

Changes to Chapter 475 RsMO, Mo's Guardianship and Conservatorship Statute

These changes are a result of the passage of SB 806, Effective August 28, 2018

Summary by Annie Ebert and David English 6-18-18

Additions by Dolores Sparks 6-25-18

Further Revision by David English 7-10-18



Terms Modified by SB 806

- ▶ **Incapacitated person** – adds reference to “cognitive” condition to make clear that you are not incapacitated if you can manage with “appropriate services and assistive technology”.
- ▶ **Least restrictive alternative** – Defined as “Least restrictive alternative” with respect to the guardianship order and the exercise of power by the guardian. A course of action or alternative that allows the person to live, learn, and work with minimum restrictions, as are appropriate considering their physical and mental condition and financial means.



Appointment Priority

475.050 - Makes the following changes

- ▶ Removes requirement that a durable power of attorney or will nominating a guardian or conservator be executed within 5 years prior to the hearing on petition for appointment
- ▶ The court is to appoint a suitable relative who is willing to serve before appointing an unrelated third party
- ▶ “Before appointing any other eligible person as guardian or conservator of a disabled person, the court shall consider the suitability of appointing any of the following persons, listed in the order of priority, who appear to be willing to serve”
 1. If the incapacitated or disabled person is, at the time of the hearing, able to make and communicate a reasonable choice, any eligible person nominated by the person;
 2. An eligible person nominated in a durable power of attorney or in an instrument in writing signed by the person and two witnesses who signed at the person’s request, before the inception of the person’s incapacity or disability;
 3. The spouse, parents, adult children, adult brothers and sisters and other close adult relatives of the incapacitated or disabled person;
 4. Any other eligible person or, with respect to the estate only, any eligible organization or corporation, nominated in a duly probated will of such a spouse or relative.



Background Checks 475.050

Except as note below, now requires that:


- ▶ A proposed guardian or proposed conservator must submit to a background check at their own expense.
- ▶ A proposed conservator must submit to a credit history investigation.
- ▶ The results of background checks and credit history reports must be filed 10 days prior to the appointment hearing.
- ▶ Exception – The background check requirement does not apply to:
 1. Public Administrators
 2. The wards, incapacitated person's or disabled person's spouse, parents, children who have reached eighteen years of age, or siblings who have reached eighteen years of age.
 3. Guardians certified by a national accrediting organization may file proof of certification in lieu of a background check.



Additional Petition Requirements

475.060

- ▶ Petition that requests appointment of co-guardian must include:
- ▶ Reasons for co-appointment, whether co-guardians are to act independently or jointly, statement that written consent has been obtained from proposed co-guardian.
- ▶ **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.**



Voluntary Conservatorship

475.062

- ▶ Adds that court appointed Attorney must advise the proposed protectee of their rights and of the consequences of having a conservator appointed by the court.
- ▶ If a petition for appointment of a conservator is made by a person on account of that person's alleged disability, the court shall first appoint an attorney for that person. The court-appointed attorney shall advise the respondent of their rights and of the consequences of the appointment of the conservator.



Notice 475.075.2

- Adds following to receive notice of the petition:
 - 1. Proposed guardian
 - 2. Proposed conservator
 - 3. Co-tenants of respondent
 - 4. Co-depositors of respondent
- As revised, the subsection now provides:
- “The respondent shall be served in person with the following:
 - A copy of the petition
 - Written notice stating the time and place the proceeding will be heard by the court
 - The name and address of appointed counsel, and the names and addresses of the witnesses who may be called to testify in support of the petition
 - A copy of the respondent’s rights”



Notice 475.075.2 (Continued)

- ▶ “The notice shall be signed by the judge or clerk and served in person on the respondent a reasonable time before the date set for hearing.”
- ▶ **A written notice stating the time and place for the petition to be heard by the court, the name and address of counsel appointed to represent the respondent shall be served upon the spouse, parents, children who have reached the age of eighteen, any person serving as the respondent’s guardian, conservator, limited guardian, or limited conservator, any person proposed to serve as guardian or conservator, any person having power to act in a fiduciary capacity with respect to any of the respondent’s custody known to the petitioner, and any cotenants or codepositors with the respondent. If no such spouse, parent, or child is known notice shall be given to at least one of the respondent’s closest relatives who have reached eighteen years of age.”**



