STATE HOSPITALS: (I) Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the estate and guardian of the person. (II) Consent of the guardian, whether the guardianship be one of the person or of the estate, is not required prior to performing an autopsy except in those few cases where subparagraph 5 of numbered paragraph 1 of Section 194.115, RSMo Cum. Supp. 1957, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, RSMo Cum. Supp. 1957, are applicable. In all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation.

PHYSICIANS:

AUTOPSY:

CONSENT:

GUARDIANS:

July 9, 1959

Honorable Addison M. Duval, M.D.
Director, Division of Mental Diseases
Jefferson City, Missouri

FILED
25

Re: File LB

Dear Dr. Duval:

This is in response to your request for an opinion dated June 3, 1959, which reads as follows:

> **"On occasions we have discussed with the Superintendents of our hospitals the question of their legal responsibility for patients. The question of what does the term "Legal Guardian" actually imply arises.**
>
> **"My own experience in the past has given me the impression that guardianship is of two types--one concerning itself with the estate of an incompetent person, and the other specifically for the person. It has been my impression for some years that usually when the Court appoints a legal guardian that is to protect the estate of the incompetent person.**
>
> **"We recently had an incident in which permission for an autopsy was obtained from a parent of a patient who died, but we did not get consent from the legal guardian, who became somewhat irate over the incident. On a review of the Missouri Autopsy Law we find no mention of the role of legal guardian in the priority list of individuals from whom to obtain these autopsy permits. This problem becomes somewhat complicated, particularly when an institution, such as a bank, is the guardian. If there is a responsible next of kin it would seem that operative,**

> as well as autopsy permits, should be obtained from the next of kin rather than from a guardian who is not a blood relative.
>
> "Currently, we have decided to obtain autopsy and operative permits from both guardian and next of kin, but we would appreciate legal clarification of this particular point.
>
> "I feel that a definite opinion in this area would be very helpful to the administrators of all the institutions in this Division."

For purposes of clarity, we have chosen to treat the issues raised in your request as two separate and distinct questions and have handled each question separately and independently.

I.

Do the statutes of Missouri provide for two types of guardian, namely, guardian of the person and guardian of the estate?

Chapter 475, RSMo Cum. Supp. 1957, relates to guardianship in the State of Missouri. The sections of Chapter 475 which are pertinent to the question at hand read as follows:

> "Section 475.010. When used in sections 475.010 to 475.370, unless otherwise apparent from the context:
>
> "(1) A 'guardian' is one appointed by a court to have the care and custody of the person or of the estate, or of both, of a minor or of an incompetent;
>
> "(2) A 'guardian ad litem' is one appointed by a court, in which particular litigation is pending, to represent a minor or incompetent or an unborn person in that particular litigation;
>
> "(3) An 'incompetent' is any person who is incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both;
>
> "(4) A 'minor' is any person who is under the age of twenty-one years;

"(5) A 'ward' is a minor or incompetent for whom a guardian has been appointed."

"Section 475.030. 1. Letters of guardianship of the person or estate, or both, may be granted for any person adjudged incompetent.

"2. Letters of guardianship of the estate of a minor shall be granted for that part of the estate of the minor which is not derived from a living parent who is acting as natural guardian.

"3. Letters of guardianship for the estate of a minor may be granted in the following cases:

"(1) Where the minor has no parent living; or

"(2) Where there is a natural guardian of the minor and where the court finds that the best interests of the minor require letters of guardianship for all of his estate.

"4. Letters of guardianship of the person of a minor may be granted in the following cases:

"(1) Where a minor has no parent living;

"(2) Where the parents or the sole surviving parent of a minor are adjudged unsuitable or incompetent for the duties of guardianship;

"(3) Where the father of a minor is imprisoned in the penitentiary of this state.

"5. No guardian of the person shall be appointed for any married minor."

"Section 475.045. 1. Except in cases where they fail or refuse to give security or are adjudged unfit or incompetent for the duties of guardianship, or waive their rights to be appointed, the following persons, if otherwise qualified, shall be appointed as guardians of minors:

"(1) The parent or parents of a minor as his guardian;

"(2) If any minor over the age of fourteen years has no

qualified parent living, any person selected by the minor as his guardian;

"(3) Where both parents of a minor are dead, any person appointed by the will of the last surviving parent, who has not been adjudged unfit or incompetent for the duties of guardian, as guardian of his minor child.

"2. Incompetency or unfitness of any of the persons mentioned in subsection 1 for the duties of guardianship may be adjudged by the court after due notice and hearing.

"3. If no appointment is made under subsection 1, the court shall appoint as guardian of a minor the most suitable person who is willing to serve but a minor shall not be committed to the guardianship of a person of religious persuasion different from that of the parents, or of the surviving parent of the minor, if another suitable person can be procured, unless the minor, being of the age of fourteen years shall so request."

