

Guardianship
&
Conservatorship
In
Virginia

This booklet is produced by
the Virginia Guardianship Association

in cooperation with

the Virginia Center on Aging

the Virginia Coalition for the Prevention of Elder Abuse

&

the Virginia Department for the Aging

The information in this booklet is general in nature, and is offered to increase public knowledge and awareness about Guardianship & Conservatorship in Virginia. It is not designed to provide advice on specific case situations.

Introduction

Guardians and conservators are appointed to protect an incapacitated person, i.e. someone who cannot make decisions without assistance. Incapacitation should not be confused with poor judgment or foolishness.

Only a Circuit Court judge can decide that a person is incapacitated and appoint a guardian and/or a conservator to act for the person.

A guardian's authority can be very broad or can be limited to making specific decisions. Usually a guardian will make personal and health care decisions but may be responsible for other personal decisions that most people take for granted, such as whether the person may have visitors or will attend a social gathering. Guardians' authority to make decisions may be limited depending on the ability of the incapacitated adult to care for some of his own personal, health and safety needs. The extent of the guardian's or conservator's authority will be set forth in the judge's order and in the Virginia Code.

A conservator is responsible for managing a person's financial and property affairs. Like the authority of a guardian, the authority of a conservator may also be limited depending on the situation of the incapacitated person.

The appointment of a Guardian or a conservator removes a person's right to make decisions for himself and should be considered only as a last resort. This option should be used only when there are no less restrictive alternatives that will protect the interest of the incapacitated person. This booklet will discuss alternatives that may be used to help avoid the appointment of a guardian or conservator.

Sometimes a person who might otherwise need a guardian or conservator can be served in a less restrictive way.

- **Caregiver**

A caregiver is a person who takes care of another often because the person in need cannot care for himself. Caregivers are usually motivated by feelings (love, sympathy, allegiance, etc.), or by financial incentives (pay, etc.). Courts do not appoint people to be caregivers.

Many people will never need a court appointed guardian or conservator because they have family or other concerned individuals who will provide the care that they need. However, a caregiver lacks authority to make legal or financial decisions for the person in her care.

Alternatives to Guardianship or Conservatorship

- **Power-of-Attorney**

An Agent, also called an Attorney-in-Fact, is an individual given written authority, under a Power-of-Attorney, to make decisions and take action on behalf of another person (the principal).

A power-of-attorney is a document executed by one person (the principal) to choose some other person to act as his agent. The person who is selected as the agent for a principal and named in a power-of-attorney must be someone who is totally trustworthy.

There are two types of powers-of-attorney, as follows:

A general power-of-attorney gives the agent the authority to take action on behalf of the principal in order to manage the principal's financial and/or property affairs. However, if the principal becomes incapacitated the agent's authority under a general power-of-attorney is automatically terminated by Virginia law.

A durable power-of-attorney gives the agent the authority to act even if the principal becomes incapacitated. Having a durable power-of-attorney may make the future appointment of a guardian or conservator unnecessary.

Regardless of the type of power-of-attorney, the power ends when the principal revokes it or dies.

- **Advance Medical Directive**

An Advance Medical Directive is a method by which the principal provides instructions about his health care treatment wishes. The principal also designates an agent to make health care decisions when the principal cannot make his own decisions. The agent's powers under the Advance Medical Directive are defined.

- **Representative Payee**

A representative payee is a person appointed by a government agency to receive another person's government benefits for him. The person appointed to be the representative payee is responsible for using the beneficiary's benefit to pay the beneficiary's living expenses.

The Social Security Administration or Department of Veteran Affairs or Railroad Retirement Board must be contacted to have a representative payee appointed to administer benefits paid by those agencies.

- **Trust**

A trust is an arrangement where one person or organization (the trustee) manages property for the benefit of another person (the beneficiary). A trust agreement directs how the trustee is to act. Trusts can be used to preserve certain assets without terminating a beneficiary's eligibility for public benefits, i.e. Social Security disability and Medicaid. A trust may affect a person's taxes. The advice of a lawyer should be sought when creating a trust.

Types of Guardianship and Conservatorship

Once a Circuit Court judge has decided that a guardian or conservator is needed for an incapacitated adult, the judge has some flexibility in determining what authority to give the guardian or conservator. The judge may make specific provisions to preserve as much of the incapacitated person's independence as possible.

There are several types of guardians and conservators as follows:

- **Full Guardianship**

Unless the Court order appointing him limits his authority, a guardian is responsible for making all personal and personal care decisions for the incapacitated person. Full guardianship should be used only as a last resort, i.e. when there are no less restrictive methods that will provide the needed protection. A guardian is required to report annually to the local department of social services about the care provided to the incapacitated adult. The report is

to be prepared on a form issued by the Office of the Executive Secretary of the Supreme Court of Virginia and provided to the guardian by the Clerk of the Circuit Court at the time the guardian qualifies.

