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## GUARDIANSHIP AND CONSERVATORSHIP

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## GUARDIANSHIP AND CONSERVATORSHIP

### **7.1 Definitions**

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The following words and terms are defined in §64.2-2000 of the Code of Virginia unless otherwise specified.

<b>Term</b>	<b>Definition</b>
<b>Annual Report</b>	The report required to be filed by a guardian pursuant to § 64.2-2020.
<b>Conservator</b>	A person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." "Conservator" includes

<b>Term</b>	<b>Definition</b>
	(i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide conservatorial services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Department for Aging and Rehabilitative Services as a public conservator, it may also serve as a conservator for other individuals.
<b>Guardian</b>	A person appointed by the court who is responsible 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 an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public guardian pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide guardian services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Department for Aging and Rehabilitative Services as a public guardian, it may also serve as a guardian for other individuals.
<b>Guardian Ad Litem</b>	An attorney appointed by the court to represent the interests of the respondent and whose duties include evaluation of the petition for guardianship or conservatorship and filing a report with the court pursuant to § 64.2-2003.
<b>Incapacitated Person</b>	An adult who has been 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 (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the

<b>Term</b>	<b>Definition</b>
	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.
<b>Limited Guardian</b>	A person appointed by the court who has only those responsibilities for the personal affairs of an incapacitated person as specified in the order of appointment.
<b>Respondent</b>	An allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.
<b>Significant- Connection State</b>	A state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available (§ 64.2-2105 of the Code of Virginia).

## **7.2 Protecting vulnerable adults through guardianship and/or conservatorship**

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In Virginia, a court may appoint a guardian or conservator *when*:

- The court finds that an adult lacks the capacity to meet the essential requirements for his or her health, safety, or therapeutic needs without the assistance and protection of a guardian.
- The court finds that an adult lacks the capacity to manage property or financial affairs or to provide for his or her support or the support of legal dependents without the assistance and protection of a conservator.

An individual may be appointed to serve as both guardian of the incapacitated adult and conservator of the adult's estate. If this occurs, the individual appointed by the court has authority for both personal and financial decisions and for property management. The court may appoint two individuals to fulfill these duties by naming one as guardian and the other as conservator.

### **7.2.1 Determining the need for a guardian and/or conservator**

The petitioning party has the responsibility to present clear and convincing evidence to substantiate the need for the appointment of a guardian and/or conservator for the respondent *including*:

- Medical and/or psychiatric testimony concerning the adult's illness and his or her inability to handle his or her personal and/or financial affairs.
- Testimony of friends, relatives, service workers, and other professionals concerning self-endangering behavior.
- An evaluation report of the adult that documents the appropriateness and necessity of guardianship and/or conservatorship. This report is required under § 64.2-2005 of the Code of Virginia.

### **7.2.2 Documenting incapacity**

#### **7.2.2.1 The comprehensive evaluation**

(§ 64.2-2005 of the Code of Virginia). A report evaluating the condition of the respondent shall be filed with the court in a separate confidential addendum and provided within a reasonable time prior to the hearing on the petition, to the guardian ad litem, the respondent, and any other person or entity that becomes a party to the action. The report shall be prepared by one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the respondent as alleged in the petition.

The LDSS worker may be asked to assist with a portion of the evaluation *if the adult with whom he or she is working is the subject of an Adult Protective Services (APS) investigation and may need a guardian or conservator.*

The purpose of the report is to inform the court about the condition and abilities of the respondent. *The report shall address the following:*

- A description of the nature, type, and extent of the adult's incapacity, including the adult's specific functional impairments.
- A diagnosis or assessment of the adult's mental and physical condition, including a statement as to whether the adult is on any medications that may affect his or her actions or demeanor. Where appropriate and consistent with the scope of the evaluator's license, the report should

include an evaluation of the adult's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement.

- The date(s) of the examination(s), evaluation(s) and assessment(s) upon which the report is based.
- The signature of the person conducting the evaluation and the nature of the professional license held by the evaluator.

If the evaluation report is not available, the court may hold the hearing without the report for good cause shown if the guardian ad litem does not object. The court, at its discretion, may order a report be prepared and delay the hearing until the report is available. The model form "Physician's Evaluation of Respondent" is posted on the DSS intranet and may be provided to the physician who is conducting the evaluation. The LDSS may modify this form as needed.

The cost of the evaluation may be charged as part of the costs of the proceedings at the discretion of the court. See Section 7.2.5.8 for information on the cost of proceedings.

#### **7.2.2.2 Role of the LDSS worker in petition process**

If the LDSS is involved in petitioning, the worker shall obtain and document all available information concerning the alleged incapacitated adult's ability to make decisions, including but not limited to:

- Arranging and/or receiving essential health and/or personal care.
- Providing or arranging for nutritional needs.
- Securing and wearing adequate clothing appropriate to the weather.
- Securing adequate and appropriate housing.
- Arranging and maintaining personal safety including safe shelter.
- Management of financial affairs including the use of funds to provide for one's basic needs.
- Management of his or her estate including both real and personal property.

