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Trusts and Estates

As Time Goes By: Options for Distribution of Assets after One Year from Date of Death

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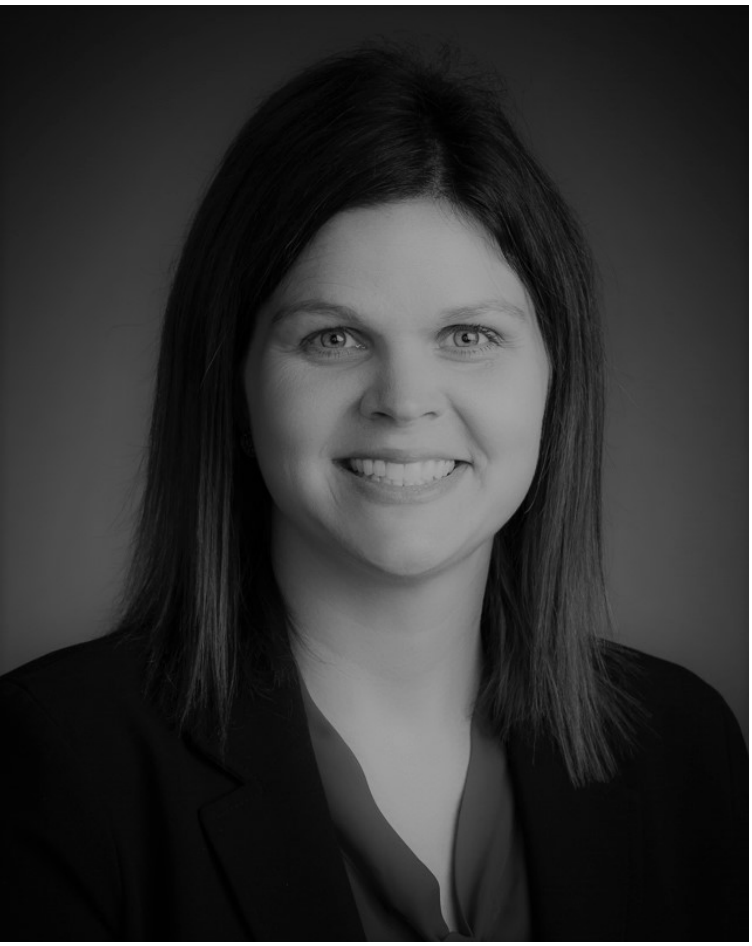
Due Process and Best Interests: The Challenges of Guardianship Cases

by Heather Hall and Josh Rose



The primary purpose of guardianship is to protect the well-being of individuals who are unable to care for themselves.[1] As in most states, the appointment of a guardian under Missouri law is statutory,[2] and authorized by the state's power of *parens patriae*.[3] The power of *parens patriae* is historically understood as a state's power to protect citizens who cannot protect themselves.[4] To this end, since at least 1939, Missouri has enacted statutory provisions for the appointment of guardians for individuals who are unable to meet their essential requirements for food, clothing, shelter, and safety.[5]

Over time, however, a predisposition toward the beneficial aspects of guardianship has overshadowed the reality that guardianship entails a loss of fundamental liberties.[6] Among the fundamental liberties implicated in a guardianship proceeding is the right to own and enjoy property;[7] to personal dignity and autonomy;[8] to speech and free expression;[9] and to travel and go unimpeded about one's ordinary affairs.[10] With limited exception, decisions regarding the support, care, education, health, and welfare of a ward are entrusted to the guardian.[11]

In 1986, the Missouri Supreme Court recognized that the predisposition toward the beneficial aspects of guardianship has caused an atmosphere of procedural informality in guardianship proceedings that is inconsistent with the right to due process. Indeed, the Missouri Supreme Court has compared the rights implicated in a guardianship proceeding to those of defendants in criminal proceedings, noting that, under a "façade of beneficence," the incapacitated are deprived of the same freedoms without the same strict procedural safeguards.[12]

The tension between an individual's "best interest" and their right to due process is highest when an individual

is incapacitated by reason of mental illness. The diagnosis and treatment of mental illness is complex, and symptoms affect all aspects of the individual in various degrees, at various times, and in various ways.[13] Capacity to manage essential requirements for food, clothing, shelter, and safety may depend on adherence to a prescribed treatment plan, access to mental health resources, or other circumstances. An atmosphere of procedural informality is not suitable in these difficult cases.

