

Public and Private Guardianship in Virginia: The Process and the Guardrails

**Patti Meire, Coordinator Virginia Public Guardian & Conservator Program
VA Department for Aging and Rehabilitative Services**

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Disclaimer

Opinions expressed in this presentation are those of the speaker and do not necessarily reflect the views of the Virginia Department for Aging and Rehabilitative Services or the Commonwealth of Virginia.

Guardianship in the News

- Nevada case involving professional guardian, April Parks, and clients, Rudy & Rennie North. Aviv, Rachel, “How the Elderly Lose their Rights.” *The New Yorker*, October 2, 2017.
- “Legal Guardianship in Elder Care.” *Last Week Tonight with John Oliver*, HBO, June 3, 2018 (television).
- Edith + Eddie, 2017 film. Academy Award Nominee for Best Documentary Short, 90th Academy Awards, 2017. Also see article from Kaiser Health News with additional background information. <https://khn.org/news/a-tale-of-love-family-conflict-and-battles-over-care-for-an-aging-mother/>



Conservatorship under California law **NOT** Guardianship under Virginia law.

Guardianship at the General Assembly

Tough Issues

- How to balance an individual's autonomy against their need for protection.
- How to decide who needs a guardian. What is "incapacity"?
- Understanding the limits of guardianship. A guardian is a legal decision-maker. A guardian cannot control behaviors.
- How to ensure guardians are neither neglecting their duties or abusing their power.

Role of the Legal Decision-Maker

CONSERVATOR

- Appointed to make manage the incapacitated person's finances, assets, and income
- Work is overseen by the Commissioner of Accounts, an officer of the court, through detailed reports filed by the conservator.

GUARDIAN

- Appointed to make other legal decisions for the incapacitated person (e.g., health care and residential decisions)

Last Resort – “Nuclear Option”

A finding of incapacity and appointment of a guardian deprives individuals of the decision-making authority. Generally, a person found to be incapacitated --

- Cannot contract
- Cannot give consent
- Unless preserved by the court, cannot own a gun, marry, vote.

Alternatives to Guardianship

Medical – Apply when individual is incapacitated as a matter of fact or law.

- Health Care Decisions Act
- Advanced Directives & Medical Powers of Attorney
- POSTS (Physician Orders for Scope of Treatment)

Financial – Apply when individual is incapacitated as a matter of fact or law.

- Authorized signers on financial accounts
- Joint Accounts
- SSA Representative Payee & VA Fiduciaries
- Durable Powers of Attorney

Supported Decision-Making Agreements

For individuals who have capacity and retain decision-making authority for themselves but consult with another person(s) for guidance.

See https://www.vacourts.gov/courts/circuit/resources/guardian_options_pamphlet.pdf; see also COV § 37.2-314.3

- AARP recommends:
 - “Careful planning can ensure that you’ll have a say in who will look after you if you ever need help.
 - Make peace with your loved ones. Judges often appoint professional guardians when families are feuding, so try to make up before problems escalate.
 - Power up. Create one durable power of attorney for finances and another for medical care. One person can fill both roles, and you can also name your POA designee as your guardian of choice.
 - Instruct. Explain to your designee how to do the job (good sources are consumerfinance.gov/managing-someone-elses-money and guardianship.org/standards).
 - Trust, but verify. In your POA document, create checks and balances by requiring your appointee to provide a periodic accounting to another trusted friend or relative.” Miller, Kenneth “What Happens When a Guardianship Gets Contentious.” AARP The Magazine, October 4, 2018.

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Why Appoint a Guardian?

- Informal assistance in the community may be effective, but it is voluntary.
- Those providing informal assistance may not agree about what action is best, and may not always act in the individual's interest.
- The individual may not accept the advice of the individual trying to provide assistance.
- A person without decision-making capacity is unable to appoint someone to act on their behalf through a power of attorney or adding another person as a signatory on their financial accounts.
- There are many complicated decisions to make when managing a person's life. Courts cannot undertake that duty for all incapacitated adults.

