

Guardianships & Conservatorships

Guardians and conservators are people appointed by the court to handle the personal and financial affairs of adults who lack the physical and/or mental capacity to care for themselves. Generally, the appointment of a guardian and/or a conservator is necessary when the incapacitated person has failed to execute a General Durable Power of Attorney or Advance Health Care Directive prior to his or her incapacity.

Guardian: A guardian is responsible for the personal affairs of an incapacitated person, including decisions relating to support, care, health, safety, education, and residential placement.

Conservator: A conservator is responsible for handling an incapacitated person's estate, finances, and property.

Both guardians and conservators have a duty to act in the best interest of the incapacitated person whom they represent.

Who Needs a Guardian and/or Conservator?

Before appointing a Guardian or a Conservator, the court will first determine whether the individual meets the legal definition of an "incapacitated person." Virginia's Guardianship and Conservatorship statute defines an incapacitated person as an adult who is 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 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.

Process for Appointing a Guardian and/or Conservator

Because guardians and conservators are court-appointed, a person seeking a guardianship or conservatorship for a loved one must file a petition with the court. The petition may ask the court to appoint one person to serve as both guardian and conservator.

After the petition is filed, the court will appoint an attorney, called a guardian *ad litem*, to represent the incapacitated person (called the "respondent") in the proceedings. The guardian *ad litem* will meet with the respondent as well as other family members. The guardian *ad litem* will then submit his or her findings to the court, with a recommendation as to the necessity of appointing a guardian and conservator.

It is also necessary to obtain an Evaluation Report prior to the hearing. The report must include a description of the nature, type, and extent of the incapacity, as well as a diagnosis or assessment of the respondent's mental and physical condition. The report must be prepared by a licensed physician, psychologist, or any other licensed professional skilled in the assessment and treatment of the physical or mental condition of the respondent. Usually, the respondent's primary care physician is asked to complete this report.

The respondent has certain rights throughout this process. For example, the respondent has the right:

- To be represented by legal counsel of his or her choice.
- To a trial by jury.
- To compel the attendance of witnesses, to present evidence, and to confront and cross-examine witnesses.
- To be personally present at the hearing and at all stages and proceedings.

The court will schedule a hearing at which the petitioner, the respondent, and the guardian *ad litem* can present evidence and witnesses showing why a guardianship

and/or conservatorship is or is not necessary. If the judge finds that the incapacitated person requires a guardian or conservator, the court will issue an order appointing one and detailing his or her specific duties.

Guardian's General Duties

Although each guardian's specific duties will vary depending on the court's guardianship order, there are some general guidelines that all guardians must follow. The guardian must stay in contact with the incapacitated person and encourage him or her to participate in the decision-making process as much as possible. The guardian should also be aware that if the incapacitated person has executed a Durable Power of Attorney or Advance Directive, the guardian may not supersede decisions covered therein. However, the guardian may petition the court to modify those documents as needed to protect the incapacitated person's best interests.

The guardian must obtain court approval before permanently moving the incapacitated person out of state, having the person's parental rights terminated, or initiating a change in the person's marital status.

A guardian stands in a fiduciary relationship to the incapacitated person for whom he or she was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person. A guardian shall not be liable for the acts of the incapacitated person, unless the guardian is personally negligent. A guardian is not required to spend personal funds on behalf of the incapacitated person.

Finally, the guardian must file an annual report with the local Department of Social Services.

Conservator's General Duties

Generally, when the court appoints a conservator, he or she must post a bond with surety to guarantee faithful performance of the duties of conservatorship. The conservator is a fiduciary and, as such, has a duty to manage the incapacitated person's estate in that person's best interests. The conservator is responsible for applying estate income to support the incapacitated person and to pay his or her debts, taking into account the person's standards of living and the size of the estate. The conservator also has the authority to enter into transactions on behalf of the incapacitated person, but

the court may place restraints on the conservator's authority to convey real estate.

At all times, the conservator is to exercise reasonable care, diligence, and prudence, and shall act in the best interest of the incapacitated person, to the extent known to him or her, the conservator shall consider the expressed desires and personal values of the incapacitated person.

Finally, the conservator is responsible for filing an inventory with the Commissioner of Accounts, in addition to annual accountings.

Learn More

Call Oast & Taylor at 757-452-6200 or visit www.OastTaylor.com to schedule a consultation with an attorney at one of Oast & Taylor's convenient office locations in Virginia Beach, Portsmouth, Chesapeake, or Elizabeth City, North Carolina.

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