475.075.3

- ▶ **Public Administrator (if nominated) must receive petition and any accompanying documents, including exhibits and medical opinions, and have opportunity to attend and be heard at the hearing.**



Court Appointed Attorney

475.075.4-5, Adds that Attorney:


- ▶ Has the right to obtain respondent's medical and financial information.
- ▶ Must visit respondent at least 24 hours before the hearing, although the court may waive this requirement upon finding of good cause.
- ▶ If the attorney finds that the respondent is capable of understanding the matter in question, or of contributing to the advancement of the respondent's interest, the attorney shall obtain from the respondent all possible aid.
- ▶ If the attorney finds that the respondent is so impaired they cannot communicate or participate in the proceedings, the attorney shall consider all circumstances then prevailing and act with care to safeguard and advance the interests of the respondent.
- ▶ The court appointed attorney may withdraw in favor of private counsel only if court permits.
- ▶ Also provides that the petitioner shall not nominate an attorney for the respondent.



Respondent's Attorney

475.075.5, 10, Adds that Attorney:

- ▶ **Cannot also serve as guardian ad litem or conservator ad litem and cannot be nominated by the petitioner.**
- ▶ **Must inform respondent of their rights.**



Professional Evaluation: 475.075.6-8


- ▶ **Section continues to provide that the court may direct the respondent be examined by a physician, licensed psychologist, or other appropriate professional. Adds that:**
- ▶ **Professional appointed to examine respondent must have experience or training in the alleged mental, physical, or cognitive impairment of the respondent.**



Respondent's Rights at Hearing

475.075.10

- ▶ Now requires that respondent's attorney advise respondent of his or her rights. Also adds that respondent has right to appeal the decision. Other rights, which are carried forward from prior law are:
- ▶ The right to be represented by an attorney;
- ▶ The right to have a jury trial;
- ▶ The right to present evidence in the respondent's behalf;
- ▶ The right to cross-examine witnesses who testify against the respondent;
- ▶ The right to remain silent;
- ▶ The right to have the hearing opened or closed to the public as the respondent elects;
- ▶ The right to a hearing conducted in accordance with the rules of evidence in civil proceedings
- ▶ The right to be represented at the hearing;



Findings 475.075. 11-12 Makes only minor revisions for purposes of clarity.

- ▶ **“If the court finds the respondent possesses capacity to manage their essential requirements and other care or that they possess the ability to manage their financial resources, the court shall deny the petition.”**
- ▶ **“If the court finds the respondent to be in some degree incapacitated or disabled, or both, the court, shall apply the least restrictive alternative principle as defined and shall not restrict their personal liberty or their freedom to manage their financial resources to any greater extent than is necessary.”**



Less Restrictive Alternatives

475.075.13

- ▶ Now requires that before appointing a guardian or conservator, the court must consider whether the respondent's needs may be met without the necessity of the appointment of a guardian or conservator, or both, by a less restrictive alternative. Less restrictive alternatives include, but are not limited to:
 - ▶ 1. Evidence that the respondent has a durable power of attorney;
 - ▶ 2. The management of the beneficial interests of the respondent in a trust;
 - ▶ 3. Evidence that a representative payee has been appointed to manage the respondent's public benefits;



Less Restrictive Alternatives

475.075.13 (continued)

- ▶ 4. Supported decision-making agreements, or the provision of protective or supportive services or arrangements provided by individuals or public or private services of agencies;
- ▶ 5. The use of appropriate services or assistive technology;
- ▶ 6. The appointment of a temporary emergency guardian ad litem or conservator ad litem;
- ▶ 7. The appointment of a limited guardian or conservator