Obtaining a Legal Guardian – The Basics

- The Virginia Code provides a detailed legal process for obtaining a G/C that includes important protections for the rights of the allegedly incapacitated person. (See Virginia Code §§64.2-2000 *et seq.*)
- Obtaining a guardian requires a decision of a Virginia circuit court through an evidence-based and potentially adversarial proceeding.
- Begins with a petitioner who brings a case alleging that an adult, the respondent, is incapacitated and in need of a legal decision-maker.
- Any person or legal entity can file a petition. It is the petitioner's job to provide evidence of incapacity and the need for a G/C.

Protections in the Process

The protections provided by Virginia law are:

- Court process (adversarial proceeding in which evidence is presented)
- Notice to the allegedly incapacitated person/respondent delivered personally
- Notice to family members
- GAL to represent respondent's best interest, to investigate the allegations by the petitioner, and submit a written report to the court
- Right to a second attorney to oppose the guardianship
- Right to jury trial
- Statutory requirement that court consideration of individual needs and circumstances of respondent
- Court's ability to tailor the guardianship order to respondent's specific circumstances
- Orders may be changed, capacity may be restored, guardian can be changed.

“Incapacitated person” is an adult 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

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

POOR JUDGEMENT ALONE IS NOT SUFFICIENT EVIDENCE TO FIND THE INDIVIDUAL IS INCAPACITATED. COV 64.2-2000.

In determining the need for a guardian and what the powers and duties of the guardian should be, the Code requires the court to consider:

- The person's limitations;
- Whether the person's needs can be met through less restrictive alternatives;
- How the person might best develop maximum self-reliance and independence;
- The need to use guardianship to protect the person from abuse, neglect, or exploitation;
- The suitability of the proposed guardian; and
- What is in the person's best interests. COV § 64.2-2007

If the court determines that a guardian is needed, an order will be issued appointing a guardian and defining the guardian's powers and duties.

- The powers may be limited in scope and time.
- The powers should be designed to permit the incapacitated person to care for himself and manage her property to the extent of his/her ability. COV § 64.2-2009.

Duties of Guardians Established by COV

(COV §§ 64.2-2019 & 2020)

- Serve as a fiduciary for the incapacitated person.
- To the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage their personal affairs.
- Consider the expressed desires and personal values of the incapacitated person to the extent known.
- Act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence.
- Not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.
- Maintain sufficient contact with the incapacitated person to know her abilities, limitations, needs, and opportunities, and to visit as often “as necessary.”
- File an annual report of the guardian with the local DSS office describing person’s situation over the course of the year.

Appointment of a Virginia Public Guardian

If the court finds that the incapacitated person is (i) without sufficient funds to pay a private guardian (*i.e.*, “indigent”) and (ii) there is no other proper and suitable person willing and able to serve, the court may appoint a guardian operating as part of the Virginia Public Guardian & Conservator Program to serve as the guardian, provided a slot is available with the local PGP provider serving the area where the incapacitated person resides. COV § 64.2-2010.

The Virginia Public Guardian & Conservator Program

Operated through DARS pursuant to COV §§ 51.5-149 et seq. and the regulations at 22 VAC 30-70.

DARS contracts with 13 organizations across the Commonwealth to serve as guardian (and sometimes conservator) for 1,049 incapacitated individuals who are indigent and without another proper and suitable person to serve as their legal decision-maker.

Four eligibility categories that correspond to the funding provided by the General Assembly.

- 454 DBHDS-ID/DD slots for adults with an ID or DD diagnosis referred by the Dept. of Behavioral Health & Development Services (DBHDS).
- 98 DBHDS-MH slots for adults incapacitated by serious mental illness referred by DBHDS. To date these have been used for individuals receiving treatment at state mental health institutes.
- 40 MI/ID slots for adults incapacitated by serious mental illness and/or an intellectual disability not referred by DBHDS.
- 457 Unrestricted slots which are typically used for individuals incapacitated by dementia, mental illness, or a traumatic brain injury.

PGP providers accept referrals from specific geographic territories and serve a specified number of PGP clients designated in PGP contract w/ DARS.