### **7.2.3 Who serves as guardian or conservator?**

The first person considered for the guardian/conservator should be the adult's spouse unless the spouse is unable or unwilling to serve. *Other people to consider include a family member or close friend.*

The following should be considered when determining the appropriateness of a person to serve as guardian or conservator:

- A relationship with the adult alleged to need a guardian/conservator.
- Geographic accessibility to the alleged incapacitated adult.
- The absence of a conflict of interest.
- A willingness to fulfill the required duties of guardianship or conservatorship.
- Ability to understand the requirements of guardianship or conservatorship, including the submission of required reports.
- Emotional stability.
- Good physical health of the proposed guardian or conservator.

The LDSS may develop its own guidance on whether LDSS employees may serve as guardians or conservators. The Code of Virginia does not prohibit LDSS employees from serving as a guardian or conservator, though the LDSS should carefully evaluate whether it is appropriate for an LDSS employee to be named as a guardian for an incapacitated adult. See Section 7.3.2.7 for procedures regarding the review of the guardian report when an LDSS employee is the guardian.

*A person who does not reside in Virginia may be appointed and allowed to qualify as guardian/conservator of an incapacitated adult. The person appointed shall follow court instructions for qualifying. (§ 64.2-1426 of the Code of Virginia).*

### **7.2.4 Eligibility for public guardian or conservator**

(§ 64.2-2010 of the Code of Virginia). The circuit court may appoint a local or regional program authorized by the Department for Aging and Rehabilitative Services pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 as the guardian or conservator for any resident of the Commonwealth who is found to be incapacitated if the court finds that (i) the incapacitated person's resources are insufficient to fully compensate a private guardian and pay court costs and fees associated with the appointment proceeding and

(ii) there is no other proper and suitable person willing and able to serve in such capacity or there is no guardian or conservator appointed within one month of adjudication pursuant to § 64.2-2015. The court shall use the guidelines for determining indigency set forth in § 19.2-159 in determining the sufficiency of the respondent's estate. If the respondent would be eligible for the appointment of counsel pursuant to § 19.2-159, he shall be eligible for the appointment of a public guardian or conservator pursuant to this section.

There may be circumstances when an LDSS is named as a guardian or the LDSS contracts with another entity to serve as guardian because there are no other suitable individual to serve in this capacity. When these situations occur and it is determined that the incapacitated adult meets criteria to be served by the public guardianship program, the LDSS shall refer the incapacitated adult to the public guardianship program waiting list for consideration of the next available public guardian slot.

Additional information about the Virginia Public Guardianship Program is available on the Department for Aging and Rehabilitative Services (DARS) website.

### **7.2.5 Procedures to petition for appointment of a guardian/conservator**

#### **7.2.5.1 Circuit court in which petitions are to be filed**

The guardianship/conservatorship petition is to be filed in the circuit court of the county or city in which the subject of the petition resides or is located or in which the subject of the petition resided immediately prior to entering a nursing facility, assisted living facility, state mental health facility, or any similar facility. The circuit court in which the proceeding is first commenced may order a transfer to another locality if it would be in the best interest of the incapacitated adult.

If the petition is for the appointment of a conservator for a non-resident with property in the state, the petition is to be filed in the city or county in which the alleged incapacitated adult's property is located (§ 64.2-2001 of the Code of Virginia).

#### **7.2.5.2 Jurisdiction**

A court in the Commonwealth has jurisdiction to appoint a guardian for a respondent if:

- The Commonwealth is the respondent's home state;

- On the date the petition is filed, the Commonwealth is a significant-connection state and:
  - The respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because the Commonwealth is a more appropriate forum; or
  - The respondent has a home state, a petition for appointment is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment:
    - A petition for an appointment is not filed in the respondent's home state;
    - An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and
    - The court in the Commonwealth concludes that it is an appropriate forum (§ 64.2-2107 of the Code of Virginia).

#### **7.2.5.3 Special jurisdiction**

A court of the Commonwealth lacking jurisdiction has special jurisdiction to do any of the following:

- Appoint a guardian in an emergency for a term not exceeding 90 days for a respondent who is physically present in the Commonwealth.
- Issue a conservatorship order with respect to real or tangible personal property located in the Commonwealth; or
- Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued.

If a petition for the appointment of a guardian in an emergency is brought in the Commonwealth and the Commonwealth was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment (§ 64.2-2108 of the Code of Virginia).

#### **7.2.5.4 Appropriate forum**

A court of the Commonwealth that has jurisdiction to appoint a guardian or issue a conservatorship order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

- Any expressed preference of the respondent;
- Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect or exploitation;
- The length of time the respondent was physically present in or was a legal resident of the Commonwealth or another state;
- The distance of the respondent from the court in each state;
- The financial circumstances of the respondent's estate;
- The nature and location of the evidence;
- The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- The familiarity of the court of each state with the facts and issues in the proceeding; and
- If an appointment were made, the court's ability to monitor the conduct of the guardian or conservator (§ 64.2-2110 of the Code of Virginia).

