

Guardianship & Conservatorship

GUARDIANSHIP 101

WHAT IS IT? WHEN IS IT APPROPRIATE? WHAT IS THE PROCESS?



Objectives

- Review the basic laws governing Guardianship & Conservatorship
- Understand the legal process
- Recognize when Guardianship and Conservatorship is necessary

Governed by Chapter 475 of
Missouri Law

Amended August 2018

Focus on Adults (over 18 years)





Guardianship and Conservatorship

What is Guardianship?

A process where a person who has been appointed by a court to have the **care and custody** of a minor **or** an adult person who has been legally determined to be incapacitated

The court-appointed responsibility of a person to make personal decisions on behalf of someone who has been deemed incapacitated by the court



Healthcare,
hospitalizations,
living arrangements

What is Conservatorship?

Process where a person is appointed by the court to manage **the property** of a minor or of an adult person who has been legally determined to be disabled

Authority of a person to make decisions regarding the finances or estate of a person



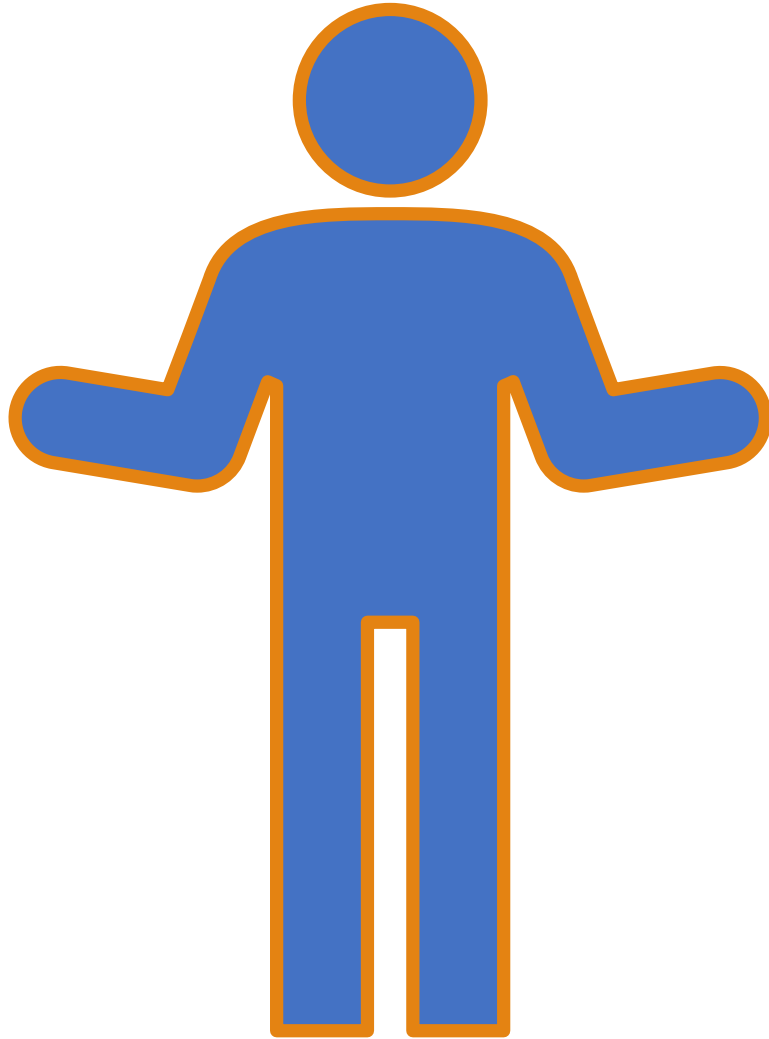
Income, Bill Paying, Investments

Important Terms - Defined

INCAPACITATED

DISABLED





Incapacitated

A person who is unable

by reason of any physical or mental condition

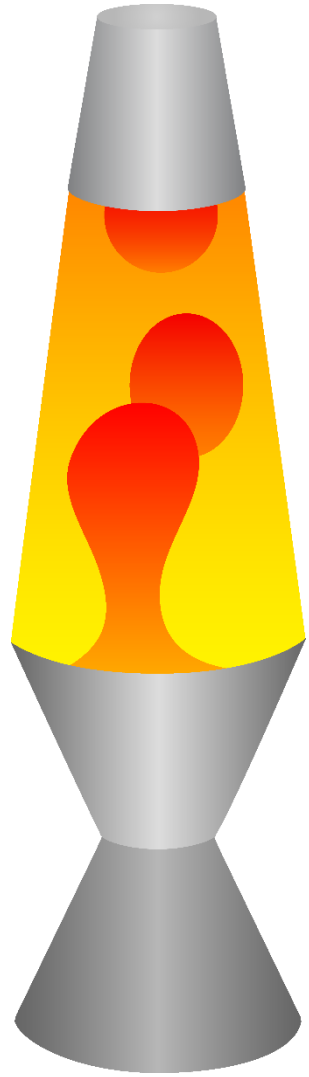
to receive and evaluate information or

to communicate decisions to such an extent

that serious harm could occur

Disabled

A person who is unable
by reason of any physical or mental condition and
who cannot manage their financial resources
such that serious harm will occur



Degrees of Disability

IT'S NO LONGER ALL OR NOTHING

Partial Disability

COURT FINDS A PERSON IS ONLY PARTIALLY
INCAPACITATED AND THEREFORE NEEDS A LIMITED
CONSERVATORSHIP AND/OR GUARDIANSHIP

Limited Guardianship

Person can drive

Person can get married

Person can vote

A Guardian's decisions can be limited primarily to medical and placement

Why do we have
to do this?

To maintain a level of
independence and self-
determination **appropriate to
the person's functional capacity**

Minimize risk of harm to the
person

Situations in which Guardianship may be indicated



Medical Crisis



Self Neglect



