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## **GUARDIANSHIP and CONSERVATORSHIP UNDER VIRGINIA LAW**

### **1. WHAT IS GUARDIANSHIP/CONSERVATORSHIP?**

Guardianship or conservatorship is a legal, court-ordered relationship in which one individual, becomes the substitute decision maker for another. It can only be created by a court of law. 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.

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

A guardian is an individual appointed by the court to bear responsibility for the personal affairs of the incapacitated person. Such affairs can include decisions regarding the incapacitated person=s housing, health care, or therapeutic treatment. These decisions might involve placement in a hospital, nursing home, or assisted living facility. A conservator is a person appointed by the court to manage the estate and financial affairs of the incapacitated person. The guardian and conservator often are, but need not be, the same person.

### **3. WHAT DOES THE TERM “INCAPACITATED” MEAN UNDER VIRGINIA LAW?**

The term *incapacitated* has a legal definition under Virginia law. It has been defined by statute to mean an adult who has been found by a court to be incapable of receiving and evaluating information. In addition, the person must be found to lack the capacity to maintain his or her health and safety, and/or to manage his or her property and financial affairs without the assistance of a guardian or conservator.

The Code of Virginia specifically states that poor judgment, alone, is not sufficient cause to warrant a guardianship or conservatorship.

### **4. WHAT IS THE COURT PROCEDURE FOR APPOINTING A GUARDIAN OR A CONSERVATOR?**

First, a petition is filed in the Circuit Court serving the jurisdiction of the residence of the proposed incapacitated 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. A licensed physician or psychologist must make these assessments.

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 the *AGuardian Ad Litem*®. 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 person has a statutory 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.

## **5. WHO CAN BE APPOINTED A GUARDIAN OR CONSERVATOR?**

Normally, the person who filed the petition for guardianship or conservatorship is appointed as guardian or conservator. This person is most often a family member or friend. The primary qualifications are that the guardian or conservator be at least 18 years old, and capable of performing the duties involved. Virginia law does not require that the guardian or the conservator be a resident of Virginia.

## **6. WHAT ARE THE DUTIES OF A GUARDIAN OR CONSERVATOR?**

Serving as a guardian or conservator is a demanding position. The person appointed is responsible for carrying out the powers granted in the court order. In addition, Virginia law stipulates a number of mandatory reporting requirements. These reports include annual financial accounting, as well as an annual, detailed report on the living conditions of the incapacitated person.

The guardian or conservator is a fiduciary of the incapacitated person. They are obligated to protect the individual's rights and welfare, health and medical needs and property and financial position. A fiduciary must not act out of convenience or self-interest but always in the interest of the incapacitated person.

## **7. WHAT ARE THE DISADVANTAGES OF A GUARDIANSHIP OR CONSERVATORSHIP?**

A guardianship or conservatorship is always a last resort. The need for these extraordinary legal proceedings indicate a lack of planning or foresight. Among the impositions and disadvantages are:

1. A guardianship and/or conservatorship terminates and denies the incapacitated person fundamental rights of self determination.

2. The legal proceedings are time-consuming and usually expensive, requiring court cost, fees for physicians and attorneys, and other expenses.

3. It is the court that picks the substitute decision maker for the incapacitated person and that decision maker may not be the individual whom the person would want.

## **8. WHAT ARE THE ALTERNATIVES TO GUARDIANSHIP OR CONSERVATORSHIP?**

The appointment of a guardian and or conservator may not be necessary if the person has already executed a Durable Power of Attorney for both financial and health care decision making. However, the Durable Power of Attorney must be executed before the person becomes incapacitated. The advantages are that the person gets to pick who he or she wants as a substitute decision maker instead of the court. Also, drafting a Durable Power of Attorney is relatively inexpensive and can be quick to execute or sign. No court action is needed. There are other forms of Advance Directives and everyone should have these documents.

## **9. CAN A GUARDIANSHIP OR CONSERVATORSHIP BE TERMINATED?**

Yes, there are several ways in which a guardianship or conservatorship can cease. These include:

1. If the incapacitated person dies, the guardianship or conservatorship automatically ends.

2. The incapacitated person can petition the Circuit Court to restore his or her legal capacity. A new hearing will be held, and the court will determine if the person has substantially regained the ability to care for his or her own person and/or his or her own estate and financial affairs.

3. Sometimes, a guardianship or conservatorship is established on a temporary basis, with a specified time limit. When this period has passed the guardianship or conservatorship automatically terminates.

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