#### **7.2.5.5 Who may file a petition?**

Any interested person may petition the circuit court to have a guardian, conservator, or both appointed for an alleged incapacitated adult. The petitioner is the person who presents evidence to the court that the respondent is unable to take care of himself or his financial affairs or both and is, therefore, in need of a guardian, conservator or both to perform certain duties. The petitioner's attorney files a petition with the court and is responsible for notifying relatives of the respondent of the guardianship and/or conservatorship hearing (§ 64.2-2002 of the Code of Virginia).

Petitioners are frequently relatives of the alleged incapacitated adult. It is appropriate for an LDSS to petition as part of an emergency order for APS.

If the LDSS is petitioning for the appointment of a guardian, the “Request for the Appointment of a Guardian” form may be used by the LDSS to gather relevant information about the respondent that needs to be included in the petition. The LDSS may modify this form as needed or when advised to do so by the LDSS attorney. The form is posted on the DSS intranet.

If a guardian/conservator is needed to protect the incapacitated adult from abuse, neglect, or exploitation, the LDSS attorney should be consulted as a first step in planning for petitioning the circuit court for the appointment.

#### **7.2.5.6 Information included in a petition**

The filing of a guardianship/conservatorship petition with the clerk of court constitutes the practice of law and shall be performed by an attorney.

*The petition for appointment of a guardian, a conservator, or both, shall be filed with a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. (§ 64.2-2002 of the Code of Virginia).*

(§ 64.2-2002 of the Code of Virginia). The petition shall state the petitioner’s name, place of residence, post office address, and relationship, if any, to the respondent, and, to the extent known as of the date of filing, shall include the following:

1. The respondent’s name, date of birth, place of residence or location, post office address, and the sealed filing of the social security number;
2. The basis for the court’s jurisdiction under the provisions of Article 2 (§ 64.2-2105 et seq.) of Chapter 21;
3. The names and post office addresses of the respondent’s spouse, adult children, parents and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including step-children. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;
4. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent’s care or custody;

5. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, or any guardian, committee or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such durable power of attorney, advanced directive, or order appointing the guardian, committee, or conservator, if available;
- 5a. The name, location, and post office address of the respondent's primary health care provider, if any;
6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;
7. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and treatment plan;
8. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;
9. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent, and that person's relationship to the respondent;
10. The native language of the respondent and any necessary alternative mode of communication;
11. A statement of the financial resources of the respondent, that shall, to the extent known, list the approximate value of the respondent's property and the anticipated annual gross income, other receipts, and debts; contained in a separate confidential addendum, pursuant to § 64.2-2000.1;
12. A statement of whether the petitioner believes the respondent's attendance at the hearing would be detrimental to the respondent's health, care or safety; and
13. A request for appointment of a guardian ad litem.

#### **7.2.5.7 Time frame for hearing**

(§ 64.2-2007 of the Code of Virginia). The court or the jury, if a jury is requested, shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones it for cause.

#### **7.2.5.8 Cost of proceedings waived or borne by the Commonwealth**

If it is alleged under oath that the estate of the alleged incapacitated adult is unavailable or insufficient to pay the fees and costs of the proceedings, the court may waive such fees and costs as prescribed by § 64.2-2008 of the Code of Virginia. Those fees include the fees for the respondent's attorney and the guardian ad litem.

When an adult subject of a guardianship and/or conservatorship petition is determined by the circuit court to be indigent, any fees and costs of the proceeding that are fixed by the court or taxed as costs shall be borne by the Commonwealth (§ 64.2-2008 of the Code of Virginia).

The guidelines for determining indigence set forth in § 19.2-159 of the Code of Virginia shall be used by the court in determining the sufficiency of the incapacitated adult's estate. If the incapacitated adult would be eligible for the appointment of counsel pursuant to § 19.2-159, he or she shall be eligible for the appointment of a guardian/conservator pursuant to this section.

#### **7.2.5.9 Reimbursement to petitioner/petitioner required to pay**

If a guardian or conservator is appointed and the court finds that the petition is brought in good faith and for the benefit of the respondent, the court shall order that the petitioner be reimbursed from the estate for all reasonable costs and fees if the estate of the incapacitated person is available and sufficient to reimburse the petitioner.

The court may require the petitioner to pay or reimburse all or some of the respondent's reasonable costs and fees and any other costs incurred if the court finds that the petitioner initiated a proceeding that was in bad faith or not for the benefit of the respondent (§ 64.2-2008 of the Code of Virginia).

