

Virginia Guardianship and Conservatorship: 2006

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Welcome!

Thank you for your interest in this brief outline of the law of guardianship and conservatorship in Virginia.

The purpose of this text is to provide a simple outline about guardianship and conservatorship: what they are, how they work, and the procedure to become a guardian or conservator for an adult (or soon to be adult) in Virginia.

Thompson & McMullan, P.C., is dedicated to this practice area. While we are a full service commercial law firm, and member of Meritas, an international association of commercial law firms, we maintain a significant elder law section staffed with several attorneys and paralegals dedicated to service in this complex and growing area of the law. Our lawyers have been leaders in local, state and national elder law associations, and have represented dozens of Virginia families and institutions in proceedings throughout Virginia. Several have written and lectured in connection with the topics briefly described here, and have often addressed professional associations of lawyers, social workers, and hospital administrators throughout Virginia and the United States regarding these and related aging and disability challenges.

We invite you to visit our web page at <http://www.t-mlaw.com>, where you may find our online services a helpful resource and convenient means of corresponding with us. We have published several questionnaires and outlines to assist you.¹

We hope we can help you help others.

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¹ See <http://majette.net>, "Forms and Questionnaires," which includes a convenient, detailed questionnaire regarding all of the information needed to proceed for the appointment of a guardian and conservator in Virginia.

A. Definitions.²

1. "Incapacitated person" means an adult who has been found by a 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 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 legal dependents without the assistance or protection of a conservator. **A finding that the individual displays poor judgment, alone, shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.** A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.
2. "Conservator" means a person appointed by the court who is responsible for managing the *estate* and financial affairs of an incapacitated person.
3. "Guardian" means a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence.
4. "Estate" includes both real estate and personal property.

B. Basic practice.

1. Petition.
 - (a.) Anyone may file a petition for the appointment of a guardian or conservator.
 - (b.) However, the petition must contain detailed allegations.³
 - (c.) The proceeding must be filed where the Respondent resides or is located.⁴
 - (d.) Notice must be served on the Respondent personally, and may be made by guardian *ad litem*, described below.⁵
2. Appointment of guardian *ad litem*.⁶
 - (a.) A guardian *ad litem* is a lawyer who is appointed to represent the best interest of the person alleged to be an incapacitated person.
 - (b.) The guardian *ad litem* has several specific duties and will generally be required to investigate the facts and make a thorough report of the facts to the judge.

² Va. Code § 37.2-1000. All references to the Virginia Code may be accessed through the writer's web page, <http://majette.net>.

³ Va. Code § 37.2-1002.

⁴ Va. Code § 37.2-1001.

⁵ Va. Code § 37.2-1004.

⁶ Va. Code § 37.2-1003. The guardian *ad litem* must be certified. The Supreme Court maintains a listing on its web site, which may be accessed through <http://majette.net>.

3. Appointment or engagement of counsel.⁷
 - (a.) The person alleged to be an incapacitated person is entitled to his or her own lawyer.
 - (b.) The lawyer has a different role than the guardian *ad litem*.
 - (i.) The guardian *ad litem* is required to provide his or her best report of what the guardian *ad litem* believes is in the “best interest” of the allegedly incapacitated person.
 - (ii.) The lawyer who is counsel for the allegedly incapacitated person acts in accordance with the wishes of the allegedly incapacitated person – even if those wishes (as long as they are not illegal) may be contrary to the counsel’s belief of the allegedly incapacitated person’s best interest.
 4. Doctor’s / Evaluator’s report.⁸
 - (a.) An evaluator’s report must be filed with the judge before the case is heard, and a copy provided to the guardian *ad litem* (and counsel, if one is appointed).
 - (b.) Required contents.
 - (i.) A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;
 - (ii.) A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;
 - (iii.) The date or dates of the examinations, evaluations, and assessments upon which the report is based; and
 - (iv.) The signature of the person conducting the evaluation and the nature of the professional license held by that person
 - (c.) Problems.
 - (i.) Confidentiality (HIPAA) concerns of several doctors.
- C. Powers and duties of guardians.
1. Powers which are not granted to the guardian are retained in the incapacitated person.⁹

