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## Adult Guardians and Conservators

When an individual becomes unable to make decisions in his own best interest, having an adult guardian and/or conservator appointed may be appropriate. This article explains the legal process involved in naming an adult guardian or conservator, the responsibilities involved, and other options available.

A Virginia Circuit Court may appoint a **guardian** and/or **conservator** for any adult person it determines is unable to manage his or her own personal or financial affairs. The person for whom a guardian or conservator is appointed is called the **incapacitated** person. A guardian is the person appointed to handle the personal affairs of the incapacitated person. A conservator handles the financial affairs of the incapacitated person. The guardian and conservator may be the same person. Not every incapacitated person will need both a guardian and a conservator.

### **The Court Process**

Any person may file a petition with a Virginia Circuit Court alleging that there is an incapacitated Virginia resident who needs to have a guardian or conservator appointed to manage some or all of his affairs. The person alleged to be incapacitated in the petition is called the **respondent**. The petition must be filed in the Circuit Court for the city or county in which the respondent lives or where he lived immediately prior to moving to a nursing home, assisted living facility or other institution. After the petition is filed, a hearing will be scheduled for the court to hear evidence as to why a guardianship and/or conservatorship is necessary and who should be appointed if it is necessary.

Lack of good judgment by the respondent is not enough for the court to find a person incapacitated. The court must determine that the respondent is incapable of receiving and evaluating information effectively or responding to people, events, or what is going on around him to such an extent that he lacks the capacity to do either or both of the following:

- Meet the essential requirements for his health, care, and safety without the assistance or protection of a guardian, or
- Manage property or financial affairs or provide for his or her support without the assistance or protection of a conservator.

The respondent must be given a copy of the petition that has been filed, notified of the hearing, and advised of her legal rights. The respondent has the right to be present at the hearing, hire an attorney, have a jury trial, and to subpoena and cross-examine witnesses.

A copy of the notice of hearing and petition must be mailed to the respondent's spouse, adult children, parents, and adult siblings, or, if none of these relatives are known, at least three other known relatives.

The court must appoint a ***guardian ad litem***. This is an attorney who represents the interests of the respondent and who must visit the respondent, advise him of his rights, and investigate the facts stated in the petition. The guardian ad litem must file a report and come to the hearing to advise the court whether or not the respondent needs a guardian or conservator, the extent of the duties and powers the guardian or conservator should have, and who should be appointed guardian and/or conservator.

A report evaluating the medical condition of the respondent must be filed with the court. The report is to be prepared by a licensed physician, licensed psychologist, or other licensed professional skilled in assessment or treatment of the respondent's mental and/or physical conditions.

The court must consider the following factors in determining whether the respondent needs a guardian or conservator and the powers and duties to be given:

- The limitations of the respondent,
- The development of the respondent's maximum self-reliance and independence,
- The availability of less restrictive alternatives including advance directives and durable powers of attorney,
- The extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse,
- The actions needed to be taken by the guardian or conservator,
- The suitability of the proposed guardian or conservator.

## **Duties**

A guardian or conservator is not liable for the acts of the incapacitated person, unless the guardian or conservator is personally negligent. Guardians and conservators are not required to spend their own funds to care for the incapacitated person.

The guardian must:

- Visit the incapacitated person as often as necessary to know of his capabilities, limitations, and needs.
- Encourage the incapacitated person to participate in decisions.
- File annual reports with the local Department of Social Services regarding the incapacitated person's medical condition, living arrangements, and the guardian's recommendations.

The conservator must:

- Take care of and preserve the assets and income of the incapacitated person.
- File annual accountings with the Commissioner of Accounts showing all money and property received and disbursed on behalf of the incapacitated person.

## **Alternatives**

Appointment of a guardian and conservator should always be looked upon as the last resort. An adult's rights and freedoms should not be taken away unless absolutely necessary. The legal process can be a difficult and costly experience for the individual and his family.

Both the lawyer representing the petitioner and the guardian ad litem must be paid. The incapacitated person does not contest most guardianship petitions, but it is still time-consuming for the attorneys so it will cost several hundred dollars and much more if it is contested.

A durable general power of attorney is usually a good alternative to guardianship and/or conservatorship. However, the incapacitated person must have planned ahead and signed the power of attorney while able to understand the nature and consequences of such action.

If only medical decisions need to be made for an incapacitated person, a guardianship is usually not necessary. An advance medical directive allows you to appoint someone to make medical decisions for you if you ever become unable to make those decisions for yourself. Even if you have not signed an advance medical directive, Virginia law gives your spouse, or your children, or other relatives authority to make medical decisions for you.

Sometimes an adult only needs help managing his income and paying his bills. There are other options to help with this, such as:

- Some of the Area Agencies on Aging offer voluntary bill payer programs, where a trained volunteer helps.
- If the only income is Social Security or SSI, a friend or relative could apply to Social Security to be appointed as his representative payee. If approved, the checks would then be sent to the representative payee to use on behalf of the beneficiary.
- Some other government benefits also have representative payee programs.

A court will not appoint a guardian and/or conservator for a person who has appointed an agent under a durable power of attorney or advance medical directive or who already has a representative payee, unless the court determines that the agent is not acting in the best interests of the incapacitated person or there is a need for decision-making outside the scope of the power of attorney, advance medical directive, or representative payee authority.

## **Duration**

A guardianship or conservatorship can be terminated or modified if the incapacitated person's condition changes. This requires another petition and hearing in circuit court.

A new guardian or conservator could be substituted if the guardian or conservator who was originally appointed can no longer serve. However, this also requires a petition and hearing before the circuit court.

A guardianship or conservatorship ends when the incapacitated person dies. The conservator has a duty to turn over whatever assets she still has in her possession to the administrator or executor of the incapacitated person's estate and to do a final accounting for the Commissioner of Accounts.

► [Guardianship and Conservatorship](#) (Virginia Legal Aid Society)

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