#### **7.2.6 Compensation to guardian ad litem, attorney, and evaluator appointed by the court**

The court may allow reasonable compensation from the estate of the incapacitated adult to any guardian ad litem, attorney, or evaluator appointed by the court. Any compensation allowed shall be taxed as costs of the proceeding (§ 64.2-2012 of the Code of Virginia).

#### **7.2.7 Qualification after appointment**

Pursuant to 64.2-2011 of the Code of Virginia, a guardian or conservator appointed in the court order shall qualify before the clerk. Qualification entails taking an oath, posting of bond, and accepting educational materials provided by the court. Upon qualification, the court issues the guardian or conservator a certificate of qualification. A guardian or conservator cannot serve as a guardian or conservator without qualifying first.

#### **7.2.8 Periodic review hearings**

(§ 64.2-2009 of the Code of Virginia). A1. Beginning July 1, 2023, the court shall set a schedule in the order of appointment for periodic review hearings, to be held no later than one year after the initial appointment and no later than every three years thereafter, unless the court orders that such hearings are to be waived because they are unnecessary or impracticable or that such hearings shall be held on such other schedule as the court shall determine.

Periodic review hearings are not retroactive to guardianship *appointments* prior to July 1, 2023. A court cannot waive the initial periodic review hearing if the petitioner for guardianship or conservatorship is a hospital, nursing facility, ALF, or other similar institution.

#### **7.2.9 Duties and powers of guardians**

The guardian stands in a fiduciary relationship to the incapacitated adult. A guardian may be held personally liable for a breach of trust in his or her performance of duties on behalf of the incapacitated adult. A guardian is not liable for the acts of the incapacitated adult, unless the guardian is personally negligent. A guardian is not required to expend his or her personal funds on behalf of the incapacitated adult.

Pursuant to § 64.2-2019 of the Code of Virginia, the guardian has the following responsibilities:

- Maintaining sufficient contact with the incapacitated adult to know of his or her capability, limitations, needs, and opportunities and as needed to comply with the duties pursuant to the order of appointment and this section and any other provision of law. The guardian shall visit the incapacitated adult as often as necessary and at least three times per year, with at least one visit occurring every 120 days. Except as otherwise provided in subsection C1, of the three required visits, at least two visits shall be conducted by the guardian. The guardian shall conduct at least one of such visits in person; the second such visit may be conducted by the guardian via virtual conference or video call between the guardian and incapacitated person, provided that the technological means by which such conference or call can take place are readily available. The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. If a person other than the guardian conducts any such visit, he shall provide a written report to the

guardian regarding any visit conducted by such person. A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

Except as otherwise provided in subsection C1, of the three required visits, at least two visits shall be conducted by the guardian. The guardian shall conduct at least one of such visits in person; the second such visit may be conducted by the guardian via virtual conference or video call between the guardian and incapacitated person, provided that the technological means by which such conference or call can take place are readily available. The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. If a person other than the guardian conducts any such visit, he shall provide a written report to the guardian regarding any visit conducted by such person. A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

C1. If for reasons outside the guardian's control the guardian cannot make an in-person visit to an incapacitated person, then the visit may be conducted in person by an individual designated by the guardian pursuant to subsection C. If either the guardian or such individual designated by the guardian is unable to conduct an in-person visit, then such visit may be conducted virtually through electronic means such as a virtual conference or video call, or, if such technological means are not readily available, by telephone.

C2. In the event of a state of emergency or public health crisis in which a facility in which the incapacitated person resides is not allowing in-person visitation, visitation requirements required pursuant to subsection C may be met via a virtual conference or video call between the guardian and incapacitated person, to the extent feasible for the facility to provide the technological means by which such conference or call can take place. A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

- Seeking prior court authorization to change the incapacitated adult's residence to another state, to terminate or consent to a termination of the adult's parental rights, or to initiate a change in the adult's marital status.
- To the extent feasible, encouraging the incapacitated adult to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated adult to the extent known, and shall otherwise act in the adult's best interest and exercise reasonable care, diligence and prudence. A guardian shall not restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship, unless such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be imposed pursuant to § 64.2-2019.1
- Having the authority to make arrangements for the funeral and disposition of the adult's remains, if the guardian is not aware of any person that has been otherwise designated to make such arrangements or if the next of kin does not wish to make the arrangements or the next of kin cannot be located.

The guardian also has the responsibility to file an annual report on the incapacitated adult's condition with the LDSS for the jurisdiction in which the incapacitated adult resides (§ 64.2-2020 of the Code of Virginia).

#### **7.2.10 Procedures to restrict communication, visitation, or interaction**

(64.2-2019.1 of the Code of Virginia). A. A guardian may restrict the ability of a person with whom the incapacitated person has an established relationship to communicate with, visit, or interact with such incapacitated person only when such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after consideration of the expressed wishes of such incapacitated person. Any such restriction may include (i) limitations on time, duration, location, or method of visits or communication, (ii) supervised visitation, or (iii) prohibition of in-person visitation, and shall be the least restrictive means possible to prevent any such harm or exploitation.

