



GUARDIANSHIPS *and* CONSERVATORSHIPS in VIRGINIA

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What is an adult guardianship or conservatorship?

An adult guardianship or conservatorship is created when a Virginia circuit court determines that a person is unable to manage his or her own personal or financial affairs and appoints a guardian and/or conservator for that person. The person for whom a guardian or conservator is appointed is called the incapacitated person. A guardian is the person appointed to handle the affairs of the incapacitated person. A conservator handles the financial affairs of the incapacitated person. The guardian and conservator may be the same person or two separate people and, a guardian can be appointed without the necessity of a conservator.

What is the process for appointing a guardian or conservator?

Any person may file a petition with a Virginia Circuit Court alleging that there is an incapacitated Virginia resident who needs to have a guardian or conservator appointed to manage some or all of his affairs. The person alleged to be incapacitated in the petition is called the respondent. 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. After the petition is filed, a hearing will be scheduled for the court to hear evidence as to why a guardianship and/or conservatorship is necessary and who should be appointed if it is necessary.

How does the law protect the rights of the person that is alleged to need a guardian? The respondent must be given a copy of the petition that has been filed, notified of the hearing, and advised of his or her legal rights. The respondent has the right to be present at the hearing, have a jury trial, and to subpoena and cross-examine witnesses. He or she has the right to hire a lawyer to represent him and if he cannot afford to pay a lawyer, he may ask the court to appoint a lawyer for him to be paid as part of the costs of the proceeding. A copy of the notice of hearing and petition must be mailed to the respondent's immediate family, or at least three other known relatives. The court must appoint a guardian *ad litem*. This is an attorney who represents the interests of the respondent. However, this attorney does not represent the respondent, rather she will tell the court what she thinks is best for the respondent. The guardian *ad litem* must visit the respondent, advise him of his rights, and investigate the facts stated in the petition. 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, the extent of the duties and powers the guardian or conservator should have, and who should be appointed guardian and/or conservator. A report evaluating the medical condition of the respondent must be filed with the court. The report is to be prepared by a licensed physician, licensed psychologist, or other licensed professional skilled in assessment or treatment of the respondent's mental and/or physical conditions.

When children with disabilities reach the age of 18, a guardianship is necessary for parents to be able to continue to address their needs, make medical decisions, and protect their interests. Upon reaching the age of majority, the parent no longer has no authority over the person absent a guardianship.

When will a Court appoint a guardian or conservator? Lack of good judgment by the person is not enough for the court to find them incapacitated. The court must determine that the respondent is incapable of receiving and evaluating information effectively or responding to people, events, or what is going on around him to such an extent that he lacks the capacity to do either or both of the following: 1.) Meet the essential requirements for his health, care, and safety without the assistance or protection of a guardian; *or*, 2.) Manage property or financial affairs or provide for his or her support without the assistance or protection of a conservator.

Guardians are individuals appointed by a court to protect an "incapacitated person."

An "*incapacitated person*" is a person who is unable to make decisions about their own care.

A "*guardian*" is someone who is totally in charge of another person's affairs. A "*conservator*" is someone who is in charge of another person's financial affairs.

A "*guardian ad litem*" is an attorney appointed by the Court to represent the Respondent's BEST INTERESTS during the hearing.



What are the Guardian's duties?

A guardian or conservator is not liable for the acts of the incapacitated person, unless the guardian or conservator is personally negligent. Guardians and conservators are not required to spend their own funds to care for the incapacitated person. The guardian *must*:

- Visit the incapacitated person as often as necessary to know of his capabilities, limitations, and needs.
- Encourage the incapacitated person to participate in decisions.
- File annual reports with the local Department of Social Services regarding the incapacitated person's medical condition, living arrangements, and the guardian's recommendations.

What are the Conservator's duties?

The conservator *must*:

- Take care of and preserve the assets and income of the incapacitated person.
- File annual accountings with the Commissioner of Accounts showing all money and property received and disbursed on behalf of the incapacitated person.

How long does a guardianship or conservatorship last?

A guardianship or conservatorship ends when the incapacitated person dies. The conservator has a duty to turn over whatever assets she still has in her possession to the administrator or executor of the incapacitated person's estate and to do a final accounting for the Commissioner of Accounts. A guardianship or conservatorship can be terminated or modified if the incapacitated person's condition changes. This requires another petition and hearing in circuit court. A new guardian or conservator could be substituted if the guardian or conservator that was originally appointed can no longer serve. However, this also requires a petition and hearing before the court.

The Court must consider the following factors in determining whether the respondent needs a guardian or conservator and the powers and duties to be given:

- The limitations of the respondent;
- The development of the respondent's maximum self-reliance and independence;
- The availability of less restrictive alternatives including advance directives and durable powers of attorney;
- The extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse;
- The actions needed to be taken by the guardian or conservator; *and*
- The suitability of the proposed guardian or conservator.

WHAT ABOUT PAYMENT?

- 1.) *In many cases, guardianships can be obtained through proper court process **without cost** (yes, FREE) to the incapacitated person or their family. If the incapacitated person has no assets and only limited income, the costs for obtaining the guardianship - including attorney's fees, guardian ad litem fees, and costs can be borne by the state.*
- 2.) *If the incapacitated person receives services from a local community services board (CSB), funding may be possible from the CSB. Funding may also be possible from Department of Social Services*
- 3.) *If the incapacitated person has an estate of value or income, the costs can be paid from the estate once the guardianship (and in these cases, conservatorship) is concluded.*



For more information, please contact us at The RATLIFF LAW FIRM at (276) 522-1220, or via e-mail at contact@ratlifflaw.net. Our firm specializes in providing high quality services including guardianships, conservatorships, estate planning, wills, powers of attorney, medical directives, trusts, and Medicaid/Medicare planning.