Abuse or Neglect



Person must lack the ability to fully understand the situation which causes them to be vulnerable and at risk of harm

Common Situations

Child with disabilities – reaching age of majority

Person with a disability – sometimes as a result of a trauma with no Power of Attorney documents

Person with Power of Attorney documents where co-agents are named, and the co-agents disagree

Person with severe mental illness or physical limitations that meet the legal standard



The Process

Who are the Parties?



THE WARD

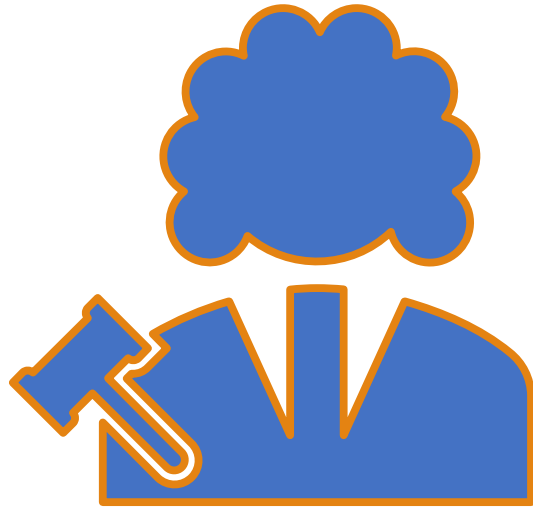


THE PROPOSED
INCAPACITATED OR DISABLED
PERSON OR THE PROTECTEE



THE RESPONDENT

Who Else Is Involved?



Attorneys

- ❖ Court appointed attorney
- ❖ Guardian ad litem
- ❖ Private counsel

Probate Judge or Probate Court Commissioner

Petitioner

Possibly Cross - Petitioner

A Petition is Filed

Who Can File a Petition?

**Process begins with
the filing of a Petition
for Appointment of a
Guardian and/or
Conservator**

**Any person can file a
petition**

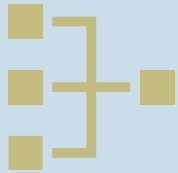
Must have an attorney

**The Department of
Health and Senior
Services can file a
petition for
guardianship**

**Does not need to be a
relative or even an
interested party**

**Can be filed in an
emergency**

Where can you File a Petition?



Governed by 475.035



Where the court has jurisdiction over the person



Filed in the county in the state where:

Domiciled

If no domicile, the county where the person may be found

Domicile - where a person intends to reside or

Where person has property

Changes in the Law about Notice

Notice

Notice is required by law

Must notify persons serving as guardian or conservator, anyone with fiduciary power, (serving as power of attorney) any person having the care and custody of the person

Closest relatives, person nominated to be the guardian and conservator, co-tenants and co-depositors



Missouri Law requires the proposed ward (the alleged incapacitated person) receives personal notice

Also referred to as the Respondent
Hand delivered to the alleged incapacitated person



This is purely statutory and must be followed for the court to have the power to exercise its jurisdiction