Approximately 12,000 adults in Virginia are under guardianship. No more than 1,049 have a public guardian operating under the Virginia PGP.

The other 11,000 guardianships are PRIVATE guardianships.

Private guardians are likely to be a family member, an attorney selected by the court, or a tax-exempt organization organized for the purposes of providing guardianship services and which is not providing direct services to the incapacitated person. (See definition of “guardian” @ COV § 64.2-2000).

An entity contracted with DARS to provide public guardianship services may operate a private guardianship program. Individuals served through these private programs are NOT public guardianship clients

Public Guardians vs. Private Guardians

PUBLIC

- Comply with the court order of guardianship and the statutory duties applicable to all guardians from COV 64.2-2000 *et seq.*
- Pursuant to the PGP regulations and contract with DARS:
 - Make a face-to-face visit with every public client at least once a month;
 - Have a client-to-staff ratio of no more than 20:1;
 - Maintain certain documentation in client files;
 - Utilize person-centered planning;
 - Attend DARS sponsored training;
 - Participate in DARS' audit; and
 - Respond to DARS' complaint process.

PRIVATE

- Comply with the court order of guardianship and the statutory duties applicable to all guardians from COV 64.2-2000 *et seq.*
 - Not subject to regulation.
 - Not subject to the oversight of any state agency.
 - The only remedy for those having a complaint about the work of a private guardian is to bring the concern before the court that appointed the guardian, or if the guardian's behavior appears to constitute abuse, neglect, or financial exploitation, to file a complaint with Adult Protective Services.

ADDITIONAL PROTECTIONS IF A **PUBLIC** GUARDIAN IS INVOLVED

Every PGP provider has a multidisciplinary panel made up of individuals from the communities from which the provider accepts referrals to review new referrals and the status of existing clients.

Before agreeing to any person the PGP provider is required to consider through its MDP:

- The appointment of a G/C is appropriate,
- Is the least restrictive alternative available to assist the person, and
- Whether the PGP provider has the resources and ability to serve the referred individual.

Based on the initial review the PGP provider should recommend to the court appropriate limitations on the power of the guardian.

All PGP clients are reviewed annually by the MDP to ensure that the appointment continues to be appropriate.

How to Obtain a Public Guardian

The need for public guardians exceeds the number of slots available throughout the state so there are waitlists for slots in all eligibility categories. With some limited exceptions, the waitlists work on a first come, first served basis.

For someone diagnosed with an intellectual disability before age 18, or another developmental disability before age 22, a referral for a public guardianship slot should be made to DBHDS by the person's community services board.

For individuals who a referral should be made to the PGP provider who serves the city or county where the allegedly incapacitated person lives.

When a slot in the appropriate eligibility category becomes available, the PGP provider's MDP will review the referral and if the individual can be accepted by the provider, advise the referring entity to initiate the legal proceeding under COV § 64.2-2000. Currently, funding is available to help defray the cost of attorneys fees.

Resources

Virginia Public Guardian Program webpage:

<https://www.vda.virginia.gov/publicguardianship.htm>

Virginia Supreme Court website:

Video Tutorial about the Appointment of Guardians/Conservators in Virginia

https://www.vacourts.gov/courts/circuit/articulate/incapacitated_adults/story_html5.html

Frequently Asked Questions about Guardianship - https://www.vacourts.gov/courts/circuit/resources/guardianship_faqs.pdf

Alternatives to Guardianship - https://www.vacourts.gov/courts/circuit/resources/guardian_options_pamphlet.pdf

Joint Legislative Audit and Review Commission:

Report on Improving Virginia's Adult Guardianship & Conservatorship System - <http://jlarc.virginia.gov/landing-2021-virginias-adult-guardian-and-conservator-system.asp>

Code of Virginia:

Guardian & Conservatorship §§ 64.2-2000 *et seq.*

Virginia Public Guardian & Conservator Program §§ 51.5-149 *et seq.*

Virginia Administrative Code:

The Virginia Public Guardian & Conservator Program 22 VAC 30-70