To be sure, guardianship is not always inappropriate, and our courts do well to uphold due process when fundamental liberties are at risk. Nevertheless, as the Missouri Supreme Court did in 1986, this article re-examines the statutory and procedural safeguards under Missouri law to assist you in navigating your next guardianship case.

Right to be Represented by an Attorney

A respondent's rights begin with the right to counsel. When a petition is filed, courts are directed to immediately appoint an attorney to represent the respondent and actively investigate the factual background of the petition.[14] The role of court-appointed counsel, however, is often misunderstood.

Commonly, the role of court-appointed counsel is confused with the role of guardian ad litem. The duty of a guardian ad litem is to act in the ward's best interest, rather than advocate for their wishes.[15] In so doing, a guardian ad litem substitutes their judgment for that of the ward and proceeds independently of their will.[16]

The duty of court-appointed counsel, on the other hand, is to advocate for the respondent's wishes, no matter the wisdom of their choice, through submission of all relevant arguments and defenses.[17] Court-appointed counsel are not to make an independent judgment of capacity, determine the respondent's best interest, and thereafter report their conclusions to the court.[18] If the respondent opposes the petition, counsel must oppose it.[19]

Of course, court-appointed counsel must initially determine the respondent's ability to advance their interests,[20] and if the respondent is capable, to obtain from the respondent all possible aid.[21] Even if the respondent is incapable, however, the duty of court-appointed counsel remains to safeguard and advance the respondent's interests under the circumstances.[22]

With anything less, the right to counsel becomes a mere formality, and does not meet constitutional and statutory guarantees of due process and representation.[23]

Right to Be Present and Participate

The right to be present and participate in hearings is a substantial right, and coincides with a respondent's right to present evidence, to cross-examine witnesses who testify against them, and the right to trial by jury. Waiver of the right to be present and participate must be made on the record and indicate whether the decision to waive the right is the respondent's own choice or a product of their counsel's best judgment.[24] The same standard applies to the right to trial by jury.[25]

A difficulty arises when a respondent is alleged to be incapacitated by reason of mental illness. The duty falls on the court to determine whether the respondent is capable of a knowing and intelligent waiver of their rights.[26] That the respondent ultimately chooses differently than court-appointed counsel might advise does not indicate the respondent is incapable of a knowing and intelligent waiver.[27] Indeed, respondents are equally entitled to potentially unwise litigation

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decisions as litigants whose competency is not at issue.[28]

Rules of Evidence

Another common misconception is that the rules of evidence in civil proceedings do not apply in guardianship proceedings. By statute, however, respondents are afforded the right to a hearing conducted in accordance with the rules of evidence in civil proceedings (except as modified by Section 475.075.8, RSMo.).[29]

Historically, our courts have applied the ordinary rules of evidence in mental health proceedings.[30] The common law rule regarding hearsay evidence, for example, is no less applicable to guardianship proceedings than civil proceedings.[31] Equally applicable is the requirement that evidence be relevant and material, as the determination of capacity is based on the respondent's condition at the time of the hearing.[32] Accordingly, evidence should be material to the respondent's capacity at the time of trial, with evidence more remote in time tested for relevancy to the court's determination.

These principles are particularly important given the nature of mental illness, where historical periods of incapacity may demonstrate a need for intervention but may not otherwise assist the court in determining capacity at a single point in time. A respondent may show insight into their illness, accept treatment when necessary, and therefore qualify for a less restrictive alternative to guardianship. The seemingly permanent nature of a finding of incapacity may not fit the needs of these individual cases.