B. The guardian shall provide written notice to the restricted person, on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia, stating (i) the nature and terms of the restriction, (ii) the reasons why the guardian believes the restriction is necessary, and (iii) how the restricted person or incapacitated person may

challenge such restriction in court pursuant to §64.2-2012. The guardian shall also inform the incapacitated person of such restriction and provide a copy of such written notice to the incapacitated person, unless the guardian has a good faith belief that such information would be detrimental to the health or safety of such incapacitated person. The guardian shall provide a copy of such written notice to the local department of social services of the jurisdiction where the incapacitated person resides and shall file a copy of such written notice with the circuit court that appointed the guardian. If the incapacitated person is in a hospital, convalescent home, or certified nursing facility licensed by the Department of Health pursuant to § 32.1-123, an assisted living facility as defined in § 63.2-100, or any other similar institution, the guardian shall also inform such hospital, home, facility, or institution of such restriction.

A guardian is required to file notice of a restriction on the form developed by the Office of the Executive Secretary of the Supreme Court of Virginia and send the form to the appropriate LDSS. The court may act in response to a challenge of a restriction imposed by the guardian. Any order issued by the court in response to a challenge of a restriction shall be filed with the appropriate LDSS. Forms or orders received by the LDSS in response to a restriction shall be uploaded to the appropriate guardianship record in PeerPlace. The LDSS is not required to take any action in response to a restriction notice or court order in response to a challenge to a restriction notice, *unless the court order directs the LDSS to act.*

#### **7.2.11 Petition for restoration of capacity, modification, termination of the guardianship/conservatorship or removal of the guardian/conservator**

*The incapacitated person, the guardian/conservator, or any other person may petition the court to restore the incapacitated adult's capacity, request modification of the guardianship/conservatorship, or to terminate or remove the guardian (§ 64.2-2012 of the Code of Virginia).*

If the petition is for modification to expand the scope of the guardianship/conservatorship, notice of the hearing and a copy of the petition shall be personally served on the incapacitated adult and mailed to other persons entitled to notice. The court shall appoint a guardian ad litem for the incapacitated adult and may appoint one or more licensed physicians or psychologists, or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the incapacitated adult.

Revocation, modification, or termination may be ordered upon a finding that it is in the best interests of the incapacitated adult and that:

- The incapacitated adult is no longer in need of the assistance or protection of a guardian/conservator;
- The extent of protection, management, or assistance previously granted is either excessive or insufficient considering the incapacitated adult's current need;
- The incapacitated adult's understanding or capacity to manage the estate and financial affairs or to provide for his or her health, care or safety has so changed as to warrant the proposed action; or
- Circumstances are such that the guardianship/conservatorship is no longer necessary or is insufficient.

Regardless of whether an individual's capacity has improved, only the Circuit Court that issued the guardianship order can terminate it. Therefore, the order will remain valid and in full effect until the Circuit Court that issued the order terminates it.

*If the person subject to the guardianship or conservatorship is not represented by counsel, the person may send informal written communication to the court requesting to be restored to capacity or to have the guardianship modified or terminated. (§ 64.2-2012 of the Code of Virginia).*

#### **7.2.12 Reasons for termination of guardianship**

A guardianship order shall terminate for any of the following reasons:

- The death of the incapacitated adult.
- The court orders the termination of the guardianship following a hearing on the petition of any interested person.
- The death, resignation, or removal of the guardian.

A guardianship that terminates due to the guardian's death, resignation or removal does not necessarily mean that the adult is no longer in need of guardianship. The LDSS may need to assess the incapacitated adult's needs, if the LDSS receives notice of the termination. The LDSS or another appropriate individual may need to file another petition for guardianship, if the adult still needs a guardian.

### **7.2.13 Transfer of guardianship or conservatorship**

(§ 64.2-2114 of the Code of Virginia). A guardian or conservator appointed in the Commonwealth may petition the court to transfer the guardianship or conservatorship to another state.

Under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, if the incapacitated adult relocates to another state, the guardian may petition to transfer the guardianship to that state. Notice of a petition to transfer shall be given to the persons that would be entitled to notice of a petition in the Commonwealth for the appointment of a guardian or conservator.

### **7.2.14 Accepting guardianship or conservatorship transferred to the Commonwealth**

A guardian appointed in another state may petition the court in the Commonwealth to accept the guardianship or conservatorship. Notice of a petition for transfer shall be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian in both the transferring state and the Commonwealth (§ 64.2-2115 of the Code of Virginia).

### **7.2.15 Registration of guardianship orders**

(§ 64.2-2116 of the Code of Virginia). If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in the Commonwealth, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in the Commonwealth by filing as a foreign judgment in a court, in any appropriate county or city of the Commonwealth, certified copies of the order and letters of office.

