

Virginia Guardianship and Conservatorship: 2016

Copyright © 2016. R. Shawn Majette, VSB 19372
Thompson McMullan P.C.
100 Shockoe Slip
Richmond, Virginia 23219
804/698-6233(V) 804/649-0543 (F)
smajette@t-mlaw.com
www.t-mlaw.com
www.majette.net
All rights reserved.

Welcome!

Thank you for your interest in this edition of our brief outline about guardianship and conservatorship in Virginia.

Our purpose is to provide a simple explanation 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.

[ThompsonMcMullan, P.C.](#), is dedicated to this practice area. A full service commercial law firm and member of the international association of commercial law firms, [Meritas](#), we maintain a significant elder law presence in the Commonwealth, staffed with attorneys and assistants committed to excellence and service in this complex, growing area of the law.

For more than 35 years, our lawyers have been leaders in local, state and national bar associations, and our team includes past and serving officers in these associations. With several lawyers inducted into *Best Lawyers in America*, honored as Virginia Leaders in the Law, and recognized by U.S. News and World Reports as outstanding in the field, we have represented dozens of Virginia families and institutions in scores of proceedings throughout Virginia. We've written and lectured extensively in connection with the topics briefly described here, and we often address professional associations of lawyers, social workers, and hospital administrators throughout Virginia and the United States regarding these and related aging and disability challenges.

In the end, it's about you and how you or your designee can help your family member, patient, or friend.

We invite you to visit our [web page](#), where you will find our online services a helpful resource and convenient means of corresponding with us. Several questionnaires and outlines are available there and at a subsidiary site I maintain,¹ and a link to our questionnaire for this practice area is on the last page of this outline.

We help you help others. *We do whatever it takes.*sm

[R. Shawn Majette](#)
ThompsonMcMullan, P.C.
December 26, 2016

¹ See *Questionnaires* pull down menu at <http://majette.net> for a detailed set of questionnaires regarding a variety of information which may be collaterally pertinent to this subject.

A. Definitions.²

1. "Incapacitated person" means an adult³ 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. "Fiduciary" is a catchall phrase which refers in this outline to a person (or other entity) whom or which the Court appoints as a guardian or a conservator.
5. "Estate" includes both real estate and personal property.
6. "Respondent" is the adult person alleged to be an incapacitated person in the papers filed with the court (the "petition").
7. "Ward" is sometimes used in this outline to refer to an adult who has been declared an incapacitated person after a hearing. It is *not* a term employed in Title 64.2 of the Virginia Code.⁴

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.⁵

² Va. Code § 37.2-2000. All references to the Va. Code may be accessed through the writer's web page, <http://majette.net>.

³ Or a minor at least 17 years, six months old. Va. Code § 64.2-2013, discussed below under "Special Proceedings."

⁴ The term is often used to refer to a minor who is in the care (or "ward") of an adult appointed by the court under Virginia Code § 64.2-1300 *et seq.*

⁵ Va. Code § 64.2-2002.

- (c.) Virginia must be the “home state” of the Respondent or it must be a “significant connection state” as defined in the Virginia Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.⁶
 - (i.) Virginia is the home state if the Respondent was physically present therein, including any period of temporary absence, for at least six consecutive months immediately before the filing of the petition.
 - (ii.) Virginia is a “significant connection state” if the Respondent has a significant connection with Virginia other than mere physical presence and substantial evidence concerning the Respondent is available in Virginia.⁷
 - (d.) The proceeding must be filed where the Respondent resides or is located in Virginia.⁸
 - (e.) Notice must be served on the Respondent personally, and may be made by guardian *ad litem*, described below.⁹
 - (i.) Notice is also given to the Respondent’s spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including step-children.
 - (ii.) Notice is also given to anyone responsible for the Respondent’s care or custody.
2. Appointment of guardian *ad litem*.¹⁰
- (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.
3. Appointment or engagement of counsel.¹¹
- (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

⁶ Va. Code §64.2-2001 (B).

⁷ Va. Code §64.2-2105.

