Title XXXI TRUSTS AND ESTATES OF DECEDENTS AND PERSONS UNDER DISABILITY

Chapter 475

Effective - 28 Aug 2018, 2 histories

475.075. Hearing on capacity or disability — notice — service — contents of petition, appointment of attorney — examination of respondent, when — burden of proof — rights of respondent — factors court to consider. — 1. Except as otherwise provided in section 475.062, when a petition for the appointment of a guardian ad litem, guardian, or conservator for any potential ward or protectee, who is then referred to as the respondent, is filed under this chapter on grounds other than minority, the court, if satisfied that there is good cause for the exercise of its authority, shall promptly set the petition for hearing.

2. The respondent shall be served in person with the following: A copy of the petition; a 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; and with a copy of the respondent's rights as set forth in subsections 9 and 10 of this section. The notice shall be signed by the judge or clerk of the court and served in person on the respondent a reasonable time before the date set for the hearing. A 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 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 financial resources, any person having the respondent's care and custody known to the petitioner, and any co-tenants or co-depositors with the respondent. Each person so listed shall be served in any manner permitted by section 472.100. 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.

3. If the public administrator is nominated as guardian or conservator or at any stage of the proceeding is being considered by the court to be nominated as guardian or conservator, the public administrator shall receive a copy of the petition from the petitioner or the court and any accompanying documents, including exhibits and medical opinions, receive written notice indicating the date and time of the proceeding, and have an opportunity to attend and be heard.

4. Upon the filing of a petition under the provisions of subsection 1 of this section or for the approval on behalf of the respondent of a transaction pursuant to section 475.092 or for the rendition of emergency medical treatment under the provisions of section 475.123, the court shall immediately appoint an attorney to represent the respondent in the proceeding. The attorney shall visit the respondent at least twenty-four hours prior to the hearing unless the court

finds good cause for waiving this requirement. 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 that the respondent 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.

5. If the court enters an order appointing an attorney for the respondent, it shall specify that the attorney shall have the right to obtain all medical and financial information of the respondent from medical care providers and financial institutions, and no medical care provider or financial institution shall be liable for damages or otherwise for the release of this information to the attorney appointed for the respondent. The court shall allow a reasonable attorney's fee for the services rendered, to be taxed as costs of the proceeding. Upon entry of appearance by private counsel on behalf of the respondent, the court may permit the court-appointed attorney to withdraw only if after a hearing the court finds cause to permit the withdrawal. The private counsel shall meet the requirements of the court-appointed attorney in representing the respondent as provided in subsection 4 of this section. The respondent's attorney shall not also serve as guardian ad litem or conservator ad litem for the respondent unless and until a judgment granting guardianship, conservatorship, limited guardianship, or limited conservatorship has been entered by the court. If the attorney for the respondent has filed or intends to file an appeal of such judgment, the attorney for the respondent shall not serve as guardian ad litem or conservator ad litem for the respondent until all proceedings in connection with such appeal have been finally resolved. The petitioner shall not nominate an attorney for the respondent.

6. The court may direct that the respondent be examined by a physician, licensed psychologist, or other appropriate professional if the other professional has experience or training in the alleged mental, physical, or cognitive impairment. The court-appointed physician, licensed psychologist, or other professional shall, prior to examination, explain to the respondent in simple language, the following:

(1) That the purpose of the examination is to produce evidence which may be used to determine whether the respondent is incapacitated, disabled, partially incapacitated, or partially disabled;

(2) That respondent has the right to remain silent;

(3) That anything respondent says may be used at the court hearing, and in making the determination of incapacity or disability.

7. The court-appointed physician, licensed psychologist, or other professional shall submit a report in writing to the court and to counsel for all parties. It shall not be a valid objection to the review of the report by the court or the attorneys for the parties that the court will be responsible for the ultimate determination of incapacity or partial incapacity. If other objections to the report are made by any party, the court may order a hearing for the limited purpose of

determining whether the court shall admit the report. The court may allow a reasonable fee for the services rendered by the physician, licensed psychologist, or other professional to be taxed as costs in the proceeding.

8. If prima facie proof of partial or complete incapacity or disability, with or without the court-ordered evaluation as provided in subsections 6 and 7 of this section, is made upon motion by any party or the court on its own motion, a physician, licensed psychologist, or other appropriate professional is competent and may be compelled by the court to testify as to information acquired from the respondent, despite otherwise applicable testimonial privileges. Evidence received under this subsection that would otherwise be privileged and confidential may not be used in any other civil action or criminal proceeding without the consent of the holder of the privilege. Any resulting report shall be shared with the respondent and counsel for all parties but shall not be used in any other civil action or criminal proceeding without the consent of the holder of the privilege.

9. The petitioner has the burden of proving incapacity, partial incapacity, disability, or partial disability by clear and convincing evidence.

10. The respondent shall have the following rights in addition to those elsewhere specified and shall be advised of these rights by the attorney for the respondent:

(1) The right to be represented by an attorney;

(2) The right to have a jury trial;

(3) The right to present evidence in the respondent's behalf;

(4) The right to cross-examine witnesses who testify against the respondent;

(5) The right to remain silent;

(6) The right to have the hearing opened or closed to the public as the respondent elects;

(7) The right to a hearing conducted in accordance with the rules of evidence in civil proceedings, except as modified by this chapter;

(8) The right to be present at the hearing;

(9) The right to appeal the court's decision.

