

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

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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 (“DARS”) or the Commonwealth of Virginia.

# Guardianship in the News & Popular Media

- Nevada case involving professional guardian, April Parks, and her 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, 90<sup>th</sup> 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/>
- I Care a Lot, a 2021 film produced by Netflix telling a fictional story about an unscrupulous guardian taking control of an elderly person’s life.



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

# Tough Issues

- How to decide who needs a guardian. What is “incapacity?”
- How to balance an individual’s right to autonomy against their need for protection.
  - When determining whether someone is incapacitated in the context of a guardianship proceeding
  - How should a guardian balance these competing interests once appointed?
- 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.

# Guardianship at the General Assembly

## JLARC Study

- In November 2020, the Joint Legislative Audit and Review Commission authorized a study on the adequacy of Virginia's system of court appointed guardians and conservators.
- The study, completed in 2021, included 42 recommendations: 22 recommendations to the General Assembly for statutory changes; 10 recommendations to the executive branch, many of which were directed at expanding DARS' role in overseeing guardianships in Virginia; and 10 recommendations to the courts. (See Resources on Slide 25.)

## 2022 Session of the General Assembly

- More than 15 bills addressing changes to Virginia's guardianship laws were introduced.
- Only three stemming from the JLARC recommendations were passed and signed into law:
  - HB 96, requiring DARS to periodically review the staffing requirements for Public Guardian Program providers to make sure that sufficient staff are available to meet their obligations to their public clients.
  - HB 634, requiring DARS to convene a workgroup to consider minimum visitation requirements for guardians
  - SB 514, adding requirements to what must be included in the report of the guardian *ad litem*, adding information that must be included in the initial notice of a guardianship proceeding, and requiring additional information in the annual reports provided by guardians.

# Role of the Legal Decision-Maker in Virginia

## 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)

# A Significant Limitation on an Individual's Rights

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

- Cannot make an enforceable contract;
- Cannot give consent (e.g., medical consent, sign up for benefits, agree to services);
- Unless preserved by the court, cannot own a gun, marry, vote.



# Alternatives to Guardianship

## Medical

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

## Financial

- 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](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](https://consumerfinance.gov/managing-someone-elses-money) and [guardianship.org/standards](https://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.

# 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 add 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 G/C 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

Some 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 his/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 his 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 with the local DSS office describing the incapacitated person’s situation over the course of the year.



# Annual Report of the Guardian

- First report due six months after the guardianship begins and covers the first four months of the guardianship. Thereafter, annually.
- Filed with the local DSS office where the incapacitated person lives.
- DSS submits the reports to the court that issued the guardianship order to be included in the court file.
- A guardian may be held in contempt of court for failing to timely file. DSS reports 90-day delinquencies to the court.

The annual report of the guardian must include the following:

- A description of the current mental, physical, and social condition of the incapacitated person, *including any change in diagnosis or assessment of any such condition of such incapacitated person by any medical provider since the last report;*
- A description of the incapacitated person's living arrangements during the reported period, *including the guardian's assessment of the adequacy of such living arrangement;*
- A statement as to whether the guardian agrees with the current treatment or habilitation plan;
- *A statement of whether the incapacitated person has been an alleged victim in a report to Adult Protective Services, to the extent known, and whether there are any other indications of abuse, neglect, or exploitation of such incapacitated person;*
- A recommendation as to the need for continued guardianship, *and any recommended changes in the scope of the guardianship;*
- *The name of any person who the guardian has restricted from having access to or communication with the incapacitated person has been restricted and the reasons for such restriction;*
- *A self-assessment as to whether he feels he is able to continue to carry out his guardianship obligations;*
- *Unless the incapacitated person resides with the guardian, a statement of the frequency and nature of any in-person visits from the guardian with the incapacitated person over the course of the reporting period. If no visit is made within a six-month period, the guardian shall describe any challenges or limitations in completing such visit;*
- *A general description of the activities taken on by the guardian for the benefit of the incapacitated person during the past year; and*
- The compensation requested and the reasonable and necessary expenses incurred by the guardian.