Specific Findings Required

475.075.14

- ▶ SB 806 requires that the Court order appointing guardian/conservator must include following detailed findings:
- ▶ 1. Extent of respondent's physical, mental, and cognitive incapacity to manage essential requirements for food, clothing, shelter, safety and to manage financial resources
- ▶ 2. Whether respondent requires placement in a supervised living situation and , if so, degree of supervision required
- ▶ 3. Whether the respondent's financial resources require supervision and, if so, the nature and extent of supervision needed
- ▶ 4. Whether the respondent retains the right to vote
- ▶ 5. Whether respondent is permitted to drive, if respondent can pass required driving test
- ▶ 6. Whether respondent retains the right to marry



Emergency Appointments

475.075.15

- ▶ The court may appoint an emergency guardian ad litem or conservator ad litem for a period not to exceed 90 days (formerly 30 days)
- ▶ Hearing must be held within 5 days of petition
- ▶ If petition for guardianship or conservatorship is not filed within the ninety 90-day appointment, the court may terminate the appointment upon a finding that doing so would not be manifestly contrary to the respondent's interests



Retention of Rights

475.078

- ▶ The court order must now state whether the respondent retains the right to vote, marry or drive.
- ▶ Court may order that respondent retains the right to vote, drive or marry even if the respondent is adjudicated totally incapacitated.
- ▶ Section as revised now provides:
- ▶ The court may expressly enter an order that their right to vote shall be retained even though they are otherwise totally incapacitated; that they are permitted to drive if they can pass the required driving test; or that they retain the right to marry.”



Clear and Convincing Evidence

475.079

- ▶ **Adds that to appoint guardian, must not only 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.**



Public Administrators

475.079

- Now provides that court may not appoint public administrator as guardian or conservator unless public administrator has opportunity to participate in hearing, including right to cross-examine witnesses and to offer witnesses and evidence.
- Public administrator may waive notice and opportunity to participate.



Limited Guardian or Conservator

475.080

- ▶ Clarifies that limited appointment may be made only if respondent's needs cannot be met by a less restrictive alternative. Section as revised provides:
- ▶ “If the court, after hearing, finds that a person is partially incapacitated and that the respondent's identified needs cannot be met by a less restrictive alternative, the court shall appoint a limited guardian. The order of appointment shall specify the powers and duties of the limited guardian so as to permit the ward to provide for self-care commensurate with the ward's ability to do so and shall also specify the legal disabilities to which the ward is subject.
- ▶ In establishing a limited guardianship the court shall impose only such legal disabilities and restraints on personal liberty as are necessary to promote and protect the well-being of the individual and shall design the guardianship so as to encourage the development of maximum self-reliance and independence in the individual.



Annual Reports (added requirements)

475.082

- ▶ **Section continues to require that at least annually the court shall inquire into the status of every adult ward and protectee under its jurisdiction for the purpose of determining whether the incapacity or disability may have ceased or changed and to insure that the guardian or conservator is discharging the guardian's or conservator's responsibilities and duties."**
- ▶ **As under prior law, the report must give the opinion of the guardian as to the need for a continuation of the guardianship and whether it is necessary to increase or decrease the guardian's powers. Several new requirements are added. The report must now include:**



Annual Reports (added requirements) continued 475.082

- 1. Plans for future care
- 2. Summary of the guardian's visits with ward and activities on ward's behalf
- 3. The extent to which the ward has participated in decision making
- 4. Any changes in the ward's condition since the last report
- 5. A summarized plan for the coming year
- An individual support plan, treatment plan, or plan of care may be submitted in lieu of a summarized plan. Also, 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.



Annual Reports (added requirements) continued 475.082

- ▶ Additional provisions of this section, all carried over from prior law include:
- ▶ **RESTORATION:** “If there is an indication that the incapacity or disability of the ward or protectee has ceased, the court shall appoint an attorney to file on behalf of the ward or protectee a petition for termination of the guardianship or conservatorship for restoration.”
- ▶ **FAILURE TO CARRY OUT DUTIES:** “If it appears to the court as part of the review, or at any time upon motion of any interested person, including the ward or protectee or some person on behalf of the ward or protectee, that the guardian or conservator is not discharging the guardian or conservator’s responsibilities and duties as required or has not acted in the best interests of the ward or protectee, the court may order that a hearing be held and direct that the guardian or conservator appear before the court.”