“The court's order appointing a guardian or conservator **shall**: (i) state the nature and extent of the person's incapacity; (ii) **define the powers and duties of the guardian** or conservator so as to permit the incapacitated person to care for himself or herself

⁷ Va. Code § 37.2-1006. Counsel can be appointed for an indigent Respondent. The fee paid to such counsel is unusually low (\$43.25 per case) under the Virginia Supreme Court’s listing of permissible payments.

⁸ Va. Code § 37.2-1005.

⁹ Va. Code § 37.2-1009.

and manage property to the extent he or she is capable; (iii) specify whether the appointment of a guardian or conservator is limited to a specified length of time, as the court in its discretion may determine; (iv) **specify the legal disabilities, if any, of the person in connection with the finding of incapacity, including but not limited to mental competency for purposes of Article II, Section 1 of the Constitution of Virginia or Title 24.2;** (v) include any limitations deemed appropriate following consideration of the factors specified in § [37.2-1007](#); and (vi) set the bond of the guardian, and the bond and surety, if any, of the conservator.

2. Specific elements.¹⁰

- (a.) A guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person.
- (b.) A guardian shall not be liable for the acts of the incapacitated person, unless the guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of the incapacitated person.
- (c.) A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known, and shall otherwise act in the ward's best interest and exercise reasonable care, diligence and prudence.
- (d.) A guardian shall be required to seek prior court authorization to change the incapacitated person's residence to another state, to terminate or consent to a termination of the person's parental rights, or to initiate a change in the person's marital status.

D. Powers and duties of conservators.¹¹

- 1. At all times, the conservator shall exercise reasonable care, diligence, and prudence, and shall act in the best interest of the incapacitated person. To the extent known to him, a conservator shall consider the expressed desires and personal values of the incapacitated person.
- 2. **Subject to any conditions or limitations set forth in the conservatorship order,**¹² the conservator shall take care of and preserve the estate of the incapacitated person and manage it to the best advantage.
 - (a.) The conservator shall apply the income from the estate, or so much as may be necessary, to the payment of the debts of the incapacitated person, including payment of reasonable compensation to himself and to any guardian appointed, to the maintenance of such person and of his or her legal dependents, if any, and, to the extent that the income is not sufficient, shall so apply the corpus of the estate.

¹⁰ Va. Code § 37.2-1020.

¹¹ Va. Code § 37.2-1022.

¹² Va. Code § 37.2-1022. Unlike the limitation of the guardian's powers to those expressed in the order, the powers of the conservator are automatically broad. The Order may limit them, but need not expand them.

- (b.) Unless otherwise provided in the contract, a conservator is personally liable on a contract entered into in a fiduciary capacity in the course of administration of the estate unless he reveals the representative capacity and identifies the estate in the contract.
 - (c.) Claims based upon contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, or torts committed in the course of administration of the estate, may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.
 - (d.) A successor conservator is not personally liable for the contracts or actions of a predecessor.
- E. Accounting and Reporting Duties.
- 1. Guardian's duty to report to the Department of Social Services.
 - (a.) The first report is due within six months of qualification of the guardian.¹³ Subsequent reports are due annually.
 - (b.) The report is filed with the local Department of Social Services for the jurisdiction which appointed the guardian.
 - (c.) The report is statutory and forms are prepared by the Supreme Court.¹⁴
 - 2. Conservator's duty to account to the Commissioner of Accounts.¹⁵
 - (a.) A conservator must comply with requirements imposed under Title 26, specifically including the duty to account set forth in § 26-17.4.¹⁶
 - (b.) The first accounting is due within six months after qualification and covers the first four months.¹⁷ After the first account has been filed and settled, the second and subsequent accounts for each succeeding twelve-month period will be due within four months from the last day of the twelve-month period commencing on the terminal date of the preceding account unless the commissioner of accounts extends the period for filing upon reasonable cause.¹⁸
 - (c.) When the incapacitated person is a Medicaid recipient, the fee of the Commissioner of Accounts is limited to \$25.¹⁹
 - (d.) For conservators acting on behalf of Social Security, Supplemental Security Income, veteran's or other federal benefits recipients, no accounting to the commissioner is required of benefits paid to a designated representative²⁰ on