## **7.3 Review of annual guardian report form**

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### **7.3.1 Case registration of guardianship cases**

LDSS shall register guardianship report review cases into the Guardianship Program in PeerPlace, including uploading the order of appointment and certificate of qualification.

Workers shall register guardianship cases, in which additional services such as ALF reassessment or APS investigation are being provided into the appropriate PeerPlace program.

A service plan and the Uniform Assessment Instrument (UAI) are not required to be completed in a guardianship case if the only services being provided are receipt and review of the guardianship report. If the LDSS is providing or arranging other services, such as companion or homemaker for an adult under guardianship, a service plan and UAI would be required per guidance. See Chapter 3, for additional information on service planning and UAI requirements.

### **7.3.2 Guardian reports filed with the LDSS**

When a guardian qualifies before the clerk of the circuit court, the clerk is required by § 64.2-2011 of the Code of Virginia to forward a copy of the order of appointment and the certificate of qualification to the LDSS in the jurisdiction where the incapacitated adult resides.

The guardian is responsible for filing an annual report on the incapacitated adult's condition with the LDSS in the jurisdiction in which the incapacitated adult resides. The report form "Report of Guardian for an Incapacitated Person" is located on the DARS public site and DSS intranet. **Note:** Temporary or limited guardians are also required to file guardian reports. Instructions for newly appointed guardians are on the DARS public site and DSS intranet.

The guardian shall certify the annual report by signing under oath that the information contained in the annual report is true and correct to the best of his knowledge.

The LDSS may notify the guardian when the initial or annual report is due. See the DSS intranet for a sample letter.

A guardian who was appointed and qualified prior to July 1, 1997 (the date the annual report law took effect) is not required to file an annual report.

#### **7.3.2.1 First (initial) report**

Within six months from the date of the guardian's qualification date (not the order of appointment date), the guardian is required to file the first report on the status of the incapacitated adult with the LDSS in the jurisdiction in which the incapacitated adult resides. This first report addresses the status of the incapacitated adult during the first four months, beginning on the date of qualification of the guardian. PeerPlace automatically computes the due date for the initial report.

When the incapacitated adult lives outside the Commonwealth of Virginia, the court that appointed the guardian retains jurisdiction and reports shall be made to the LDSS in the jurisdiction in which the guardian was appointed. See

Section 7.2.13 for information regarding transfer of guardianship to another state.

Pursuant to § 64.2-2020 of the Code of Virginia, the guardian shall submit a \$5.00 filing fee with the first report. If the filing fee is in the form of a check, it should be made payable to the LDSS. If the filing fee is in the form of cash, the LDSS shall issue a receipt to the guardian.

#### **7.3.2.2 Subsequent guardian reports**

Subsequent guardian reports will be for a period of 12 months. Reports will be due within four months from the last day of the previous 12-month reporting period. Each report shall be accompanied by a \$5.00 filing fee. PeerPlace automatically computes the due dates for subsequent annual reports.

#### **7.3.2.3 Co-guardian reports**

When co-guardians are appointed, each co-guardian is required to sign the "Annual Report of Guardian for an Incapacitated Person" form if filing jointly. One filing fee of \$5.00 shall accompany the report signed by co-guardians. Each co-guardian may file a separate report. Separate co-guardian reports shall each be accompanied by the \$5.00 filing fee.

#### **7.3.2.4 Exception to filing guardian report**

In rare instances, the guardianship order may state that the guardian is excused from the requirement to file any guardian reports. The LDSS shall follow the guardianship order. As appropriate, the LDSS may ask their attorney to review an order that contains this exception.

#### **7.3.2.5 Processing the guardian report filing fees**

Guardianship filing fees received by the LDSS shall be used in the provision of services to adults in need of protection. The LDSS should report all guardian report filing fees as a receipt to APS, Budget Line 895, Cost Code 89501. To record the receipt of Guardianship Fees, the LDSS should enter the amount collected as a credit, using Account Code 40895 Receipt of Guardianship Fees.

#### **7.3.2.6 When the filing fee is not sent**

Some guardians may submit the report without including the \$5.00 filing fee. The LDSS may develop their own guidance on how to address the issue of guardians who do not submit the \$5.00 filing fee.

The worker is still responsible for reviewing the report even if the \$5.00 was not submitted with the report.

#### **7.3.2.7 When the LDSS or LDSS employee is the guardian**

When the LDSS or an employee of the LDSS in the jurisdiction in which the incapacitated adult resides is the guardian, the order of appointment and certificate of qualification shall be forwarded to a neighboring LDSS, and the annual reports shall be made by the guardian to the neighboring LDSS. The LDSS may contact an Adult Services Specialist for assistance in assigning responsibility to another LDSS.

#### **7.3.2.8 Review of guardian report by the LDSS**

The date the LDSS received the guardian report should be stamped or noted on the report form. **Within 10 calendar days** of the receipt of a guardian report, the LDSS worker should review the report. The review should assess:

- Whether the report has been properly completed in its entirety.
- Whether the contents of the report provide reason to suspect that the subject of the report is being abused, neglected, or exploited or is at risk of abuse, neglect, or exploitation. See *Guardian Report Review guidelines on the DSS intranet*.