# 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 currently 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.

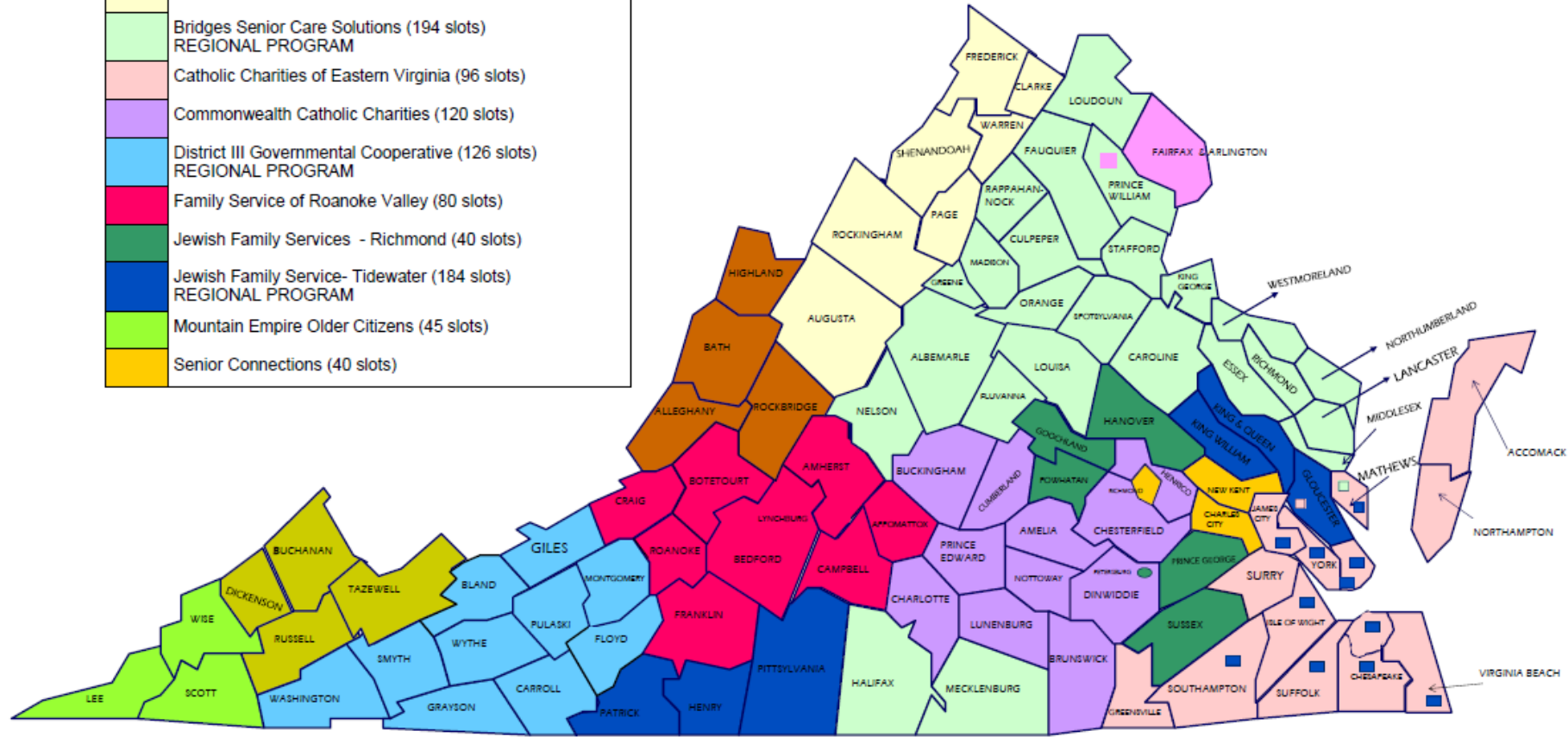
Four eligibility categories that correspond to the funding provided by the General Assembly.

- 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 by the provider's contract w/ DARS.

# VIRGINIA PUBLIC GUARDIAN & CONSERVATOR PROGRAMS SERVICE AREA As of June 30, 2021

	Alleghany/Highlands Community Services PGP (18 slots)
	Appalachian Agency for Senior Citizens (35 slots)
	The Arc of Northern Virginia (50 slots)
	Autumn Valley Guardianship (21 slots)
	Bridges Senior Care Solutions (194 slots) REGIONAL PROGRAM
	Catholic Charities of Eastern Virginia (96 slots)
	Commonwealth Catholic Charities (120 slots)
	District III Governmental Cooperative (126 slots) REGIONAL PROGRAM
	Family Service of Roanoke Valley (80 slots)
	Jewish Family Services - Richmond (40 slots)
	Jewish Family Service- Tidewater (184 slots) REGIONAL PROGRAM
	Mountain Empire Older Citizens (45 slots)
	Senior Connections (40 slots)



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 that 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. Its job is to review new referrals and review the status of existing clients.

Before agreeing to accept any person as a public guardian client, the PGP provider is required to consider through its MDP:

- Whether the appointment of a G/C is appropriate,
- Whether PGP services are 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 waitlist 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 don't meet criteria for a DBHDS-ID/DD slot, the 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, some funding is available to help defray the cost of attorneys fees, up to a per-case cap established by DARS and DBHDS.

# Common Misconceptions

Any guardian who is not a family member is a Virginia public guardian

- A Virginia public guardian is a Program provider contracted with DARS to provide public guardianship services to incapacitated individuals who a court has found to be eligible for the program.

A public guardian provides direct services to its clients.

- Guardians are legal decision-makers. They are not hands-on care givers.

A public guardian should be appointed whenever there is an emergency need for a guardian.

- There are only 1,049 program slots, 552 of which have been reserved by the General Assembly for individuals referred by DBHDS. Clients generally hold public slots for the rest of their lives. A Program provider can't accept public clients in excess of the number of public slots designated in its contract with DARS or outside of its contracted service area or which would cause it to be out of compliance with the Program requirements designed to ensure adequate staffing.

# 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](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](https://www.vacourts.gov/courts/circuit/resources/guardianship_faqs.pdf)

Alternatives to Guardianship - [https://www.vacourts.gov/courts/circuit/resources/guardian\\_options\\_pamphlet.pdf](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