GUARDIANS:
INCOMPETENTS:
PROBATE COURTS:

(1) Upon the death, removal or resignation of a guardian of an incompetent it is not necessary to have a second application and a rehearing on the question of competency in order to appoint a successor guardian. (2) Confinement in a state mental hospital does not constitute an adjudication of incompetency which will authorize the appointment of a guardian.

Opinion No. 271

October 18, 1962

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Honorable Larry M. Woods
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Woods:

This is in response to your letter to this office of July 3, 1962, requesting our opinion on the following matters:

> "Reference is made to Section 475.115, Revised Statutes of Missouri 1959. The first portion of this section appears to give the court authority to appoint a successor guardian in the same manner as in the case of a deceased executor or administrator. There has been some contention that the latter part of this section requires a proceeding which would include everything done originally, even though the incompetent is still incompetent so far as the record shows and all that is actually needed is the appointment of a guardian to succeed a deceased guardian. My question is, is it necessary for the court to hold a proceeding to include everything which was originally done or may the court simply appoint a successor guardian without further proceedings?
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> "Also, the Superintendent of State Hospital Number 1 requests appointment of a guardian for a patient who has been an inmate for more than fifty years. The guardian is to make application for welfare payments to apply on the expenses

> of nursing home care, where the patient is to be transferred. Reference is made to Section 208.180, in the latter part of Paragraph 1, as to waiver of expenses. My question is, may the court make such an appointment for such purpose directly upon the request of the Superintendent, or should there be a hearing, counsel appointed, and all other proceedings that are otherwise necessary?"

In answer to your first question, prior to 1955, a sanity hearing was initiated by filing a verified information in writing with the probate court. If satisfied there was good cause for the exercise of its jurisdiction, the court would cause the facts to be inquired into by a jury, or, if no demand for a jury was made, by the court sitting as a jury. Section 458.020 RSMo 1949. If an inquiry or hearing was held, written notification to the alleged incompetent was required, and if no licensed attorney appeared the court was required to appoint one to safeguard the rights of the alleged incompetent. Section 458.060 RSMo 1949. If the subject of the inquiry was found to be incompetent, a guardian was then appointed. Section 458.070 RSMo 1949. Under these statutes, the adjudication of incompetency and the appointment of a guardian were entirely separate acts. If the appointment of a successor guardian became necessary, the court was authorized to do so by Section 458.520 RSMo 1949, which read as follows:

> "Whenever any such guardian shall die, resign, or be removed from his trust, the probate courts shall have the same authority as they have in like cases over executors and administrators and their sureties."

In such cases, the probate court would appoint a successor guardian in ex parte proceedings without the necessity of any of the procedure required for an adjudication of incompetency. In Re Hoerman's Estate, (1952) Mo., 247 S.W.2d 762; State ex rel. and to the use of Beardon v. American Surety Co. of New York, (1937) 231 Mo.App. 491, 104 S.W.2d 755. These cases did not hold directly that the adjudication of incompetency and the appointment of a guardian were separate and distinct acts, nor that a successor guardian could be appointed in ex parte proceedings without the necessity of further action by the court. We can find no Missouri cases directly so holding. However, this procedure was followed

in these cases and no question was raised as to the propriety of the courts' action.

This procedure was changed slightly by the enactment of the new Probate Code in 1955. A sanity hearing is now initiated by an application for guardianship. Section 475.060 RSMo 1949. This application now must allege not only the statutory grounds necessary for an adjudication of incompetency (Subsection 9), but also certain information regarding the proposed guardian (Subsections 8, 10).

The requirements for a hearing on the question of competency, after due notice to the alleged incompetent, and the subsequent appointment of a guardian, if the subject of the inquiry is found to be incompetent, were not changed materially and are found in Sections 475.075 and 475.090 RSMo 1959. Section 458.520 RSMo 1949, now Section 475.115 RSMo 1959, regarding the appointment of a successor guardian, was changed very slightly, and the clause "and may appoint another guardian in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian" was added. These changes,purportedly were derived from the Model Probate Code, and Sections 475.060 and 475.115 are the same as Sections 204 and 217 of the Model Code.

The question is, does the addition of this clause in Section 475.115, taken together with the change embodied in Section 475.060, change the previous law and require another application, a hearing thereon after proper notice, and a readjudication of incompetency before the appointment of a successor guardian may be made.

It is our opinion it does not. The adjudication of incompetency and the appointment of a guardian are still separate acts. A petition must be filed alleging facts which, if true, require the appointment of a guardian. Section 475.060. After due notice a hearing is held at which the rights of the alleged incompetent are fully protected. Section 475.075. If the subject of the inquiry is found to be incompetent, then a guardian is appointed. This procedure is in essence no different from that followed before the adoption of the new Probate Code.

To find the meaning of a statute, it must be presumed that the Legislature intended a reasonable construction which will permit of beneficial results. Darlington Lumber Co. v. Missouri Pacific R. Co., (1909) 216 Mo. 658, 116 S.W. 530; Memmel v. Thomas, (1944) Mo., 181 S.W.2d 168. Section 475.360 RSMo 1959 provides for an

inquiry and hearing in the event of a recovery of competency of an individual previously adjudged to be incompetent. It would not be reasonable to believe the Legislature intended the amendment in Section 475.115 to require a readjudication of competency which was already fully covered by another statute. Construing Section 475.115 to require a new application, an additional notice and hearing, and a readjudication of incompetency for which no need is shown is neither reasonable nor beneficial. Such a construction would entail additional court costs to either the estate of the incompetent or to the county for no reason. It is possible that notice of a hearing and appearance before the court might also subject the incompetent to a severe emotional disturbance detrimental to his health.

The necessary qualifications for guardians are set out in Section 475.055 RSMo 1959. A more reasonable construction of the statute is that the clause "in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian," was added for clarification of the former statute and that such language simply refers to the requirements as to the qualifications of the guardian, and the fact that such appointment must be made by the court, by order, the same as required when an original appointment is made.

In answer to your second question, any person may file a petition for the appointment of himself or another qualified person as guardian of an alleged incompetent. Section 475.060 RSMo 1959. However, hospitalization of a mentally ill person, even as a result of a judicial proceeding, is not a determination of that person's incompetency. Missouri Practice, Volume V, Sections 1779 and 1882; Murphy v. Murphy, (1962) Mo., 358 S.W.2d 778. The state of mental incapacity required for admission to a state hospital is not necessarily the same as that required for an adjudication of incompetency. Sections 202.780(5), 202.797-1(2), 202.807-5, and 475.060(9) RSMo 1959. Therefore, the fact that the patient has been in a mental hospital for over fifty years does not vitiate the necessity of following the required statutory procedure for an adjudication of incompetency prior to the appointment of an original guardian.

In answering this question, we have assumed the patient was confined in the state hospital by a proceeding other than an incompetency hearing and no guardian was appointed for him at that time. If the patient had a guardian at one time, in accordance with our answer to your first question, the court may appoint a successor guardian with no further proceedings necessary.

Honorable Larry M. Woods

CONCLUSION

It is our opinion it is not necessary to have a second application and a rehearing of the question of competency in order for the probate court to appoint a successor guardian for an incompetent. However, confinement in a state mental hospital does not constitute an adjudication of incompetency for which a guardian may be appointed. If a guardian is sought for an inmate thereof, the court must follow the statutory procedure required for an original appointment of a guardian.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD:sr