#### **7.3.2.9 Visitation by a guardian**

Section 64.2-2019 of the Code of Virginia does not address sanctions, penalties, or actions if the guardian does not visit the incapacitated person at the frequency (e.g., every 120 days) or contact *method* (e.g., in-person, telephonic) outlined by law. The worker may circle or highlight the guardian's response to visitation section on the annual report form to call the court's attention to the guardian's response, if the worker believes that the guardian did not *visit* according to the law.

#### **7.3.2.10 Worker's response to review of the guardian report**

If the review of the guardian report finds the report is incomplete, the guardian should be requested to submit the missing information.

If the LDSS worker has a concern that the guardian has made a false entry or statement on the annual report, the worker should notify the supervisor of this concern. The concerns should be discussed with the agency attorney.

If a guardian makes a false entry or statement in the annual report, he shall be subject to a civil penalty of not more than \$500. This penalty shall be collected by the attorney for the Commonwealth or the county or city attorney (§ 64.2-2020 of the Code of Virginia).

If it is the judgment of the worker that there is reason to suspect that the subject of the annual report is abused, neglected, or exploited or is at risk of abuse, neglect, or exploitation, an APS report shall be made.

If the incapacitated adult lives outside the Commonwealth and there is reason to suspect that the subject of the report is abused, neglected, or exploited, or is at risk of abuse, neglect, or exploitation, the service worker shall make an APS report to the appropriate state, county, or city where the incapacitated adult resides.

If an APS case is opened, a copy of the guardian's report shall be uploaded to the attachments in the APS program registration.

The LDSS worker is still responsible for signing and dating the review of the form in the appropriate area on the annual report form, even if an APS report has been made.

If it is the judgment of the worker that there is no reason to suspect that the subject of the annual report is abused, neglected, or exploited, or is at risk of abuse, neglect, or exploitation, the date of review and the name of the worker should be noted, and the report uploaded in PeerPlace.

Documentation of the review shall be entered in PeerPlace guardianship program registration notes. The LDSS may send a letter confirming receipt of the report and the date the next report is due. See sample letter on the DSS intranet.

(§ 64.2-2020 of the Code of Virginia). Within 60 days of the receipt of the annual report, the local department shall file a copy of the annual report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case.

### **7.3.2.11 When a guardian fails to file a required report**

If the guardian fails to file a required report within thirty days of its due date, the worker may send a letter to the guardian to notify him that the report is overdue. See DSS intranet for sample overdue letters.

The LDSS may also:

- Ask the court whether the guardianship was transferred to another state.
- Send a second letter by certified mail, return receipt requested, stating the report is overdue.
- Contact the guardian by phone or other means.
- Notify the court earlier than required by § 64.2-2020 of the Code of Virginia if the guardian is delinquent in submitting the report and does not respond to letters sent by the LDSS.
- Visit the home of the guardian and/or incapacitated adult.

All efforts to contact the guardian shall be documented in PeerPlace guardianship program registration notes.

If, the guardian continues to fail to submit the report within four months from the last day of the reporting period and the well-being of the incapacitated adult is unknown or is in question, then the LDSS worker shall make an APS report.

However, if the incapacitated adult has relocated outside of Virginia, the guardian fails to file the report, and the LDSS worker is concerned that the incapacitated adult may be at risk for abuse, neglect or exploitation, the LDSS worker shall make a report to APS in the appropriate state. The LDSS may consult the LDSS attorney for additional guidance, as appropriate.

Twice each year the LDSS shall file with the appropriate circuit court a list of all guardians who are more than ninety days delinquent in filing an annual report (§ 64.2-2020 of the Code of Virginia).

LDSS are recommended to submit the list of delinquent guardians on agency letterhead and include the following information in the letter to court:

- Court case number.
- Name of incapacitated person.
- Name of guardian.
- Date annual report was due.

- Information about actions that the LDSS may have taken to contact the guardian and request the annual report.
- Contact information for the appropriate LDSS worker who can answer questions about the situation.

A sample letter is available on the DSS intranet.

If the LDSS *notifies the court* that the annual report has not been filed timely the court may issue a summons or rule to show cause why the guardian has failed to file such annual report (§ 64.2-2020 of the Code of Virginia).

#### **7.3.2.12 Transferring the guardianship case when the incapacitated adult relocates to another jurisdiction**

When the incapacitated adult relocates to another jurisdiction the guardian is required to submit the annual report with the LDSS in that jurisdiction.

When the LDSS becomes aware that the incapacitated adult has relocated, the LDSS shall notify the appropriate LDSS of the relocation, document the transfer in the guardianship registration notes, and close the registration in PeerPlace.