11. If the court finds that the respondent possesses capacity to manage the respondent's essential requirements for food, clothing, shelter, safety, and other care or that the respondent possesses the ability to manage the respondent's financial resources, the court shall deny the petition. On the other hand, if the court finds that the capacity of the respondent to receive and evaluate information or to communicate decisions is impaired to such an extent as to render the respondent incapable of managing some or all of the respondent's essential requirements for food, clothing, shelter, safety or other care so that serious physical injury, illness, or disease is likely to occur, or that the capacity of the respondent to receive and evaluate information or to communicate decisions is impaired to such an extent so as to render the respondent unable to

manage some or all of the respondent's financial resources, the court shall appoint a guardian or limited guardian, a conservator or limited conservator, or both in combination.

12. If the court finds the respondent to be in some degree incapacitated or disabled, or both, the court, in determining the degree of supervision necessary, shall apply the least restrictive alternative principle as defined in this chapter and shall not restrict the respondent's personal liberty or the respondent's freedom to manage the respondent's financial resources to any greater extent than is necessary to protect the respondent's person and the respondent's financial resources. The limitations imposed upon the authority of the guardian or conservator as set forth in the findings of the court shall be stated in the letters of the guardian or conservator and shall be set forth in the notice of first publication of letters of conservatorship granted.

13. Before appointing a guardian or conservator, the court shall 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 including, but not limited to, the following:

(1) Evidence that the respondent has appointed an attorney-in-fact in a durable power of attorney executed by the respondent before the petition was filed;

(2) The management of the beneficial interests of the respondent in a trust by a trustee;

(3) Evidence that a representative payee has been appointed to manage the respondent's public benefits;

(4) Supported decision-making agreements or the provision of protective or supportive services or arrangements provided by individuals or public or private services or agencies;

(5) The use of appropriate services or assistive technology;

(6) The appointment of a temporary emergency guardian ad litem or conservator ad litem under subsection 15 of this section; or

(7) The appointment of a limited guardian or conservator.

14. The court shall make and recite in its order detailed findings of fact stating:

(1) The extent of the respondent's physical, mental, and cognitive incapacity to manage essential requirements for food, clothing, shelter, safety, or other care;

(2) The extent of the respondent's physical, mental, and cognitive incapacity to manage the respondent's financial resources;

(3) Whether the respondent requires placement in a supervised living situation and, if so, the degree of supervision needed;

(4) Whether the respondent's financial resources require supervision and, if so, the nature and extent of supervision needed;

(5) Whether the respondent retains the right to vote;

(6) Whether the respondent is permitted to drive a motor vehicle if the respondent can pass the required driving test; and

(7) Whether the respondent retains the right to marry.

15. If it is alleged in a petition that an alleged incapacitated or disabled respondent has no guardian or conservator and an emergency exists that presents a substantial risk that serious physical harm will occur to the respondent's person or irreparable damage will occur to the respondent's property because of the respondent's failure or inability to provide for the respondent's essential human needs or to protect the respondent's property, the court may, with notice to such person's attorney, as provided in subsection 4 of this section, and service of notice upon such person as provided in subsection 2 of this section, and, with or without notice to other persons interested in the proceeding, after hearing, appoint an emergency guardian ad litem or conservator ad litem for a specified period not to exceed ninety days and for specified purposes. Except for good cause shown, the court shall hold a hearing on petitions filed under this section within five business days of the filing of the petition. Orders appointing the guardian or conservator ad litem may be modified upon motion and hearing. Only after a hearing and a showing of continuing emergency need, the court may order the extension of the appointment of an emergency guardian ad litem or conservator ad litem from time to time, not to exceed ninety days each. A guardian ad litem or conservator ad litem may be removed at any time and shall make any report the court requires. Proceedings under this subsection shall not be employed as alternative to proceedings for the involuntary detention and treatment of a mentally ill person under the provisions of chapter 632. If no petition for guardianship, conservatorship, limited guardianship, or limited conservatorship has been filed within the first ninety days following the granting of emergency authority under this section, the court may terminate the authority granted under the emergency letters upon motion of the attorney for the respondent and a finding that doing so would not be manifestly contrary to the respondent's interest.

(RSMo 1939 §§ 447, 449, A.L. 1955 p. 385 § 297, A.L. 1983 S.B. 44 & 45, A.L. 1985 S.B. 35, et al., A.L. 2018 S.B. 806)

Prior revisions: 1929 §§ 448, 450; 1919 §§ 444, 446; 1909 §§ 474, 476

(1986) Waiver of rights under this section must be affirmative and on the record. In re Link, 713 S.W.2d 487 (Mo. banc).

(1996) A court may not circumvent the right to a jury trial by entering a judgment notwithstanding the verdict against the alleged incompetent. Matter of Korman, 913 S.W.2d 416 (Mo.App.E.D.).

---- end of effective 28 Aug 2018 ----

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	Effective	End
475.075	8/28/2018	
475.075	8/28/1985	8/28/2018

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