Right to Less Restrictive Alternatives

Before appointing a guardian, the court must first consider whether the respondent's needs may be met by a less restrictive alternative, and whether the respondent's needs may be met without appointment of a guardian at all.[33]

"Least restrictive alternative" is defined as a course of action or alternative that allows the respondent to live, learn, and work with minimum restrictions on their person, considering their physical and mental condition.[34] "Least restrictive alternative" also means choosing the decision or approach that places the least possible restriction on the respondent's personal liberty and exercise of rights, and promotes the greatest possible inclusion of the person into their community.[35]

In practice, application of the "least restrictive alternative" principle may include a finding of total or partial incapacity, and in conjunction therewith, an addition or subtraction of the rights and privileges to which the respondent should be entitled under the evidence.[36]

To continue the example of the mentally ill: the "least restrictive principle" could require that a guardian be appointed to make health care and placement decisions, to ensure the symptoms of mental illness are appropriately managed over time; but also require that the respondent retain certain other rights and liberties, including the right to drive, to a spending allowance, and to enter into basic contracts (employment applications, gym memberships, cellphone plans, etc.).

While not characterized as such, Missouri law is clear that a finding of total incapacity is a last resort, and that alternatives to guardianship should be part of the relevant defenses and arguments made by court-appointed counsel.

Right to Remain Silent

A respondent's statutory right to remain silent is supported by the Fifth Amendment of the United States Constitution.[37] The right to remain silent extends to pre-trial discovery by deposition, interrogatories, request for production, and requests for admission.[38]

The right to remain silent also extends to court-ordered mental examinations.[39] Although the court may order that the respondent be examined by a physician, licensed psychologist, or other professional, the respondent must first be advised that (1) the purpose of the examination is to produce evidence which may be used to determine their capacity; (2) they have the right to remain silent; and (3) anything they say may be used in court.[40]

The right to remain silent does not bar testimony based on a review of medical records or other information acquired from the respondent.[41] Often, however, the testimony of a physician or medical professional is based on the mental examination alone because the respondent's physician will not testify to capacity, medical records are unavailable, or the respondent has no documented history of incapacity. In such an instance, a failure to advise the respondent of their

rights prior to examination would cause the results of the examination to be inadmissible at trial.

Use of Medical Evidence

A respondent retains a physician-patient privilege to confidential medical information until prima facie proof of incapacity is established.[42] Commonly, prima facie proof of incapacity is attempted through a Motion for Mental Examination at the onset of a guardianship case, which if sustained, not only permits [43] a physician or other medical professional to examine the respondent, but may also permit the discovery of other medical records and testimony despite otherwise applicable physician-patient privileges. [44]

But medical evidence is most often introduced through affidavit, filed contemporaneously with the Petition for Appointment of Guardian. Despite widespread use, however, the concept of a "medical affidavit" or "physician interrogatory form" has no basis in Missouri law generally, let alone Chapter 475. Medical affidavits and physician interrogatories are a concept of local practice and process to facilitate the use of medical evidence at trial, and are therefore susceptible to the same atmosphere of procedural informality identified in this article.

Often, court-appointed counsel will stipulate to the admission of a medical affidavit to save the medical professional from appearing in court to testify, which can be burdensome and expensive for all parties. Stipulation to the admission of medical affidavits is so commonplace, in fact, that a refusal of court-appointed counsel to so stipulate can be viewed as obstructive or unreasonable.

Frequently overlooked, however, is the effect of stipulations on the respondent's other substantial rights. By stipulating to the admission of a medical affidavit, the respondent forfeits the right to cross-examine the witness who will testify against them and risks the admission of certain other statements in the affidavit that, if made in court, would otherwise be objectionable (*i.e.*, hearsay, foundation). A stipulation also has the effect of waiving the respondent's physician-patient privilege, assuming prima facie proof of incapacity has not otherwise been established. The medical affidavit itself is not prima facie proof of incapacity until offered and admitted into evidence.[45] Indeed, absent stipulation, the "medical affidavit" or "physician interrogatory form" is not evidence at all.

To be clear, there are acceptable reasons for court-appointed counsel to stipulate to the admission of a medical affidavit. A respondent may expressly authorize court-appointed counsel to so stipulate, for example, following a discussion of the right to cross-examination and physician-patient privilege, or court-appointed counsel may so stipulate when capacity is not in dispute.

Conclusion

In a trust and estate practice, guardianship cases are among the most difficult. Given the fundamental liberties at stake, it is perhaps for good reason that a Petition for Appointment of Guardian can be burdensome to file and prosecute. The procedural informality addressed in this article makes guardianship less burdensome for petitioners and their counsel but may come at the detriment to respondents and their right to due process. A renewed attention to statutory and procedural safeguards is necessary to protect this careful balance.