All other interested parties by mail

Personal Service

Respondent's Rights

Right to have a jury trial

- **Jury would decide the issue of disability and incapacity only, but the court determines who is to serve as the guardian and/or conservator**

Right to remain silent

- **Respondent cannot be made to testify**

Respondent's Rights

Right to have the hearing open or closed to the public

Right to be present at the hearing

Right to legal representation

- **A court-appointed attorney**
- **The right to employ a private attorney**
- **Appointed attorney must meet with the Respondent before the hearing**

Respondent's Rights

Right to present evidence on his/her behalf

Right to cross-examine witnesses who testify against the Protectee

Proving Incapacity

Levels of incapacity exist

Partial incapacity

Partial disability



Burden of proving incapacity is on the Petitioner

Examination by
physician and
interrogatories

Extremely difficult
to prove without
medical testimony

Courts rely
heavily on the
Doctor's report

Interrogatories / Affidavit

Interrogatories or Medical Affidavit

Physician

Psychologist

Other professional directed by the court

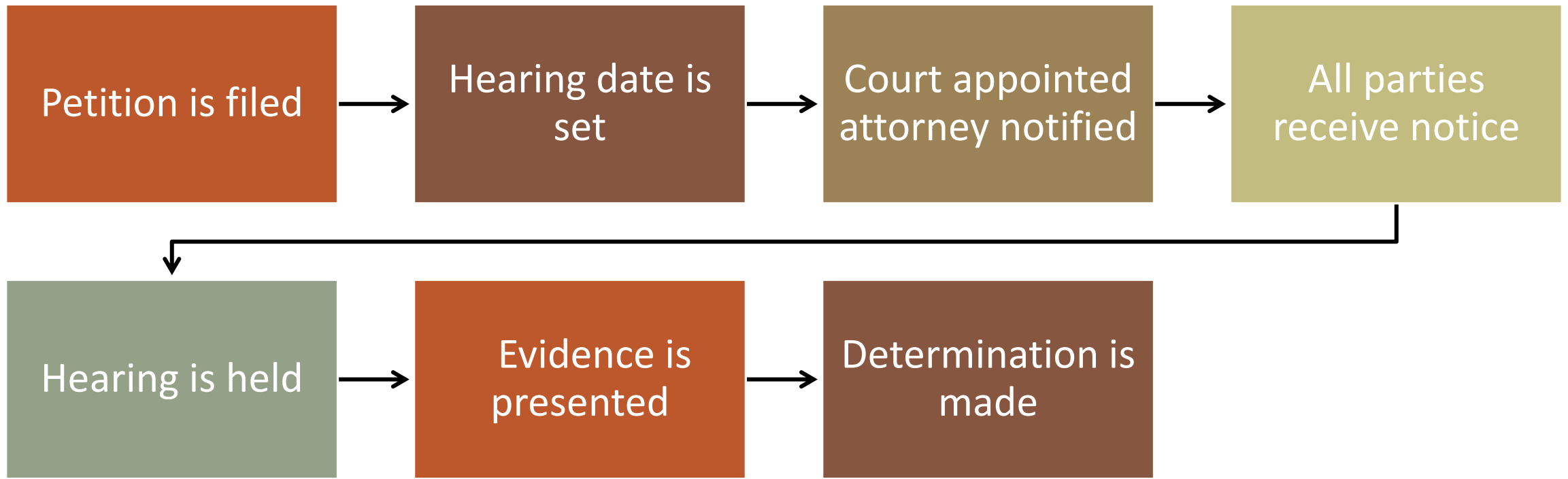
Specialized training in the alleged mental, physical or cognitive impairment of the respondent



Level of Proof Needed

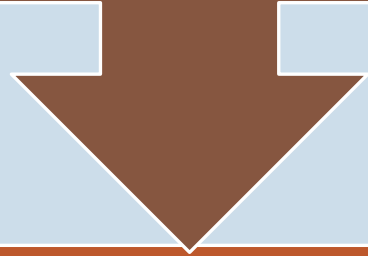
Must prove by clear and convincing evidence

- ❖ Clearly convinces the fact finder
- ❖ Evidence that ‘tilts the scales’ in the affirmative when weighed against the opposition
- ❖ Fact finder’s mind is left with the abiding conviction that the evidence is true



The Court Process

Sole discretion of the trial court



Court considers the suitability of appointing the following persons:

Court considers the person nominated by the Respondent *if the person can make and communicate a reasonable choice at the time*