"Section 475.050. The spouse of a person adjudged incompetent may be appointed guardian of the person or of the estate, or of both, of the incompetent."

"Section 475.055. 1. Except as herein otherwise provided:

"(1) Any natural person of full age may be appointed guardian of the person or of the estate or of both of a minor or incompetent, except that a parent shall not be denied appointment as guardian of the person of a minor for the reason that the parent is a minor;

"(2) Any charitable organization, incorporated under the laws of this state, which has custody of the person of a minor or incompetent and which has power under its charter to so act, may be appointed guardian of the person or of the estate or of both of such minor or incompetent.

"(3) Any corporation authorized to do business in this state and empowered by its charter to so act or any national banking association authorized to so act in this state may be appointed guardian of the estate.

"2. No judge of the probate court or sheriff or clerk of the probate court or deputy of either in his own county, no person under twenty-one years of age, other than as provided in subsection 1, or of unsound mind, no habitual drunkard or narcotic addict and, except as otherwise provided by law, no person who is a non-resident of this state, shall be appointed guardian of the person or of the estate. No person whose letters of guardianship are revoked for failure to make settlement, shall be appointed guardian within two years after the revocation. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person."

"Section 475.090. If it appears to the court that a guardian should be appointed for a minor or if it is found by the jury or the court that the subject of an inquiry is incompetent as defined in this law, the court shall appoint a guardian of the person and estate of the minor or incompetent, or if the court finds that it will be to the advantage of the minor or incompetent to appoint a guardian of the estate, different from the guardian of the person, the court shall make such appointment. The appointment of guardians of minors shall be made in accordance with Section 475.045, except that if a person entitled to appointment as a guardian or entitled to select a guardian fails to appear after notice or to apply for such appointment or make selection in accordance with the order of the court the court may appoint any suitable person as guardian."

Section 475.010(1), supra, in defining the word "guardian" states that as used in the statutes it means a person appointed by the probate court to have the care and custody of the person, care and custody of the estate, or both. Section 475.030, supra, provides that letters of guardianship of the person or estate, or both may be granted when certain circumstances exist and then the circumstances are listed.

Sections 475.045 and 475.050, supra, specify who may be appointed guardian of minors and incompetents, and Section 475.090, supra, provides that if the court finds that it will be to the advantage of the minor or incompetent it may appoint one person

guardian of the person and another person guardian of the estate.

Therefore, it must be concluded that Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the person and guardian of the estate. It is possible to have either one or both types of guardians in a given case, depending upon the circumstances. Furthermore, it is possible for one person to be appointed guardian of the person and another person to be appointed guardian of the estate, or the same person may be both. In order to determine the nature of the guardianship, one would have to refer to the letters of guardianship issued by the probate court.

II.

Is consent of the guardian required prior to performing an autopsy or a surgical operation?

Section 194.115, RSMo Cum. Supp. 1957, provides that it shall be unlawful for a physician, and surgeon to perform an autopsy without the consent of one of the persons named in the act. Nowhere in that section is it indicated that the consent of the guardian is ever required except where subparagraph 5 of numbered paragraph 1 is applicable. Furthermore, Section 475.285, RSMo Cum. Supp. 1957, specifies when the authority of the guardian terminates and subparagraph 6 of numbered paragraph 1 provides that the guardianship terminates upon the death of the ward except that if there is no person other than the estate of the ward liable for the funeral and burial expenses of the ward, the guardian may with the approval of the court contract for the funeral and burial of the ward.

In view of the foregoing, it is the opinion of this office that the consent of the guardian, whether the guardianship be one of the person or one of the estate, need not be obtained prior to performing an autopsy except in those few cases where subparagraph 5 of numbered paragraph 1 of Section 194.115, supra, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, supra, are applicable.

We have been unable to find a statute that requires the consent of a patient to a surgical operation. However, it is well-settled law that a physician or surgeon who performs an operation without the consent, express or implied, of his patient or someone legally authorized to consent for him is liable for damages. 70 C.J.S. Section 48, page 967.

You inquire as to whether the consent of the guardian is required before a surgical operation is performed on the ward.

You point out in the request that in those cases where an institution, such as a bank, is guardian, it would be quite complicated if it is necessary to obtain the operative permit from the guardian. You further state that it would seem that the consent of the next of kin, who is a blood relative, rather than the guardian should be obtained.