Annual Reports (added requirements) continued 475.082

- ▶ FAILURE TO CARRY OUT DUTIES (Continued)
- ▶ **“If such hearing is ordered and the ward or protectee is not represented by an attorney, the court shall appoint an attorney to represent the ward or protectee.”**
- ▶ **“If the court finds that the guardian or conservator is not discharging his or her duties and responsibilities as required by this code, or is not acting in the best interests of the ward or protectee, the court shall enter such orders as it deems appropriate under the circumstances.”**



Termination or Modification

475.083

- ▶ 1. Adds that if court determines the guardian unable to provide the necessary services due to the ward's absence from the state or other particular circumstances, the guardianship will be terminated.
- ▶ 2. **Continues prior law that at any time the guardian, conservator, or any person on behalf of the ward or protectee may, individually or jointly with the ward or protectee, or the ward or protectee individually 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;** except that, if the court determines the petition is frivolous, the court may summarily dismiss the petition without hearing.



Termination or Modification (continued)

475.083

- ▶ 3. Adds that the petition from the ward or protectee or on behalf of the ward or protectee may be an informal letter to the court. Anyone who interferes with the transmission of the ward or protectee's letter or petition may be cited by the court for contempt after notice and hearing. If at any time the court, on its own motion, has reason to believe that the guardian 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 a hearing.
- ▶ 4. Continues prior law that upon the filing of a joint petition by the guardian, conservator, and the ward or protectee, the court, if it finds restoration or modification to be in the best interests of the ward or protectee, may summarily order restoration or a decrease in powers of the guardian or conservator or return rights to the ward or protectee without the necessity of notice and hearing.



Termination or Modification(continued)

475.083

- ▶ 5. Adds that the court may on its own motion set a hearing if the court believes that the powers of the guardian or conservator or rights of the ward or protectee should be increased or decreased.
- ▶ 6. Adds that the court may require that a report by a professional be provided:
- ▶ “In deciding whether to terminate or modify a guardianship or conservatorship, the court may require a report by and consider recommendations 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.”



Conservator's Estate Planning Powers

475.094

- ▶ Clarifies and expands authority of court. Following express authority of the court and notice to interested persons, a conservator may:
- ▶ 1. Make gifts the protectee might have been expected to make, including gifts that qualify protectee for government benefits or reduce federal estate taxes.
- ▶ 2. Convey interests in property
- ▶ 3. Exercise a power of appointment
- ▶ 4. Create a revocable or irrevocable trust of the estate property or amend a trust
- ▶ 5. Change beneficiaries under insurance policies or surrender the policies
- ▶ 6. Exercise any right to an elective share



Conservator's Estate Planning Powers (continued) 475.094


- ▶ In fashioning order, court must consider primarily the decision the protectee would have made.
- ▶ Court must also consider:
 - ▶ 1. Financial needs of protectee, dependents, and creditors
 - ▶ 2. Possible reduction of tax liabilities
 - ▶ 3. Eligibility for governmental assistance
 - ▶ 4. Protectee's previous pattern of giving or level of support
 - ▶ 5. Existing estate plan
 - ▶ 6. Protectee's life expectancy
 - ▶ 7. Any other factor the court considers relevant
- ▶ Without authorization of the court, conservator may not revoke or amend a durable power of attorney of which the protectee is the principal.



Guardian Powers/Requirements

475.120

- ▶ Requires that a guardian or limited guardian of an incapacitated person shall act in the best interest of the ward. The guardian has a duty to:
 - ▶ 1. Assure that the ward resides in the best and least restrictive setting reasonable available
 - ▶ 2. Assure that the ward receives medical care and other services that are needed
 - ▶ 3. Promote and protect the care, comfort, safety, health, and welfare of the ward
 - ▶ 4. Provide required consents on behalf of the ward
- ▶ Exercise all powers and discharge all duties necessary or proper to implement the provisions of this section



Guardian Powers/Requirements (continued)