Person nominated in a DPOA, within 5 years of the hearing if the person could make and communicate a choice

Spouse, parents, children, siblings or other close relatives

Who May Be Appointed

Preferences in the Law



§475.050 governs and is hierarchal



Preferential treatment to the Attorney-in-Fact named in the Power of Attorney document



Within the sound discretion of the trial court



Preference for a relative, if otherwise suitable over a stranger



Close, personal relationship, love, concern are important

Changes in the law regarding who can be appointed

CERTAIN PERSONS MUST SUBMIT TO EXTENSIVE SCREENING

Extensive Screening required

For a proposed guardian or conservator who is **someone other than a spouse, parent, child or sibling of the proposed ward:**

- Mandatory background check – must include the following Missouri departments:
 - Mental Health
 - Social Services
 - Department of Health and Senior Services
 - Abuse and Neglect Registries for adults and children
 - Missouri Criminal Record
 - Sexual Offender Registry
 - Credit History

Issues related to the additional screening

- May cause delays in filing of Petition – must be submitted 10 days prior to hearing but some courts are requiring it at time of filing as a practical matter
- Extensive information is needed on the credit history
- At the expense of the individual applying
- May make it more difficult for non-immediate family members to be appointed

Bond Required

- A bond is required for persons requesting to be appointed as the Conservator for a disabled person's estate
- Must have good credit
- Cost of bond is paid by the disabled person's estate

Changes in the law about Co-Guardianship

SPECIFIC REASONS WHY CO-GUARDIANS ARE
NECESSARY

Role of the Legal Guardian

Must always act in the best interests of the Protectee

Must act and make decisions re: Protectee's care, treatment, shelter, education, support and maintenance

Assure resides in the least restrictive environment

What
does this
mean?

Least Restrictive Environment/Alternative

Only impose on the personal liberties such restraint necessary to prevent the person from injuring himself/herself or others *and*

Provide the person with the care and treatment appropriate for him/her considering his physical, mental condition and financial means

The Court's Findings

Court makes a finding as to whether incapacity or disability exists

If so, the extent of incapacity or disability

Whether a supervised living situation is needed

High degree of supervision required by the courts

Whether supervision of finances is needed and to what extent

Adjudication

Presumed to be competent

Only way a person is deemed incompetent

Review

Limited Guardianship

If after a finding of partial incapacity, the court shall appoint a “limited guardian”

- Commensurate with their ability to care for herself/himself

May be limited to:

- Medical decisions
- Insurance coverage

Practical Considerations of Appointing a Guardian/Conservator

Once a person has been appointed as a guardian, it is difficult to remove them

Once a guardianship has been established, restoration may also be difficult

Termination of the Guardianship/Conservatorship



For the minor

Terminates when the minor reaches 18

For the incapacitated or disabled adult

- Upon adjudication that an incapacitated or disabled person has been restored
- Upon revocation of Letters
- Upon acceptance of the court of the resignation
- Upon the death of the incapacitated or disabled person
- Upon expiration of an Order appointing a Guardian/Conservator ad litem – unless extended
- Upon termination by court order
- Upon filing a joint petition

Restoration of Capacity

Removal of a Guardian

Causes for Removal

- Mental incapacity
- Convicted of a felony or other “infamous” crime
- Becomes a habitual drunkard
- Or in any manner incapable or unsuitable to execute the trust placed in him
- Fails to do his duties
- Commits waste or mismanagement
- Fails to answer a citation, make a settlement, file a report
- Upon the court’s own motion – after notice to the parties

Resignation of a Guardian and/or Conservator

APPOINTMENT OF A SUCCESSOR GUARDIAN AND/OR
CONSERVATOR

Authority of the Guardian

Guardian must always act in the best interests of the protectee

“Guards the person”

- Must act and make decisions about the Protectee’s care
- Housing
- Treatment
- Education

Authority over all personal decisions

Prepares annual report

Authority of the Conservator

Responsible to

- Protect
- Preserve and
- Manage the Protectee's money

“Conserves the money”

Conservator Duties



A Conservator ...

