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8A South Street, SW
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**LEGAL SERVICES OF
NORTHERN VIRGINIA,
INC.**



**GUARDIANSHIP AND
CONSERVATORSHIP IN
VIRGINIA**

(UPDATED 2014)



1. WHAT IS A GUARDIANSHIP OR CONSERVATORSHIP?

A guardianship or conservatorship is a legal, court-appointed relationship in which one individual becomes the substitute decision maker for another. It can only be created by a court of law and the court determines the incapacity of the person involved and appoints a substitute decision maker to meet the needs and protect the rights of the incapacitated person (also usually known as the Respondent).

2. WHAT IS THE DIFFERENCE BETWEEN A GUARDIAN AND CONSERVATOR?

A guardian is an individual appointed by the court to bear responsibility for the personal affairs of the incapacitated person, such as their housing, health care, or therapeutic treatment. A conservator is a person appointed by the court to manage the estate and financial affairs of the incapacitated person.

3. WHO CAN BE APPOINTED A GUARDIAN OR CONSERVATOR?

Often the person who files the petition for guardianship or conservatorship is appointed as guardian or conservator. This person is most often a family member or close friend. The primary qualifications as for guardians or conservators are that they are at least 18 years old and capable of performing the duties involved. Virginia law does not require guardians or conservators to be Virginia residents.

4. WHAT DOES THE TERM "INCAPACITATED PERSON" MEAN UNDER VIRGINIA LAW?

The term incapacitated is defined under Virginia law as an adult who has been found by the court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to: (i) meet the essential requirements for his or her health, care, safety or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his or her support or for the support of his or her legal dependents without the assistance or protection of a conservator. Note however, the Code of Virginia specifically states that poor judgment alone is not sufficient cause to require a guardianship/conservatorship.

5. WHAT IS THE COURT PROCEDURE FOR APPOINTING A GUARDIAN OR A CONSERVATOR?

First, a petition for the appointment of a guardian or conservator is filed in the Circuit Court serving the jurisdiction of the residence of the proposed incapacitated person. This petition may be filed by any person. In addition, a report on the conditions and circumstances of the proposed incapacitated person, including medical diagnosis and an analysis of the person's functional capabilities is also filed. This report must be prepared by a licensed physician or psychologist.

Second, the proposed incapacitated person is given proper notice that a guardianship petition has been filed. The court will also appoint an attorney to represent the interests and rights of the proposed incapacitated individual. This legal representative is called a *Guardian Ad Litem* ("GAL"). The *Guardian Ad Litem* advises the proposed incapacitated person and prepares and presents an independent report to the court as to the need for and fitness of the proposed guardian or conservator.

Finally, a court hearing is held. The proposed incapacitated person has a right to counsel to oppose the action. If the court finds that the person is incapacitated, the court will appoint a guardian and/or conservator, as appropriate. The court order must specify and define the powers and authority of the guardian and/or conservator, and the court may limit such authority when the individual has some capability of attending to his or her own interest in some areas.

6. HOW DOES THE COURT SET THE BOND FOR THE PETITIONING GUARDIAN/ CONSERVATOR? WHOSE MONEY CAN BE USED TO PAY FOR THE BOND?

At the time of the appointment of a conservator, the Guardian Ad Litem will ask for an approximate value of the respondent's personal property, including cash, savings, stocks, cash value of life insurance policies, furniture, automobiles, jewelry, etc., plus the next year's estimated income.

In the absence of extenuating circumstances, the bond will be set at one-and-a-half to two times that total figure. The bond premium is an approved expense of the incapacitated person's estate.

A guardian is required to post a bond to stand for faithful performance of his or her duties, but it is typically without a surety (up front money).

7. WHAT ARE THE DUTIES OF A GUARDIAN OR CONSERVATOR?

The person appointed as a guardian or conservator is responsible for carrying out the powers granted in the court order. In general, a guardian is responsible for the health, medical needs, and general wellbeing of the incapacitated person whereas a conservator handles the person's property and finances. The guardian or conservator is considered to be a fiduciary of the incapacitated person. This means that he or she is obligated to do what is in the incapacitated person's best interest. Virginia law also requires guardians and conservators to file certain reports annually. Guardians must file a report about the care and living conditions of the incapacitated person. Conservators must file a financial accounting.

