommendations included for state courts and national guardianship network organizations to collaborate to establish Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and implement the recommendations adopted by the Summit. (Recommendation No. 5.1). In Missouri, an organization known as

[1] Senate Bill 806 also made changes to the probate code regarding the State of Missouri's recovery for medical assistance in decedent estates as well as the statutes governing public administrators.

Missouri's Working Interdisciplinary Network of Guardianship Stakeholders ("MO-WINGS") was convened by the Missouri Developmental Disabilities Council and was established in part based upon Recommendation 5.2 of the Summit to have an interdisciplinary group rather than just attorneys and judges address issues of guardianship and conservatorship. See http://mo-wings.org. This group met over a number of years and proposed legislation to the state legislature for its consideration. The genesis for most of the legislation proposed by MO-WINGS can be directly traced to the Standards and Recommendations of the Summit. Senate Bill 806 contains many of the proposed legislative changes of MO-WINGS.

III. SIGNICANT CHANGES

a. Definitions

The Summit recommended changes to the language used in guardianship matters. Definitory changes made in Section 475.010[2] include the definition for Conservator ad litem; the addition of the term "cognitive" to the definitions of "disabled" and "incapacitated person"; a completely revised definition for "habilitation"; a change from "least restrictive environment" to "least restrictive alternative" together with the definition for "least restrictive alternative"; and a definition of "interested person."

b. Proof of Qualification of Proposed Guardian and Conservator

The Summit recommended that standards should be promoted to improve guardian practices and enhance public confidence in guardianship. Specific guardian background requirements are one way to improve guardian practice and enhance public confidence in guardianship. Section 475.050 now requires proposed guardians to submit to the Court at their own expense a background screening that include 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 record review and the sexual offender registry. A caregiver background screen form can be found at: http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/documents/MO300-1590s.pdf. A proposed conservator must submit at their own expense a credit history investigation. Proposed guardians and conservators who are public administrators, the incapacitated and/or disabled person's spouse, parents, children or siblings over the age of 18, as well as persons certified by a national accrediting organization, are exempted from these requirements. The results of the report must be submitted at least ten (10) days before the hearing date unless waived or modified by the Court for good cause shown by an affidavit filed with the Petition. The Court cannot enter an order appointing a guardian or conservator until such reports have been filed and reviewed by the Court. If appointed, the guardian and conservator can request reimbursement of their expense in obtaining the reports.

[2] All statutory references are to RSMo. as currently supplemented.

c. Additional Pleading Requirements

Sections 475.060-61 now require the petitioner to allege a factual basis for the conclusion that the person is incapacitated and/or disabled; the reasons, incidents and specific behaviors demonstrating why the appointment is sought; if requesting co-guardians, the reasons for such request and whether the co-guardians should act independently or only together; the written consent from any person, including the public administrator, who is to be appointed as guardian; and if filing for an emergency guardian, to meet the additional requirements set forth in Section 475.075(15).

d. Notice Requirements for the Petition

Significant revisions were made to the requirement for notice of the hearing on the Petition. Written notice stating the time and place for the petition to be heard by the court, and the name and address of counsel appointed to represent the respondent, shall be served upon all "interested persons" along with any person proposed to serve as guardian or conservator and any co-tenants or co-depositors with the respondent. "Interested persons" is now defined at Section 475.010 to include spouses, children, parents, adult members of the ward's/protectee's family, creditors or any others having a property right or claim against the estate of the protectee being administered, trustees of a trust in which the ward/protectee is a beneficiary, agents of DPOA for ward/protectee, children of protectee who may have property right or claim against an interest in the estate of the protectee, and such meaning can change depending on different stages and different parts of the proceedings. Arguably, a creditor of the respondent may not be interested in the initial proceedings, but each Court will have to determine who is "interested" for purposes of receiving notice of the initial hearing. The statutes are silent as to the effect of not providing notice to an interested person.

If a public administrator is nominated as guardian or conservator, or at any stage of the proceeding that a public administrator is being considered to be nominated, the public administrator must be given a copy of the petition, any accompanying documents, including exhibits and medical opinions, receive written notice of the date and time of the hearing and have an opportunity to attend, participate and be heard.

e. Duties of Court-Appointed Counsel and Other Pre-Trial Matters

There was much discussion at MO-WINGS meetings regarding the perceived failure of many court-appointed attorneys to protect the interests of the respondent. The statutory revisions codified the duties imposed upon court-appointed counsel for the respondent as set forth by the Missouri Supreme Court in *In re Link,* 713 S.W.2d 487 (Mo. 1986), such as the duty to safeguard the interest of the respondent if the attorney finds that the respondent is so impaired that the respondent cannot communicate or participate in the proceedings. In addition, it set forth time-standards such that the court-appointed attorney must visit with the respondent at least 24 hours

before the hearing date unless waived by the court for good cause. The revisions make clear that the court-appointed counsel has the right to obtain all medical and financial information of the respondent from medical care providers and financial institutions and those providers and institutions are released from liability for providing that information. The revisions codify the current law regarding the entry of appearance of a private attorney for the respondent and when and upon what grounds the court-appointed attorney may be allowed to withdraw. The court-appointed attorney must also advise the respondent of their rights, which includes their right of appeal of an adverse judgment.