If an LDSS receives a guardian report on an adult with whom they are not familiar, it is recommended that the LDSS search PeerPlace to locate the LDSS that managed the guardianship report previously. The LDSS should confirm that the adult has relocated to the new jurisdiction and the new LDSS should request that the previous LDSS close the registration.

#### **7.3.2.13 Maintenance of the guardian report**

When the guardian report has been reviewed by the worker, and no further action is needed, the completed report form shall be uploaded to the attachments tab in the client registration. Once a guardian report becomes part of a case record, the report is considered a confidential social service record pursuant to §§ 63.2-104 and 2.2 3705.5 of the Code of Virginia.

#### **7.3.2.14 Purging of the guardian report**

Guardian report forms filed with the LDSS in compliance with § 64.2-2020 of the Code of Virginia shall be purged in PeerPlace following the schedule (GS-15) established by the Library of Virginia. Guardian report forms that have not been uploaded to the PeerPlace record shall be purged by the LDSS according to GS-15. GS-15 is located on the Library of Virginia's website.

## **7.4 Conservators**

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### **7.4.1 General duties and liabilities of conservators**

A conservator stands in a fiduciary relationship to the incapacitated adult for whom he or she was appointed conservator and may be held personally liable for a breach of fiduciary duty to the incapacitated adult.

The powers of a conservator shall terminate upon the death of the incapacitated adult or upon the death, resignation, or removal of the conservator or upon the termination of the conservatorship.

The conservator's responsibilities to the incapacitated adult include:

- Acting in the best interest of the incapacitated adult and, to the extent known, considering the incapacitated adult's expressed desires and personal values.
- Caring for and preserving the estate of the incapacitated adult and managing it to the best advantage; applying the income from the estate to the payment of the incapacitated adult's debts including reasonable compensation to the conservator and to any guardian appointed and to the incapacitated adult's legal dependents.
- Encouraging the incapacitated adult to participate in decisions, to act on his or her own behalf, and to develop or regain capacity to manage the estate and his or her financial affairs (§ 64.2-2021 of the Code of Virginia).

### **7.4.2 Management powers and duties of the conservator**

A conservator, in managing the estate of an incapacitated adult, has the following management powers and duties (§ 64.2-2022 of the Code of Virginia):

- To ratify or reject a contract entered into by the incapacitated adult;
- To pay bills for the benefit of the incapacitated adult;
- To maintain life, health, casualty and liability insurance for the benefit of the incapacitated adult or his or her legal dependents;
- To manage the estate following termination of the conservatorship until it is delivered to the incapacitated adult or his or her successors;

- To execute and deliver all documents and to take all other actions that will serve the best interest of the incapacitated adult;
- To initiate a proceeding:
  - To revoke a power of attorney under the provisions of the Uniform Power of Attorney Act (§ 64.2-1600 et seq. of the Code of Virginia);
  - To claim a share of the estate of a deceased spouse under § 64.2-302 of the Code of Virginia; or
  - To make an election to take a family allowance, exempt, property, or a homestead allowance under § 64.2-313; and
- To borrow money as seems advisable and/or to mortgage portions of the incapacitated adult's estate to secure loan(s) or renew existing loan(s).

#### **7.4.3 Accounting responsibilities of the conservator**

The conservator accounts to the Commissioner of Accounts. At the time of qualification, the clerk of the circuit court will provide the conservator with the name and address of the Commissioner of Accounts.

(§ 64.2-2021 of the Code of Virginia). A conservator shall comply with and be subject to the requirements imposed upon fiduciaries generally under Part A (§ 64.2-1200 et seq.) of this subtitle, specifically including the duty to account set forth in § 64.2-1305.

An accounting is a record of all money, property, and other assets for which the conservator is responsible. The accounting includes a record of money spent, a record of any investments, and a statement of available cash.

The first accounting covers the first four months of the conservatorship and shall be filed with the Commissioner of Accounts within six months of qualification. After the initial accounting, other accounts are due annually. Any account filed with the commissioner shall be signed under oath by the fiduciary who is filing.

#### **7.4.4 APS reports involving conservators**

When the LDSS receives an APS report that the incapacitated adult's funds are being misused by the conservator, and the report is valid an APS investigation shall be initiated.

## **7.5 Appendix A: Forms**

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The following forms are used in guardianship cases. These forms are located on the Adult Services forms page of the DSS intranet.

### ***Guidelines for Review of Guardian's Report***

*This document provides guidelines for LDSS review of annual guardian report.*

### **Notice of Restriction**

This form is used by guardian to notify the incapacitated adult, the restricted person, the circuit court and the LDSS of a restriction.

### **Physician's Evaluation of Respondent**

This form may be provided to the physician who is conducting an evaluation.

### **Report of Guardian for an Incapacitated Person**

This form is used by the guardian to complete the initial report and subsequent annual guardianship report.

### **Request for the Appointment a Guardian/Conservator**

This form may be used by the LDSS to gather information about the respondent for inclusion in the petition.