Section 475.130, RSMo Cum. Supp. 1957, outlines the general powers of the guardian of the estate and reads as follows:

> "1. The guardian of the estate of a minor or incompetent shall, under supervision of the court, protect and preserve the estate, invest it prudently, apply it as provided in this code, account for it faithfully, perform all other duties required of him by law, and at the termination of the guardianship deliver the assets of the ward to the persons entitled thereto.
>
> "2. The guardian of the estate shall take possession of all of the ward's real and personal property, and of rents, income, issue and profits therefrom, whether accruing before or after his appointment, and of the proceeds arising from the sale, mortgage, lease or exchange thereof. Subject to such possession, the title to all such estate, and to the increment and proceeds thereof, is in the ward and not in the guardian.
>
> "3. The guardian of the estate shall prosecute and defend all actions instituted in behalf of or against his ward; collect all debts due or becoming due to his ward, and give acquittances and discharges therefor, and adjust, settle and pay all claims due or becoming due from his ward, upon such terms as may be prescribed by the probate court so far as his estate and effects will extend."

As the duties and powers of the guardian of the estate as enumerated in the above cited section concern and deal with only the estate of a minor or incompetent, we are of the opinion that the consent of the guardian of the estate is not required before performing a surgical operation.

Honorable Addison M. Duval, M. D.

With respect to your comment regarding the complications when a bank is guardian we direct your attention to Section 475.055, RSMo Cum. Supp. 1957, which sets out the qualifications for guardians and reads as follows:

> "1. Except as herein otherwise provided:
>
> "(1) Any natural person of full age may be appointed guardian of the person or of the estate or of both of a minor or incompetent, except that a parent shall not be denied appointment as guardian of the person of a minor for the reason that the parent is a minor;
>
> (2) Any charitable organization, incorporated under the laws of this state, which has custody of the person of a minor or incompetent and which has power under its charter to so act, may be appointed guardian of the person or of the estate or of both of such minor or incompetent.
>
> "(3) Any corporation authorized to do business in this state and empowered by its charter to so act or any national banking association authorized to so act in this state may be appointed guardian of the estate.
>
> "2. No judge of the probate court or sheriff or clerk of the probate court or deputy of either in his own county, no person under twenty-one years of age, other than as provided in subsection 1, or of unsound mind, no habitual drunkard or narcotic addict and, except as otherwise provided by law, no person who is a nonresident of this state, shall be appointed guardian of the person or of the estate. No person whose letters of guardianship are revoked for failure to make settlement, shall be appointed guardian within two years after the revocation. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person."

Numbered paragraph 2 of the section quoted hereinabove provides that the guardian of the person must be a natural person except for the exception contained in subparagraph 2 of numbered paragraph 1, that exception being charitable organizations which have been incorporated under the laws of Missouri and who have power under their charter to act as guardian of the person. Subparagraph 3 of numbered paragraph 1 of the above section permits a corporation, which includes banks, to act as guardian of the estate but not as guardian of the person. Therefore, as consent of the guardian of the estate is not required for surgical operations, and as banks may act only as guardians of the estate, the complication suggested in your request should not arise except in a few isolated instances where a charitable institution has been appointed guardian of the person.

Section 475.120, RSMo Cum. Supp. 1957, outlines the powers and duties of the guardian of the person and provides as follows:

> "1. The guardian of the person of a minor is entitled to the custody and control of his ward and to the care of his education, support and maintenance.
>
> "2. The guardian of the person of an incompetent shall take charge of the person of his ward and provide for his support and maintenance as required by this code. If the court finds that an incompetent ward is so far disordered in his mind as to endanger his own person or the persons or property of others, it may make an order for his restraint and safekeeping. The guardian shall confine any such ward in a suitable place for a reasonable time and until the court may make such order."

As the above cited section gives the guardian of the person full charge of the ward, we are of the opinion that in all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation on the ward.

It is to be noted that as your inquiry related only as to if and when the consent of the guardian is required, this opinion

has been limited to that proposition. However, it is not to be inferred from this opinion that where an incompetent has a guardian of the person that the consent of the guardian is all the consent that is required. It is our view that in those cases where there is a guardian of the person, you should continue, as you have been doing, to obtain the consent of the next of kin in addition to the consent of the guardian. In those cases where the patient is capable of giving his consent, you should also obtain that consent in addition to the consent mentioned hereinabove.

CONCLUSION

Therefore, it is the opinion of this department that:

I.

Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the estate and guardian of the person.

II.

Consent of the guardian, whether the guardianship be one of the person or of the estate, is not required prior to performing an autopsy except in those few cases where subparagraph 5 of numbered paragraph 1 of Section 194.115, RSMo Cum. Supp. 1957, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, RSMo Cum. Supp. 1957, are applicable. In all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Calvin K. Hamilton.

Very truly yours,

John M. Dalton
Attorney General

CKH:mw:gm