

## Guardianship in Virginia Summary

by Barbara Lloyd Kessinger, Esq.

Guardianship transfers the control of an incapacitated person's health care, personal, and medical needs to another person. Guardianship proceedings generally involve a Petitioner represented by an attorney, a Respondent (the allegedly "incapacitated person"), and a court-appointed Guardian *ad Litem* attorney. Uncontested Guardianship proceedings typically occur over a time frame of four to six weeks. The statutory authority for Guardianship is found at Va. Code §64.2-2000, *et seq.*

### I. Types of Guardianship: Uncontested, Temporary, Standby, Limited, Contested

### II. Initial Considerations

#### A. Threshold Issue #1

Is an individual an "incapacitated person" per the statutory definition?

#### B. Other Issues

1. Who should file the Petition for Guardianship?
2. Who will pay the fees related to the proceedings?
3. Who should be named as the proposed Guardian(s)?

#### C. Threshold Issue #2

Is/Are Guardian(s) nominated in the Petition proper and suitable person(s)?

### III. Petition, Other Documents, and Notice

#### A. Required Contents of Petition\*

#### B. Addendum Containing SSN (filed under seal)

#### C. Praecipe Stating Date of Hearing

#### D. Evaluation Report (filed under seal)

#### E. Required Contents of Notice\* and 14-point Conspicuous Bold Print

### IV. Appointment of Guardian *ad Litem* (GAL) Attorney

#### A. Serves "incapacitated person" and advises him or her of rights

#### B. Investigates assertions in Petition and evidence; reviews records, incl. I.E.P.\*

#### C. Represents "incapacitated person's" best interests, not his or her desires

Note: Other attorneys also may become involved in proceedings.

- V. Additional Notice and Certification
  - A. Required Mailing by Petitioner of Copies of Petition, Notice, Eval Report\*
  - B. Required Filing by Petitioner of Statement of Compliance
- VI. Guardian *ad Litem*'s Report
  - A. Required Contents (Findings and Recommendations)\*
  - B. Must Be Timely Filed with Court
  - C. Copy Must Be Provided to Petitioner or Attorney of Record
  - Note: Findings and Recommendations carry significant weight.
- VII. Petitioner's Proposed Order
  - A. Required Contents\* and Other Provisions, as Applicable\*
  - B. Must Be Timely Filed with Court
  - C. Copy Must Be Provided to Guardian *ad Litem*
  - D. 14-point Conspicuous Bold Print Required for Certain Provisions
  - Note: HIPAA Authorization should be included.
- VIII. Guardianship Hearing
  - A. Held in accordance with local rules of Circuit Court
  - B. Two-Pronged Determination
    - 1. Is Respondent incapacitated?
    - 2. Is/Are proposed Guardian(s) appropriate?
  - C. Clear and Convincing Evidentiary Standard
  - D. Attendance by Individual with Special Needs May or May Not Be Required
- IX. Court Order
  - A. Findings and Required Provisions\*
  - B. Bonding with or without Surety
  - C. Award of Guardian *ad Litem*'s Fees
  - D. Other Provisions, as Applicable\*
- X. Guardian Qualifies and Acts as Fiduciary
  - A. Deputy Clerk administers Oath
  - B. Guardian's Duties, Powers and Liabilities found at Va. Code §64.2-2019
  - C. Visitation Requirements\* and Periodic Review Hearings (~~if not waived~~)\*
  - D. Guardian Must File Reports pursuant to Va. Code § 64.2-2020
  - E. Deputy Clerk provides Instructions

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# Guardianship in Virginia

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## **GUARDIANSHIP IN VIRGINIA:**

**Focus on Children  
Attaining 18 Years of Age**

Presented by  
Barbara Lloyd Kessinger, Esq.

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## WHAT IS GUARDIANSHIP?

Va. Code §64.2-2000, *et seq.*

- Court-supervised proceeding
- Court-created fiduciary relationship

An incapacitated person's control over his or her own medical / personal affairs is transferred to another person / persons.

## TYPES OF GUARDIANSHIP

- Uncontested (our focus)
- Temporary, Standby, Limited
- Contested (not our focus)

## **GUARDIANSHIP**

(addresses medical concerns)

**VS.**

## **CONSERVATORSHIP**

(addresses financial concerns)

**Related Handouts: Guardianship in Virginia Summary  
Virginia Code Definitions  
Virginia Decision-Making Capacity  
Alternatives to Guardianship**

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**WHEN GUARDIANSHIP  
SHOULD BE CONSIDERED**

- Child with special needs is at least 17 1/2 years of age
- Child, upon turning age 18, will not have capacity to execute advance directive / medical power of attorney

**THRESHOLD ISSUE #1**

- Statutory definition of “incapacitated person” (known as Respondent)
- Va. Code §64.2-2000

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**OTHER ISSUES**

- Who should file Petition?
- Who will pay the fees?
- Who should be Guardian?

**THRESHOLD ISSUE #2**

Is/Are the Guardian(s) nominated in Petition proper and suitable person(s) to serve?

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**GUARDIANSHIP PETITION**

- Required Contents\*
- Evaluation Report
- Private Addendum

**GUARDIANSHIP NOTICE**

- Required Wording\*
  - 14-point Conspicuous Bold Print
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**GUARDIAN AD LITEM ATTORNEY**  
(Court-Appointed Attorney)

- Visits and serves Respondent
- Advises him or her of rights
- Investigates; reviews records, including I.E.P.\*
- Represents Respondent's best interests

**ADDITIONAL NOTICE**  
**AND CERTIFICATION**

- Required mailing by Petitioner's attorney\*
  - Required filing by Petitioner's attorney
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**GUARDIAN AD LITEM'S  
REPORT**

- Findings\*
- Recommendations\*

**PETITIONER'S  
PROPOSED ORDER**

- Required Contents\*
  - Must be timely filed with Court
  - Copy must be provided to GAL
  - 14-point Conspicuous Bold Print
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**GUARDIANSHIP HEARING**

- Proceeding held in accordance with local rules of Circuit Court
- Attendance by Respondent may or may not be required
- Proceeding typically occurs on Friday morning in Circuit Court

**GUARDIANSHIP HEARING**

**Two-Pronged Determination:**

1. Is Respondent incapacitated?
2. Is proposed Guardian appropriate?

**Evidence Must Be Clear & Convincing.**

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**COURT ORDER**

- Findings/Required Provisions\*
- Bonding with/without surety
- Award of GAL's fees
- Other Provisions, as Needed\*

**GUARDIAN QUALIFICATION**

- Deputy Clerk administers Oath
- Guardian is bonded (typically, without surety)
- Deputy Clerk provides Instructions

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**GUARDIAN AS FIDUCIARY**

- Duties, Powers and Liabilities Va. Code §64.2-2019
- Visitation Requirements\*
- Periodic Review Hearings\*
- Initial and Annual Reports Va. Code §64.2-2020

**GUARDIANSHIP  
IN VIRGINIA**

For more information,  
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# NOTES

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