○ **Limited Guardianship**

A limited guardianship is used when decisional help is needed for specific tasks but not for all tasks. For example, an incapacitated adult may be able to take care of his own daily needs but is unable to make health care decisions and has not designated an agent under an Advance Medical Directive. In this situation a judge may appoint a guardian to make health care decisions leaving the person free to make all other decisions. A limited guardian has the same responsibility as a full guardian to report annually to the local department of social services about the care provided to the incapacitated adult.

○ **Emergency Order for Adult Protective Services**

If the adult in need of protective services:

- is incapacitated;
- is experiencing an emergency;
- lacks the capacity to consent to protective services needed to address the emergency;
- and, the proposed order is substantially supported by the findings of the local department of social services that has investigated the case,

an emergency or temporary guardian may be appointed for fifteen days. The purpose of the fifteen day guardianship is to designate a guardian to handle the emergency by authorizing the needed protective services.

For an emergency or temporary guardian, an employee from the local department of social services must go to the Circuit Court and request that a

guardian be appointed for the purpose of handling the emergency. The guardian so appointed can act to correct the conditions causing the emergency. If necessary the period of time for which the guardian was appointed can be extended by the court for another five days upon showing to the court that continuation of the original order is necessary to remove the emergency.

- **Standby Guardian**

A standby guardian is a person who will become the guardian of an incapacitated person when the individual who is currently responsible for providing care dies. This type of guardianship is used to allow parents to plan for the care of a mentally impaired child after they are gone. A standby guardian does not assume any duties until the death of the last surviving parent.

- **Full Conservator**

A conservator appointed without limitations has the authority to make all financial decisions for the person. This includes paying bills, investing money and selling property. A conservator is required to post surety on a bond with the court and report to the court about all income received and funds expended. Reports to the court are made through an officer of the court called the Commissioner of Accounts. See *Commissioner of Accounts* under Legal Terms Used in Guardian and Conservator Cases, in this booklet.

- **Limited Conservator**

A limited conservator is used where decisional assistance is needed only for specific financial matters. For example, a person is able to take care of daily needs but is unable to pay bills and fill out tax returns. The judge will appoint a conservator to pay bills and fill out tax returns leaving the incapacitated person free to make all other financial decisions.

Legal Terms Used in Guardian and Conservator Cases

- **Respondent**

The Respondent is the person for whom a guardian or conservator is sought before the court determines that a guardian or conservator is needed.

Respondents have the right to:

- Be represented by legal counsel
- Be present at the hearing
- Present evidence
- Have witnesses present who can speak on their behalf
- Cross-examine all witnesses who provide evidence and
- Have a jury decide the issues.

- **Petitioner**

The petitioner is the person who presents evidence to a Circuit Court that a person is unable to take care of his or her affairs. The petitioner may be a concerned family member, an employee of a social services agency such as Adult Protective Services, or any person who believes that an incapacitated adult needs a guardian or conservator. Relatives of the respondent must be notified about the hearing. The petitioner also arranges to provide to the court medical and/or psychological evidence supporting the need for a guardian or conservator.

- **Guardian or Conservator**

A guardian or conservator is totally in charge of the personal and/or business affairs of the respondent unless the guardian's or conservator's authority is limited by the court order. In addition to medical evidence and a capacity evaluation, a judge may consider the wishes of the respondent when deciding on guardianship cases. A family member of the respondent is frequently appointed to be the respondent's guardian or conservator. In other instances, an attorney, a friend of the respondent, a public guardian or a volunteer may be appointed. One person may serve as both guardian and conservator or the judge may appoint different persons to serve in each capacity.

- **Guardian *Ad Litem***

After a petition has been filed with the court to appoint a guardian or conservator but before the hearing takes place, the judge appoints a guardian *ad litem*. The guardian *ad litem* is an attorney whose role is to protect the rights of the respondent. He gathers information to present to the judge as to what is in the best interests of the respondent.

Before the court hearing, the guardian *ad litem* must visit the respondent for whom a guardian or conservator is being considered. The guardian *ad litem* will explain the court process and inform the respondent of his rights during the hearing.

After collecting information and meeting with the respondent the guardian *ad litem* will make a recommendation to the judge. Once the hearing is over, the guardian *ad litem*'s job is usually completed.

- **Clerk of the Circuit Court**

Any person appointed guardian or conservator must qualify before the Clerk of the circuit court of the county or city where the respondent is a resident or is

located. The guardian or conservator qualifies by taking an oath promising to faithfully perform the duties given in the court order. He also answers questions regarding his own credit, residence, and criminal background. He posts a bond as order by the court and he accepts any educational materials provided by the court. Once the person is qualified, the clerk will give the guardian or conservator a certificate along with a copy of the order. This certificate indicates that the guardian or conservator is properly authorized to act regarding matters contained in the court's order of appointment.