475.120

- ▶ 1. A guardian must make decisions regarding the adult ward's support, care, education, health, and welfare.
- ▶ 2. A guardian may exercise authority only as necessitated by the adult ward's limitations; and
- ▶ 3. To extent possible, a guardian must encourage an adult ward to participate in decisions, to act on the adult ward's own behalf, and to develop or regain the capacity to manage the adult ward's personal affairs



Managing Estate of Protectee


475.130

- Adds that in managing, investing, and distributing the estate of a protectee, the conservator shall use reasonable efforts to:
 - 1. Ascertain the income, assets and liabilities of the protectee
 - 2. Ascertain the needs and preferences of the protectee
 - 3. Coordinate with the guardian and consult with others close to the protectee
 - 4. Prepare a plan for the management of the protectee's income and assets; and
 - 5. Provide oversight to any income and assets of the protectee



Sale of Real/Tangible Personal Property 475.230

- ▶ 1. A protectee must now be given 10 days notice prior to a hearing on a petition for the sale of the protectee's real or tangible personal property
- ▶ 2. Prior notice to protectee not required for sale of intangible personal property.



Additional Information to be included in Settlement (Unless Public Administrator is appointed) 475.270

- 1. An opinion of the conservator as to the continued need for the appointment
- 2. Compensation requested
- 3. Plan for the coming year
- 4. Present address of the protectee
- 5. Present address of conservator
- 6. Service being provided to protectee
- 7. Significant actions taken by the conservator
- 8. Any recommended changes in the scope of the conservatorship
- 9. Expenses incurred by the conservator
- 10. Any other information requested by the court
- 11. Any other information useful in the opinion of the conservator



If the Protectee's Assets are Controlled by Another Fiduciary 475.276

- ▶ Court may waive requirement of an annual settlement if assets are under control of another fiduciary such as a Social Security representative payee or VA fiduciary



Conflicts of Interest

475.341

- Adds that a transaction entered into by the conservator for the conservator's personal gain or in which a conflict of interest exists is voidable, unless the transaction:
 - 1. Was approved by the court
 - 2. Involves a contract entered into or a claim acquired by the conservator before the person became or contemplated becoming conservator
 - 3. Involves a deposit of estate moneys to a bank operated by the conservator
 - 4. Involves an advance by the conservator of money for the protection of the estate
- No transaction by a Public Administrator for personal gain is allowed



Earmarking/Commingling

475.342

- ▶ 1. A conservator is prohibited from combining personal property and estate property
- ▶ 2. A conservator must cause the estate property to be designated so that any ownership appears in records maintained by a financial institution or party other than the conservator or protectee.



The Rights of the Ward

475.361 – Very important new provision

In every guardianship, the ward has the right to:

- ▶ 1. A guardian who acts in the best interests of the ward
- ▶ 2. A guardian who is reasonable accessible to the ward
- ▶ 3. Communicate freely and privately with family, friends, and other persons other than the guardian; except that, such right may be limited by the guardian for good cause but only as necessary to ensure the ward's condition, safety, habilitation, or sound therapeutic treatment
- ▶ 4. Individually or through the ward's representative or legal counsel, bring an action relating to the guardianship, including the right to file a petition alleging that the ward is being unjustly denied a right or privilege granted by this chapter, including the right to bring an action to modify or terminate the guardianship under the provisions of section 476.083



The Rights of the Ward (continued)

475.361

- ▶ **5. The least restrictive form of guardianship assistance, taking into consideration the ward's functional limitations, personal needs, and preferences**
- ▶ **6. Be restored to capacity at the earliest possible time**
- ▶ **7. Receive information from the court that describes the ward's rights, including rights the ward may seek by petitioning the court**
- ▶ **8. Participate in any health care decision-making process**



The Rights of the Ward (continued)

475.361

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



The Rights of the Ward (continued)

475.361

- ▶ **The appointment of a guardian is not a determination that the ward lacks testamentary capacity**
- ▶ **The appointment of a guardian revokes the powers of an agent under a previous health care power of attorney unless the court orders otherwise**