8. HOW DOES THE COURT COMPENSATE A GUARDIAN/ CONSERVATOR FOR THEIR SERVICES?

A Guardian or Conservator is allowed reasonable compensation and reasonable expenses.

If a person serves as a guardian AND conservator, there is not, customarily, a separate fee allowed, other than his or her reasonable expenses and costs. A guardian, should keep an accurate log of his or her time expended and the duties performed, and should be compensated at a reasonable rate for each service performed.

9. WHAT ARE THE DISADVANTAGES OF A GUARDIANSHIP OR CONSERVATORSHIP?

A guardianship or conservatorship is always a last resort. The need for these extraordinary legal proceeding indicates a lack of planning or foresight. Among the disadvantages:

1. A guardianship or conservatorship takes away the incapacitated person's fundamental rights of self determination.
2. The legal proceedings are time-consuming and usually expensive, often requiring court costs, fees for physicians and attorneys, etc.
3. It is the court's decision to pick the substitute decision maker for the incapacitated person and that decision maker may not be the individual whom the incapacitated person would have wanted if competent to make the decision personally.

10. WHAT IS AN ALTERNATIVE TO A GUARDIANSHIP OR CONSERVATORSHIP?

The appointment of a guardian or conservator may not be necessary if the person has already executed a **General Durable Power of Attorney**.

However, the General Durable Power of Attorney must be signed before the person becomes incapacitated. One advantage of this alternative is that the person gets to pick who he or she wants as a substitute decision maker, instead of the court. Other benefits are that a General Durable Power of Attorney is relatively inexpensive and can be created quickly because no court action is needed.

11. CAN A GUARDIANSHIP OR CONSERVATORSHIP BE TERMINATED?

Yes, there are several ways in which a guardianship or conservatorship can terminate, including the following:

1. If the incapacitated person dies, the guardianship/conservatorship automatically ends.
2. Someone can petition the Circuit Court to restore the incapacitated person's legal capacity. If this happens, a new hearing will be held in which the court will determine if the person has substantially regained the ability to care for his or her own person and/or estate and financial affairs.
3. If the guardianship or conservatorship is established on a temporary basis, with a specified time limit, then the guardianship or conservatorship will automatically end when this period has passed.

12. IF SOMEONE QUESTIONS A DECISION MADE BY A GUARDIAN OR CONSERVATOR ARE THEY LIABLE?

The mere questioning of a decision does not impose any liability. However, if a guardian or conservator acts in a manner **contrary** to the law or order of appointment, a court may impose personal liability on that guardian or conservator. Here, prevention is the best protection so the guardian or conservator should know the scope of his or her authority and responsibility, keep scrupulous records, seek professional help for advice in advance of a significant decision and remember to be prudent with his or her decisions.

13. IS AN INCAPACITATED PERSON ABLE TO MAKE A WILL?

The level of comprehension, or "testamentary capacity," required to execute a valid will is not high. The incapacitated person must only understand what he or she owns, who his or her family is, and the purpose of the will. The mere fact that one is under a guardianship or conservatorship does not deprive a person of the capacity to make a will, unless the authority to do so is prohibited in their order of appointment. Your attorney should be consulted for guidance concerning the drafting and execution of the will in order to minimize objections to the will after the incapacitated person's death.

14. IF A GUARDIAN IS APPOINTED WILL THE INCAPACITATED PERSON STILL BE ALLOWED TO VOTE IN FUTURE GENERAL ELECTIONS, DRIVE AND HAVE USE OF A FIREARM?

Unless the order appointing a guardian specifically finds that the incapacitated person retains the right to vote, the right to drive and the right to use a firearm, those rights will not be retained by the incapacitated person. The Clerk of the Circuit Court is required to forward a copy of the appointment order to the Secretary of the State Board of Elections and to the Commissioner of the Department of Motor Vehicles, so that the incapacitated person's name will be struck from the voter roll and their driver's license suspended. On the other hand, the court has the authority to set out a finding in the order to PRESERVE the incapacitated person's license or other rights lost in a guardianship/conservatorship petition, as well.

