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GUARDIANSHIP And CONSERVATORSHIP

Guardianship isn't something that most people plan for, but it can be an essential protection if someone cannot take care of themselves or their property. It happens, for example, when children with severe developmental disabilities become adults, when an adult is brain injured in a car accident, or when an older person loses the ability to make decisions, or handle matters due to dementia. If these things happen, a court decides if a person is incapacitated. If guardianship is necessary the court may appoint a guardian to make decisions for the incapacitated person who needs help. A conservator may also be appointed to handle the incapacitated person's financial affairs and property.

WHAT MAKES A PERSON "INCAPACITATED"?

An incapacitated person is an adult who has been found by a court to be incapable of effectively understanding and responding to people, events, or environments to such an extent that the individual is unable to:

- Care for his health, care, safety, or therapeutic needs without assistance or protection of a guardian, or
- Manage property or financial affairs or provide for his support or for the support of legal dependents without the assistance or protection of a conservator.

Displaying poor judgment, in and of itself, is not sufficient evidence that the individual is an incapacitated person. Only the court or a physician can determine whether a person is truly incapacitated. A person with a guardian/conservator may be called a "ward," an "incapacitated person" or a "protected person."

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WHO CAN BE A GUARDIAN/CONSERVATOR?

A family member may be called upon to serve as guardian or conservator. A guardian could also be a friend or a professional guardian. In some cases, it might be a public guardian or conservator (a state agency), a bank, a volunteer, or a not for profit agency. The court decides who the guardian or conservator will be and what decisions they may make. A guardian/conservator's authority can be very broad or can be limited to making specific decisions. The same person or agency could be appointed as both guardian and conservator.

WHAT DOES A GUARDIAN DO?

A guardian is a person appointed by the court to care for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with the order, residence.

WHAT DOES A CONSERVATOR DO?

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

GUARDIANSHIP OPTIONS

A full, limited, or emergency guardian may be appointed, depending on the circumstances and what is in the incapacitated person's best interests. A standby guardian may also be appointed. A standby guardian is a person who will become the guardian of the incapacitated person when the individual caring for that person, such as a parent, dies. A standby guardian does not assume any duties until after the death of the surviving caretaker.

Guardianship may be full or limited, as the court sees fit, but it should be limited to meet the specific needs of the incapacitated person. A guardian might be appointed only to make decisions about living arrangements, personal needs, or medical care.

REQUIREMENTS FOR GUARDIANSHIP

Petitioning for guardianship is a complex process. The court will only appoint a guardian if a person:

- Has a physical or mental problem that prevents them from caring for their basic needs;

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- Is in danger of substantial harm; and,
- Has no family member or other person available to assume responsibility for them.

REQUIREMENTS FOR CONSERVATORSHIP

A conservator will only be appointed if a person:

- Has a physical or mental problem that prevents them from managing their own affairs;
- Has no family member or other person available to assume these financial responsibilities; and,
- Cannot be financially protected by use of other money management methods.

ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP

Guardianship and conservatorship should be viewed as “last resorts,” considered only when no other options exist. If the person is able to handle any aspect of their affairs without assistance, then they may not need a guardian, and instead should consider:

- Obtaining a caregiver, although this person will have no legal authority to make legal or financial decisions for the person in his or her care, or
- Drafting a limited, general, or durable power of attorney authorizing an agent of the person’s choosing to act on his or her behalf, or
- Drafting an advance medical directive, to select an agent to make health care decisions when the person is unable to make decisions for him or herself and, if including a living will, giving instructions to that agent as to what health care decisions are desired, or
- Appointing a representative payee to take care of their money, and pay the other person’s living expenses, or
- Establishing a trust, where one person or organization (a “trustee”) manages the property for the benefit of the other person (the “beneficiary”).