⁸ Va. Code §64.2-2001.

⁹ Va. Code §64.2-2004.

¹⁰ Va. Code §64.2-2003. 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>.

¹¹ Va. Code § 64.2-2006. 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.

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; ¹² special report for psychiatric hospital admissions. ¹³

(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.) Psychiatric facility ¹⁴ admissions. ¹⁵

(i.) A supplemental report (or testimony in open court) is required for the Court to confer the power to consent to an involuntary admission of the ward to a psychiatric facility, as discussed below. ¹⁶

(ii.) The report (or testimony) must be presented by a **licensed psychiatrist**.

(d.) Problems.

(i.) Confidentiality (HIPAA) concerns of several doctors.

C. Suitable conservators and guardians.

1. Any natural person can serve, with special rules for out of state fiduciaries.

2. The spouse is *not* granted a preference. ¹⁷

3. Often the decision as to whom will serve as the conservator will depend upon the credit history of the nominee because the law generally requires that a bond (called "surety") be issued by an insurance company to guarantee the actions of the

¹² Va. Code § 64.2-2005.

¹³ Va. Code § 37.2-805.1.

¹⁴ "Facility" means a state or licensed hospital, training center, psychiatric hospital, or other type of residential or outpatient mental health or mental retardation facility." Va. Code § 37.2-100.

¹⁵ *Id.*

¹⁶ See Va. Code § 64.2-2009.

¹⁷ Va. Code § 64.2-2007.

conservator. Bankruptcy or other bad credit often results in a refusal of the insurance company to guarantee the actions of the nominee.

D. Powers and duties of guardians.

1. Powers which are not granted to the guardian are retained in the incapacitated person.¹⁸

“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 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 § [64.2-1007](#); and (vi) set the bond of the guardian, and the bond and surety, if any, of the conservator.

2. Specific elements.¹⁹

- (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.

3. Special Psychiatric and related facility admissions powers.²⁰

- (a.) If the court order authorizes it, a guardian may consent to admission of that person to a mental health or related facility²¹ for no more than 10 calendar days if

¹⁸ *Id.*

¹⁹ Va. Code § 64.2-2019.

²⁰ Va. Code § 37.2-805.1 (B).

²¹ See definition above.

a physician on the staff of or designated by the proposed admitting facility examines the person before admission and states, in writing, that the person

- (i.) has a mental illness,
 - (ii.) is incapable of making an informed decision²² regarding admission to the hospital,
 - (iii.) needs treatment in a facility;
 - (iv.) the proposed admitting facility is willing to admit the person; and
 - (v.) the guardianship order specifically authorizes the guardian to consent to the admission of such person to a facility, pursuant to Va. Code §64.2-2009.
- (b.) Va. Code §64.2-2009 requires the petitioner to prove by clear and convincing evidence that
- (i.) the Respondent has severe and persistent mental illness that significantly impairs his capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed psychiatrist;
 - (ii.) such condition is unlikely to improve in the foreseeable future; and
 - (iii.) the guardian has formulated a plan for providing ongoing treatment of the person's illness in the least restrictive setting suitable for the person's condition.

E. Powers and duties of conservators.²³

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,**²⁴ 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.
 - (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.

²² Va. Code § 54.1-2982.

²³ Va. Code §64.2-2021.

²⁴ Va. Code §64.2-2021. 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.

T:\Majettes\Handouts\Virginia Guardianship And Conservatorship 2016 V.2 12-27-2016 1350.Doc LS: 12/26/2016 1:50 PM LP:0/0/0000 0:00 AM

- (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.) Upon the death of the incapacitated person, the conservator winds up the estate.
 - (i.) For estates of more than \$25,000, the conservator may pay to a qualified personal representative of the estate.²⁵
 - (ii.) For other estates, the conservator may pay the balance of the incapacitated person's estate to the incapacitated person's surviving spouse or, if there is no surviving spouse, to the distributees of the incapacitated person or other persons entitled thereto, including any person or entity entitled to payment for funeral or burial services provided.²⁶

F. 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.²⁷ 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.²⁸
2. Conservator's duty to account to the Commissioner of Accounts.²⁹
 - (a.) A conservator must comply with requirements imposed under Chapter 1 of Title 64.2, specifically including the duty to account set forth in § 64.2-1305.³⁰
 - (b.) The first accounting is due within six months after qualification and covers the first four months.³¹ 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.³²

²⁵ Va. Code § 64.2-2026 (B).