- **Commissioner of Accounts**

A Commissioner of Accounts receives and reviews financial reports from the conservator. The conservator must file an inventory with the Commissioner of Accounts within four months after qualification. The first accounting must be filed within six months after qualification. The second accounting is due 12 months after the first accounting; i.e. 18 months after qualification. Subsequent accountings are due annually.

- **Local Department of Social Services**

The local department of social services receives and reviews reports from the guardian. The report is reviewed to assess the timely submission of the report and the care and protection of the incapacitated adult. The court will inform the guardian of the due date of the report. Twice each year the local department of social services is required to file with the clerk of the circuit court a list of all guardians who are more than 90 days delinquent in filing an annual report. Failure to file a required report may result in an Adult Protective Services investigation.

Frequently Asked Questions

1. How do I know if a person needs a guardian or a conservator?

A **guardian** may be needed for a person:

- Whose functional capacity prevents him from caring for his own basic needs without the assistance of a guardian;
- Who is at risk of substantial harm or exploitation, and;
- Who has no family member or other person available to assume responsibility for assisting him.

A **conservator** may be needed for a person:

- Whose functional capacity prevents him from managing his own financial affairs or is at risk of financial exploitation without the assistance of a conservator;
- Who has no family member or other person available to assist with financial responsibilities; and
- Who cannot be financially protected by use of other less restrictive money management methods.

2. Who decides whether a person will have a guardian or a conservator?

The judge of the Circuit Court decides whether a person needs a guardian or a conservator. Before deciding, the judge must have clear and convincing evidence of the need for a guardian or conservator.

The decision is based upon a medical report evaluating the condition of the respondent, testimony concerning the difficulties of the respondent and the report of the guardian *ad litem*.

3. What are the duties of the guardian?

The guardian makes decisions about how the incapacitated person lives including decisions about health and medical treatment, residence and social activity. When known the guardian applies the values of the incapacitated person in making these decisions. When not known the guardian must make every effort to learn the incapacitated person's values.

4. What are the duties of a conservator?

The conservator takes charge of the management of the incapacitated person's property and is responsible for identifying that property by taking an inventory. The conservator must file the inventory with the Commissioner of Accounts. The incapacitated person's money must be kept separate and cannot be put into the conservator's own bank account. The conservator is authorized to make investments and other financial decisions for the incapacitated person. The conservator must also give an accounting of the incapacitated person's property to the Commissioner of Accounts as described under *Commissioner of Accounts* in the Legal Terms Used in Guardian and Conservator Cases section of this booklet.

5. How can a guardianship or conservatorship be ended?

Any person who believes that the guardian or conservator is not acting as required by law concerning the incapacitated person may petition the court to end the guardianship or conservatorship, or to review the actions of the guardian or conservator, or to have another person appointed to be the guardian or conservator.

The incapacitated person may petition the court to end the guardianship or conservatorship. If he is able to show an ability to care for and manage his or her own affairs the judge will end the guardianship or conservatorship.

The guardian or conservator may petition the court to end the guardianship or conservatorship.

The death of the incapacitated person ends the authority of the guardian or conservator.

Publications

Additional information of interest to guardians and conservators is available in the following publications:

Virginia Handbook for Guardians and Conservators: A Practical Guide for Court-Appointed Guardians and Conservators of Adults

Virginia Guardianship Association

Post Office Box 9204

Richmond, VA 23227

Phone: (804) 261-4046

Web page: www.vgavirginia.org

Senior Citizens Handbook – Laws & Programs Affecting Senior Citizens in Virginia

Virginia State Bar

707 East Main Street, Suite 1500

Richmond, VA 23219

Local: (804) 775-2548

Guide to Consent & Substitute Decision Making

Virginia Association of Community Services Boards (VACSB)

In partnership with Virginia Network of Private Providers

Download from www.vacsb.org and click on special projects

Additional Resources

Virginia Guardianship Association

Post Office Box 9204

Richmond, VA 23227

Telephone: 804-261-4046

Website: www.vgavirginia.org

The Virginia Lawyer Referral Service

707 East Main Street, Suite 1500

Richmond, VA 23219

Toll-free: 1-800-552-7977 (Nationwide)

Local: 775-0808

TTY: (804) 775-0502

Web Site: www.vsb.org/vlrs.html

Virginia Department of Social Services

Adult Protective Services (A service of the Virginia Department of Social Services)

7 North Eight Street

Richmond, VA 23219

24-Hour, Toll-Free APS Telephone Line: 1-888-832-3858

Web Site: www.dss.virginia.gov

Reports of suspected abuse, neglect, and/or exploitation of elders or adults with disabilities may be made to a local department of social services or by calling the toll free line listed above.

APS receives and investigates reports/complaints of abuse, neglect, exploitation of elders and adults with disabilities and provides protective services to elders and adults with disabilities who are found through investigations to be in need of protective services.

Area Agencies on Aging (AAA) are located throughout the State. For information on services in your area that can help older persons, their families and caregivers, contact your local Area Agency on Aging. For contact information see their web site at <http://www.vaavaa.org/agencies.html>.

04/04/2008