ESTABLISHING GUARDIANSHIP AND CONSERVATORSHIP

Petitioning for guardianship/conservatorship is a complicated process involving many forms and processes. You will most likely need an attorney to assist you. If you need to have a guardian or conservator appointed for someone unable to handle their own affairs, you must follow these steps:

1. As the *petitioner*, you must file a petition with a Virginia Circuit Court stating that there is an incapacitated Virginia resident (called the *respondent*) in need of a guardian or conservator. This is a complex process which most likely will require the assistance of a private attorney.
2. The petition must be filed in the Circuit Court for the city or county in which the respondent lives, or where he lived immediately prior to moving to a nursing home, assisted living facility or other institution.

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3. After the petition is filed, a hearing will be scheduled for the court to hear evidence explaining why a guardianship/conservatorship is necessary.
4. Before the hearing is held, a guardian ad litem will be appointed to the respondent. This is an attorney who represents the respondent's best interests.
5. The guardian ad litem must visit the respondent, advise him of his rights, and investigate the facts stated in the petition.
6. The guardian ad litem must file a report and come to the hearing to advise the court whether or not the respondent needs a guardian or conservator, and what powers the guardian or conservator should have.
7. A report evaluating the respondent's medical condition must be filed with the court.
8. Finally, you should attend the hearing where the judge will examine all of the evidence and make a decision as to whether or not the respondent needs a guardian or conservator, who the guardian or conservator will be, and what decisions they may make.

SERVING AS GUARDIAN OR CONSERVATOR

If you are appointed as a guardian, or conservator, you will need to:

- Qualify before the clerk of the circuit court by taking an oath promising to perform your duties faithfully;
- Answer questions regarding your credit, residence, and criminal background; and,
- Post a bond as ordered by the court.

The clerk will then give you any educational materials provided by the court, as well as a certificate and a copy of the court order.

The certificate and the court's order will explain what duties you have and what decisions you are allowed to make. You may have just a few powers or you may need to make most decisions on behalf of your ward. You must carefully understand the line between what you can decide and the rights that your ward keeps. You must try to make choices based on the ward's values and to involve the ward in making decisions whenever possible.

GUARDIANSHIP DUTIES

If you are appointed as guardian, the list of responsibilities can be quite long, depending on your ward's needs and the court's order. You may need to:

- Make sure the ward is living in the most appropriate place;
- Arrange for caregivers, social activities, transportation;
- Consent to medical treatment such as surgeries or medications;
- Supervise hygiene, meals, and clothing;
- Provide for any physical, speech, or occupational therapies;
- Frequently visit the ward and try to improve the ward's quality of life;

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- Report to the court and/or Department of Social Services on the care that you are providing.

Being guardian for someone else is a major undertaking. You will need to be in frequent contact with the court, the Commissioner of Accounts, the Department of Social Services and your attorney to make sure you are properly acting on behalf of your ward.

CONSERVATORSHIP DUTIES

What you can do depends on the court order, but if you are appointed as conservator you will at least need to:

- Find and protect the ward's assets;
- Set up separate accounts with the ward's funds;
- Spend the ward's money only for the ward's care and needs;
- Keep detailed records of all expenditures;
- Keep the ward's property in good repair and insured;
- Carefully invest the ward's resources;
- File inventories and accountings with the Commissioner of Accounts on a regular basis; and,
- Get directions from the court before taking major actions.

ENDING GUARDIANSHIP/CONSERVATORSHIP

Guardianship and conservatorship only end upon the ward's death, unless prior to the ward's passing:

- The ward petitions the court to end the guardianship/conservatorship and can show the judge that he or she is able to care for and manage their own affairs;
- The judge appoints another person as guardian/conservator;
- The guardian petitions the court to end the guardianship/conservatorship;
- Someone believes the guardian/conservator is not acting in the ward's best interests and petitions the court to end the guardianship/conservatorship, or to have another person appointed as guardian/conservator.

THIS INFORMATION IS NOT LEGAL ADVICE. Legal advice is dependent upon the specific circumstances of each situation. Therefore, the information contained in this pamphlet cannot replace the advice of competent legal counsel.

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Free Legal information by Web and Phone: www.vlas.org and
1-866-LeglAid (534-5243)

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