[1] *In re Link*, 713 S.W.2d 487, 493 (Mo. banc 1986).
[2] *In re Myles*, 273 S.W.3d 83, 85 (Mo.App. E.D. 2008).
[3] *Addington v. Texas,* 441 U.S. 418, 426 (1979).
[4] *In re Link*, *supra* note 1, at 493.
[5] *In re Myles*, *supra* note 2 at 85.
[6] *Id.*
[7] *Lynch v. Household Finance Corp*., 405 U.S. 538, 544 (1972).
[8] *Lawrence v. Texas*, 539 U.S. 558, 592 (2003).
[9] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
[10] *Kent v. Dulles*, 357 U.S. 116, 125 (1958).
[11] § 475.120.3, RSMo (2021).
[12] *In re Link*, *supra* note 1, at 493.
[13] Matthew J. Edlund, *Psychiatric Diagnosis is Difficult and so is Tteatment* Psychology Today (2018), https://www.psychologytoday.com/us/blog/the-power-rest/201807/psychiatric-diagnosis-is-difficult-and-so-is-treatment (last visited Feb 8, 2022); see also MENTAL ILLNESS, MAYO CLINIC (2019), https://www.mayoclinic.org/diseases-conditions/mental-illness/diagnosis-treatment/drc-20374974 (last visited Feb 8, 2022).
[14] § 475.075.4, RSMo (2018); *In re Link, supra* note 1, at 497.

[15] *Matter of O'Reilly,* No. SD36874 (Mo.App. S.D. January 18, 2022), at p.4 n.7.
[16] *Id.*
[17] *Id.*
[18] *In re Link, supra* note 1, at 496.
[19] Missouri Supreme Court Rule 4-1.3, Comment [1].
[20] *In re Link*, *supra* note 1, at 497; *In re Myles*, *supra* note 2, at 85
[21] § 475.075.4, RSMo.
[22] § 475.075.4, RSMo.
[23] *In re Link*, *supra* note 1, at 496.
[24] *In re Myles*, *supra* note 2, at 86.
[25] *Couch v. Couch*, 824 S.W.2d 65, 72 (Mo.App. W.D. 1991) (Fenner, J., dissenting); *Matter of Conservatorship Estate of Moehlenpah*, 763 S.W.2d 249, 259 (Mo. App. E.D. 1988).
[26] *Flair v. Campbell*, 44 S.W.3d 444, 454 (Mo.App. W.D. 2001); *Moehlenpah, supra* note 25, at 259.
[27] *In re Link*, *supra* note 1, at 497 n.9.
[28] *Id.*
[29] § 475.075.10(7), RSMo.
[30] *In re Delany*, 226 S.W.2d 366, 375 (Mo.App. St.L.D. 1950), *superseded on other grounds by statute.*
[31] *Id.*
[32] *Matter of Mitchell*, 914 S.W.2d 844, 847 (Mo.App. S.D. 1996).
[33] § 475.075.13, RSMo.
[34] § 475.010(13), RSMo (2018).
[35] *Id.*
[36] *Matter of Nelson*, 891 S.W.2d 181, 187 (Mo.App. W.D. 1995).
[37] *State ex rel. Simanek v. Berry*, 597 S.W.2d 718, 720 (Mo.App. W.D. 1980).
[38] 5C Missouri Practice: Probate Law & Practice § 1950 ("Hearing rights of alleged incapacitated person—Right to remain silent") (3d ed. 1999).
[39] § 475.075.6(2), RSMo.
[40] § 475.075.6, RSMo.
[41] *In re Estate of Moormann*, 709 S.W.2d 160, 161 (Mo.App. E.D. 1986).
[42] S*ee State ex rel. Dixon Oaks Health Ctr., Inc. v. Long,* 929 S.W.2d 226 (Mo.App. S.D. 1996).
[43] An Order for Mental Examination does not require the respondent to undergo a mental examination. The respondent may still exercise his or her right to remain silent pursuant to § 475.075.10(5).
[44] § 475.075.8.
[45] *Matter of Crocker*, 629 S.W.3d 846, 852 n.7 (Mo.App. E.D. 2021).