15. WHAT IF THE INCAPACITATED PERSON LIVED IN ANOTHER STATE AND IS NOW LIVING IN VIRGINIA? WHAT ABOUT TRANSFERRING A GUARDIANSHIP FROM ONE STATE TO ANOTHER?

In 2011, Virginia adopted the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* (also known as UAGPPJA). This statute addresses the issue of jurisdiction over adult guardianships, conservatorships & other protective proceedings, providing a

mechanism for resolving multi-state jurisdictional disputes. The goal is that only one state will have jurisdiction at any one time. The statute also addresses transfer of incapacitated persons from one state to another and how to enforce a guardianship order from one state in another state.



If you would like further information regarding Guardianship and Conservatorship, you may also contact the following agencies:

Virginia Guardianship Association
Post Office Box 6357
Newport News, VA 23606
1-804-261-4046
www.vgavirginia.org

The Virginia Lawyer Referral Service
707 East Main Street, Suite 1500
Richmond, VA 23219
1-800-552-7977
TTY: 1-804-775-0502

Virginia Department of Social Services
Adult Protective Services
24 Hour Toll Free APS Telephone Line:
1-888-832-3858

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GLOSSARY OF TERMS

Annual Accounting – refers to the detailed accounting covering all receipts to and disbursements from the estate of the incapacitated person, for each year from the date of qualification. Each transaction must have written documentation. An accounting must be filed with the Commissioner of Accounts within six months of the date of qualification, and yearly thereafter.

Bond – is a dollar amount, set by the court, to guarantee faithful performance by a conservator. It is often one-and-a-half times the value of the current assets, plus one-and-a-half times the annual income of the incapacitated person. If the bond is “with surety,” that is, an insurance policy issued by an insurance or bonding company, the cost of the bond premium is an expense of the estate. Only rarely is the bond “without surety.” The guardian will also be required to post a bond to stand for faithful performance of duties, but it is typically of a modest dollar amount, and without a surety.

Commissioner of Accounts – is an attorney, appointed by the court, to receive, review, and approve (or reject) initial inventories and annual and final accountings from conservators and other fiduciaries.

Committee – is the person named by court order entered prior to January 1, 1998 to handle the affairs of a person who cannot handle his own affairs by reason of mental illness or mental retardation, after a finding of incompetency.

Conservator – is a person, named by the court, to make all financial decisions for the incapacitated person, subject to any limitations in the order of appointment.

Estate – refers to the property, both real and personal, of the incapacitated person. It is not just the property of a deceased person.

Guardian Ad Litem – is the attorney appointed to represent the interests of the incapacitated person in all matters relating to the pending petition. A *Guardian Ad Litem* is obligated to

inquire into and report to the court on any relevant or material matter.

Guardian – is a person, named by the court, to make all non-property decisions for the incapacitated person, subject to any limitations in the order of appointment. This was traditionally known as the “guardian of the person” prior to 1998.

Incapacitated Person – refers to the person who has been determined to be in need of a guardian or conservator and for whom one or both have been appointed.

Incapacity – refers to the inability of a person to handle his or her affairs, but the term implies that the condition is more temporary than for a person who is incompetent.

Incompetence – refers to the inability of a person to handle his or her affairs, but it implies that condition is more permanent than for a person who is incapacitated.

Initial Inventory – refers to the list of assets (and their values) owned by the incapacitated person and under the control of the conservator at the time of qualification, as reported to the Commissioner of Accounts within four months of qualification.

Qualification – refers to the completion of all the required steps before the guardian or conservator can act and usually includes entry of the order and the posting and execution of the bond with the Clerk of the Court.

Respondent – refers to the person who is alleged to be incapacitated and is the subject of a petition for the appointment of a guardian or conservator.

Ward – is the “incapacitated person” for whom a guardian or committee was appointed by the court. After January 1, 1998, this term is not used in Virginia.