Section 475.075 has been deemed the "bill of rights" of respondents in guardianship matters. *Matter of Weissinger,* 720 S.W.2d 430 (Mo. App. 1986). Additional revisions of this "bill of rights" include the procedure for obtaining and the use of court-ordered evaluations of the respondent, extending the time for an emergency guardian ad litem or conservator ad litem to act from 30 to 90 days, and requiring a hearing for an emergency guardian ad litem or conservator ad litem to be held within five business days of the filing of the petition except for good cause shown.

f. Required Findings

Under previous law, upon a finding of incapacity or disability, the court was to consider the least restrictive environment and could determine that there was no need for the appointment of a guardian and conservator because the needs of the respondent could be met by a previously executed power of attorney instrument and trust agreement. See *Estate of Ewing,* 883 S.W.2d 545 (Mo. App. 1994) (Court terminated guardianship and conservatorship finding it unnecessary for the incapacitated and disabled respondent because of previously executed powers of attorney and trust agreement). The court is now required to make detailed findings of fact showing it considered other less restrictive alternatives before appointing a guardian or conservator; the extent of the respondent's incapacity or disability; if placement in a supervised living situation is required, and if so, the extent of such supervision; the nature and extent of any required supervision of the respondent's financial resources; whether the respondent is permitted to drive a motor vehicle if the respondent can pass the required driving test; whether the respondent can retain the right to vote; and whether the respondent retains the right to marry. The court may enter a finding of total incapacity but can find the respondent retains the right to drive if they can pass the driver's test, retain the right to vote and/or the right to marry.

The Court shall not appoint an unrelated third party as a guardian or conservator unless there is no relative suitable and willing to serve or if the appointment of a relative or nominee is otherwise contrary to the best interest of the incapacitated or disabled person. The revisions also removed the time limitation of five years for the preference of appointment for someone who had been appointed as an attorney in fact by the respondent.

g. Administration Matters

An inventory must now disclose any non-probate transferees designated to receive non-probate transfers upon the death of the protectee. (§475.145) The conservator must now give at least ten days' notice of required hearings on petitions for sale of real or tangible personal property to the protectee unless waived for good cause. Section 475.094 has been re-written and gives the conservator broad authority if an order authorizing the exercise of such authority is given by the court after notice to interested persons and hearing. In setting a support allowance, the court should consider the previous standard of living of the spouse or other family members, the composition of the estate, the income and other assets available to the protectee and the other persons, and the expenses of the protectee or the other persons entitled to support. The revisions give guidance to how the conservator should manage, invest and distribute the estate of the protectee and expressly authorizes the conservator to accept additions to the estate; deposit funds in a bank; pay taxes, assessments and other expenses in the estate; to prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and to execute and deliver all instruments that will accomplish or facilitate the conservator's powers. (§475.130)

The dollar amount for which the conservator has the authority to act without court order in the settlement of claims against or in favor of the estate, to exchange chattels and choses in action for other property, or to sell chattels and choses in action has been increased from $1,000 to $5,000. The revisions codified the law prohibiting conservators from commingling the protectee's funds with their own and requiring the conservator to cause the estate's property to be designated so that any ownership interest of the estate, to the extent feasible, appears in records maintained by a financial institution or party other than the conservator or protectee. Additionally, a transaction involving a conflict of interest of the conservator is voidable unless the conservator is not a public administrator and the transaction was approved by the court, involved a contract or claim acquired by the conservator before the person became or contemplated becoming conservator, involves a deposit of estate moneys to a bank operated by the conservator or involves an advance by the conservator of moneys for the protection of the estate.

A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, the ward shall be encouraged to participate in the decisions, act on their own behalf and develop or regain the capacity to manage their own personal affairs. A guardian is not required to use the guardian's own financial resources for the support of the ward. A guardian continues to need court authority to admit a ward to a mental health or intellectual disability facility for more than 30 days.

It appears the Legislature resolved the issue raised in *In re SJM,* 453 S.W.3d 340 (Mo. App. 2015)[3] by stating that the probate division has jurisdiction of the issues of incapacity and

[3] The Court in *SJM* held that pursuant to §452.340 a court in a dissolution matter had the authority to order custody as well as child support of a disabled child over the age of 18 and a court in a guardianship proceeding could not interfere with such custody order.

disability and the appointment of guardian and conservator of an adult 18 years of age or older whose parents have a pending matter under chapter 210 or chapter 452 for child custody or visitation of that child, and the other court has the authority to enter orders only as to child support after the probate division's adjudication and appointment of a guardian. Section 475.357. Thus, if a court in a dissolution action has ordered both custody and child support for a child that is more than 18 years of age, upon the probate division adjudication and appointment of a guardian, the custody order of the dissolution court no longer has any effect.