²⁶ *Id.*

²⁷ Va. Code § 64.2-2020, incorporating the deadlines of Va. Code § 64.2-1305.

²⁸ The forms are available at <http://majette.net>.

²⁹ Va. Code § 64.2-1305.

³⁰ Va. Code § 64.2-2021.

³¹ Va. Code § 64.2-1305.

³² *Id.*

- (c.) When the incapacitated person is a Medicaid recipient, the fee of the Commissioner of Accounts is limited to \$25.³³
- (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 representative³⁴ on behalf of the recipient if the representative is otherwise required to account for such benefits.³⁵
 - (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.

G. Special proceedings.

1. Substituted judgment proceedings for tax, Medicaid and related financial planning for incapacitated person under Va. Code §64.2-2023.
 - (a.) Gifts.³⁶
 - (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.³⁷

³³ *Id.* For small estates, when authorized, the conservator may be relieved of the requirement to account beyond filing a receipt with the Clerk, in compliance with Virginia Code § 8.01-606 (E): “E. Whenever a fiduciary is administering funds not exceeding \$25,000, the circuit court of the county or city in which the fund is being administered by order entered of record may authorize the fiduciary, when considered competent to administer the funds, to continue to administer the funds for the benefit of the person entitled to the fund without the necessity of filing any further accounts, whether such person resides within or without this Commonwealth. The clerk of the court shall take a receipt from the fiduciary, which shall show the amount of the fund remaining, to whom it belongs, and the date the court entered the order exempting the filing of further accounts. The receipt shall be signed and acknowledged by the fiduciary, and entered of record in the book in the clerk's office in which the current fiduciary accounts are entered and indexed. No surety shall be required on the bond of a fiduciary granted an exemption from filing any further accounts.”

³⁴ A “representative payee” under these federal programs. See <http://www.ssa.gov/payee/faqrep.htm>.

³⁵ Va. Code § 64.2-1312 (C).

³⁶ Va. Code § 64.2-2023 (D, E). Gifts in a calendar year of up to \$25,000 may be approved by a Commissioner of Accounts. Gifts of no more than \$150 per donee, not to exceed a total of \$750 in a calendar year, may be made in the discretion of the conservator without further authorization. ***Caveat:*** certain gifts made by Medicaid applicants or recipients may trigger imposition of mandatory long term care penalty periods. See 42 USC 1396p, 12 VAC 30-40-300, Va. Medicaid Manual § M1450.001 *et seq.*

³⁷ Effective December 13, 2016, a mentally competent, disabled person under the age of 65 can establish a special needs trust pursuant to 42 USC 1396p (d)(4)(A). See § 5007, 21st Century Cures Act (P.L. 114-255).

T:\Majettes\Handouts\Virginia Guardianship And Conservatorship 2016 V.2 12-27-2016 1350.Doc LS: LS: 12/26/2016 1:50 PM LP:0/0/0000 0:00 AM

- (f.) A parent or legal guardian of a minor who is at least seventeen years and six months old may file a guardianship / conservatorship proceeding.³⁸ The Court's order must specify whether it is effective upon entry or at the 18th birthday of the minor.³⁹
2. Standby guardianships for incapacitated children.⁴⁰
- (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 applicable to the fiduciary (i.e., for appointment of a guardian or conservator) as described above.
3. Standby guardianship for incapacitated parents under amended Va. Code § 64.2-1013.
- (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.

Click [here](#) for Guardianship /
Conservatorship Questionnaire

³⁸Va. Code §64.2-2001.

³⁹ Va. Code § 64.2-2001 (C).

⁴⁰ Va. Code § 64.2-2013.