¹³ Va. Code § 37.2-1021, incorporating the deadlines of Va. Code § 26-17.4.

¹⁴ The forms are available at <http://majette.net>.

¹⁵ Va. Code § 26-17.4.

¹⁶ Va. Code § 37.2-1022.

¹⁷ Va. Code § 26-17.4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ A "representative payee" under these federal programs. See <http://www.ssa.gov/payee/faqrep.htm>.

behalf of the recipient if the representative is otherwise required to account for such benefits.²¹

- (i.) The accounting must disclose the total amount of such benefits received during the accounting period.
- (ii.) No incremental fee shall be charged by the commissioner for such income.

F. Special proceedings.

1. Substituted judgment proceedings for tax, Medicaid and related financial planning for incapacitated person under Va. Code § 37.2-1024.
 - (a.) Gifts.
 - (b.) Credit shelter trusts (to avoid estate tax).
 - (c.) Disclaimers (to avoid creditors and estate tax).
 - (d.) Community spouse resource allowance transfers (when one spouse enters a nursing home and the other spouse – the “community spouse” – wishes to avoid financial hardship).
 - (e.) Special trusts for disabled persons (including the incapacitated person, his spouse, and his children of any age, or anyone else who is under the age of 65 and disabled) under 42 USC 1396p and 42 USC 1382b.
2. As of July 1, 2006, a guardianship / conservatorship proceeding can be filed by a parent or legal guardian for a minor who is at least seventeen years and six months old.²²
3. Standby guardianships for incapacitated children.²³
 - (a.) Parents (or the legal guardian) of an incapacitated child can petition Circuit Court where the parent, parents or legal guardian resides.
 - (b.) The Court may appoint a standby guardian of the person or a standby conservator of the property, or both, of the incapacitated child.
 - (c.) The appointment of the standby fiduciary must be affirmed biennially by the parent, parents or legal guardian of the child and by the standby fiduciary prior to his assuming his position as fiduciary by filing with the court an affidavit which states that the appointee remains available and capable to fulfill his duties.
 - (d.) Upon the death or adjudication of incapacity of the last surviving of the parents, the standby fiduciary may immediately, without further proceedings, assume the duties of his office, subject to confirmation of his appointment by the circuit court within sixty days following assumption of his duties.
 - (e.) If the incapacitated person is eighteen years of age or older, the court, before confirming the appointment of the standby fiduciary, must conduct a full hearing

²¹ Va. Code § 26-17.10 (C).

²² 2006 Acts of Assembly, Chapter 552, amending Va. Code § 37.2-1001.

²³ Va. Code § 37.2-1013.

applicable to the fiduciary (i.e., for appointment of a guardian or conservator) as described above.

4. Standby guardianship for incapacitated parents under amended Va. Code § 37.2-1013.
 - (a.) The statute permits “one or both parents, one or more children or the legal guardian of an incapacitated person” to petition a circuit court to “appoint a standby guardian of the person or a standby conservator of the property, or both, of the incapacitated person.”
 - (b.) The standby fiduciary (guardian, conservator) must similarly be affirmed biennially by the parent, parents, child, children, or legal guardian of the person and by the standby fiduciary prior to his assuming his position as fiduciary by filing with the court an affidavit which states that the appointee remains available and capable to fulfill his duties.

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