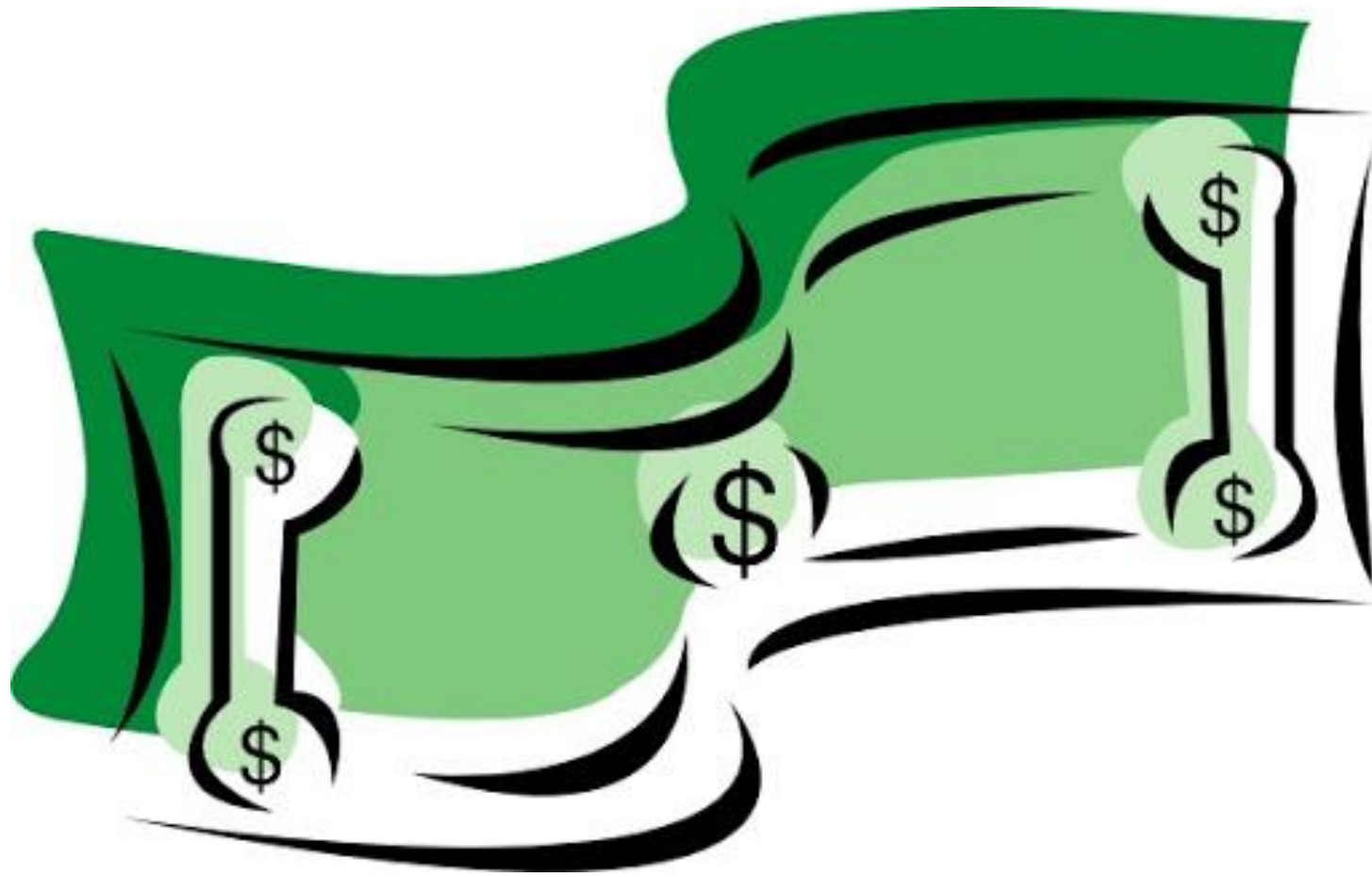
Is Bonded

Not personally liable on the contract when properly entered in his/her capacity as a conservator

Must disclose his/her authority

Total control of the Protectee's finances

Court approval for expenses



What does
it cost?

Expenses and Fees

Court costs – filing expenses

Costs of background check

Attorney Fees

Fees for Service of Process

Fee for a Bond – if there is a conservatorship

Possibly other expenses – depending on the situation

What can you do?

How can you advocate?

Understanding the process – is helpful to your clients

Understanding that this is really a last resort

Encourage your clients with capacity to plan for the possibility of incapacity with the use of a Power of Attorney for Healthcare and Power of Attorney for Finances

Refer them to a knowledgeable, experienced attorney

Getting to the point of pursuing guardianship can be a lengthy and emotional process – it is important to have guidance and counsel through the process



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THANK YOU!