Section 475.361, an entirely new statute, guarantees a ward in every guardianship to: a guardian who acts in the best interests of the ward and is reasonably accessible to the ward; communicate freely and privately with family, friends, and other persons other than the guardian unless such right is limited by the guardian for good cause; bring an action relating to the guardianship, including to enforce their rights under the guardianship or to modify or terminate the guardianship and conservatorship; the least restrictive form of guardianship assistance; being restored to capacity at the earliest possible time; receive information from the court that describes the ward's rights, including rights the ward may seek by petitioning the court; and participate in any health care decision-making process. The ward may petition the court to grant the ward the right to contract to marry or to petition for dissolution of marriage; to make, modify, or terminate other contracts or ratify contracts made by the ward; to consent to medical treatment; to establish a residence or dwelling place; to change domicile; to bring or defend any action, except an action relating to the guardianship; or to drive a motor vehicle if the ward can pass the required driving test.

The appointment of a guardian shall revoke powers of an agent previously appointed by the ward to act as an agent under a durable power of attorney for health care, unless the court so orders. The existing law that the appointment of a guardian is not a determination that the ward lacks testamentary capacity is codified in the revisions.

h. Settlements and Annual Status Reports

The time for filing annual settlements has been extended from 30 days after the anniversary of grant of letters to 60 days. The time for filing final settlements has been extended from sixty 60 days from the termination of their authority to 90 days except when the court orders that no administration should be granted. The statutory revisions add additional requirements to both the annual status reports of the guardian and the settlements of conservators. Guardians and Conservators that had been appointed before the effective date of the revisions have until August 28, 2019 to meet the different reporting requirements.

The annual status reports have new requirements so that courts can determine if the guardianship should be terminated or the powers of the guardian increased or decreased, and allows the court to contact the Department of Health and Senior Services or other agencies to investigate the conduct of the guardian and file a report of its findings. The new requirements

include: 1) plans for future care; 2) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making; 3) the current mental and physical condition of the ward and any major changes in the ward's condition since the last report; and 4) a summarized plan for the coming year. If an individual support plan, treatment plan, or plan of care is in place, such plan may be submitted in lieu of this last requirement.

Except when a public administrator is serving as conservator, additional information required of a conservator's settlement is: 1) the present address of the protectee; 2) the present address of the conservator; 3) the services being provided to the protected person; 4) the significant actions taken by the conservator during the reporting period; 5) an opinion of the conservator as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship; 6) the compensation requested and reasonable and necessary expenses incurred by the conservator; 7) a plan for the coming year; and 8) any other information requested by the court or useful in the opinion of the conservator.

i. Restoration, Removal and Termination

The ward or protectee, or anyone on behalf of the ward or protectee, may petition the court to restore the ward or protectee, to decrease the powers of the guardian or conservator or to return rights to the ward or protectee. The "petition" may be an informal letter to the court. Anyone who interferes with the transmission of such letter or petition may be cited for contempt. If the court, on its own motion, has reason to believe that the guardian's or conservator's powers should be increased or decreased or additional rights should be returned to the ward or protectee, the court shall set the matter for hearing, which shall be conducted in accordance with the provisions of section 475.075. The court may require a report and consider the recommendations in the report of a physician, licensed psychologist, or other appropriate qualified professional who has experience or training in the alleged mental, physical, or cognitive impairment of the ward or protectee.

Under prior law, normally family members did not have standing to bring an action for removal of a guardian or conservator. See *Estate of Freebairn,* 481 S.W.3d 555 (Mo. App. 2015 (daughter of ward lacked standing to seek removal of niece of ward who had been appointed guardian and conservator). Arguably the revisions have changed this law by adding a definition of "interested persons" directly in the guardianship code that includes family members of the ward.

The court now has the express authority to terminate a guardianship if the court determines that the guardian is unable to provide the services due to the ward's absence from the state or other particular circumstances of the ward.

IV. CONCLUSION

Senate Bill 806 makes significant revisions to the Missouri Guardianship Code, which was first enacted in 1983. The revisions create additional requirements for guardians and conservators, their attorneys and the court. The revisions reflect the influence of the Third National Guardianship Summit Standards and Recommendations and the trend toward person-centered planning and supportive decision making. This article is a brief summary of some, but not all, of the revisions to adult guardianships and conservatorships. A complete reading and understanding of Senate Bill 806 are required of any attorney who practices in the area of adult guardianships and conservatorships.