



VIRGINIA HANDBOOK FOR GUARDIANS AND CONSERVATORS

*A Practical Guide
for
Court-Appointed Guardians and Conservators
of Adults*

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3rd Edition



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The authors express their appreciation for editorial review to members of the Board of Directors of the Virginia Guardianship Association and specifically Joy Duke. The law firm of Anderson & Desimone, P.C. contributed significantly to the production of the Third Edition through the services of the para-legal staff and office support during the revision process. A special word of appreciation goes to Jessica Wood. Any errors in form or substance belong solely to the authors.

The Virginia Guardianship Association was awarded a grant by the Roanoke Bar Association to provide seed money for the original project in 1995. The publication of both the second and third edition was underwritten by a generous contribution from the Carilion Health Systems, Roanoke, Virginia. The Virginia Department for the Aging and the Roanoke Bar Association also supported the publication of the Third Edition with funds. This second printing of the Third Edition was made possible with a contribution from Jamont Communications. The VGA and the authors express sincere gratitude for the contributions that have made it possible to publish this Third Edition, second printing

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CHAPTER 2

DUTIES OF THE GUARDIAN *AD LITEM* AND COUNSEL FOR THE RESPONDENT

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Duties of the Guardian *ad litem*

The role of the guardian *ad litem* is a legal and practical necessity in the appointment process. Because the authority and responsibility of the guardian *ad litem* is so frequently misunderstood by the parties, this chapter is included to present the scope – and limits – of the guardian *ad litem*'s responsibility. For additional clarification, comments are included concerning the appointment and role of counsel for the respondent.

As stated in the Introduction, society is interested, as a matter of public policy, in the protection of those people unable to adequately protect themselves. To this end, the law has always required the involvement of a guardian *ad litem* in any judicial matter involving a person under a disability. A "person under a disability" has broad meaning and includes any person deemed incapacitated, incarcerated or under the age of eighteen. Any proceeding involving guardianship or conservatorship will require the active involvement of a guardian *ad litem*.

A guardian *ad litem* is a guardian *for the suit*, meaning that the responsibility is during the active phase of the proceeding and typically ends upon the dismissal of the petition or the appointment of guardian or conservator. The court may specify continuing responsibilities for the guardian *ad litem* in the order of appointment, however, if it appears appropriate to do so. For example, if the respondent's funds were being handled pursuant to a general power of attorney and a conservator were not appointed, the guardian *ad litem* could be directed to monitor monthly financial reports and report on any anomalies.

The role of the guardian *ad litem* is seen to be so crucial that the General Assembly directed the Judicial Council of Virginia to adopt standards for those serving as guardians *ad litem* for adults. Those standards take into consideration: (1) license or permission to practice law in Virginia, (2) training in the roles, responsibilities and duties of guardian *ad litem* representation, (3) knowledge of the fields of disabilities and aging, and community resources, and (4)

demonstrated proficiency in this area of the law. Through the office of the Executive Secretary of the Supreme Court of Virginia, with the assistance of the Virginia Guardianship Association, the Virginia Department of Social Services, the Virginia Bar Association, the Virginia Commissioners of Accounts Association, and the Virginia Law Foundation, standards were developed, approved and implemented January 1, 1998. Attorneys qualified to serve as guardians *ad litem* are listed through the Supreme Court with the Clerks of the Circuit Courts. Additionally, guardians *ad litem* are required to complete approved continuing legal education training in order to maintain their eligibility. The current list of qualified guardians *ad litem* is available on the Virginia Supreme Court website. It should be noted, however, that the Circuit Court has the authority to appoint a guardian *ad litem* whose name is not on the qualified list.

It is the responsibility of the guardian *ad litem* to be the eyes and ears of the court in gathering factual information and making recommendations at the court hearing. The guardian *ad litem* should be objective in presenting all relevant information and is guided by a *best interests* standard with regard to the respondent, that is, the person alleged to be incapacitated. It is important to note that the guardian *ad litem* is **not** the attorney or counsel for the respondent. (The responsibility of counsel for the respondent is discussed in the next section.) The statutory responsibilities of the guardian *ad litem* are set forth in § 37.2-1003 of the Code of Virginia (see Chapter 1).

The responsibilities of the guardian *ad litem* include the following:

- Personally visiting the respondent
- Making a recommendation regarding the need for counsel for the respondent
- Investigating all allegations in the petition
- Determining whether or not additional medical, psychiatric or psychological evaluation is needed concerning the respondent
- Personally appearing at all stages of the proceedings
- Advising the respondent of his or her statutory rights, including:
 1. Under § 37.2-1006:
 - the right to be represented by counsel of choice (either the guardian *ad litem* or the respondent may petition the court for the appointment of an attorney, if the need is expressed and the respondent cannot afford an attorney)

2. Under § 37.2-1007:

- the right to a trial by jury on the issue of the need for a guardian or conservator
- the right to compel the attendance of witnesses
- the right to confront and cross-examine witnesses
- the right to be present at all stages of the proceedings

Once the guardian *ad litem* has completed the required investigation, it is necessary to prepare a written report for the court and all attorneys of record in the proceeding. Pursuant to § 37.2-1003(c), the report must include the following:

- A certification that the statutory rights (as outlined above) have been related to the respondent
- Whether or not the court has jurisdiction over the respondent (*jurisdiction* in this case would mean proper notice to the respondent and that the petition is filed in the proper city or county)
- Whether or not there is an apparent need for a guardian or conservator, or both
- The recommended extent of the duties and powers of the guardian or conservator
- The propriety or suitability of the proposed guardian or conservator
- A recommendation as to the amount of the bond for the conservator (implicit in this requirement is an opinion by the guardian *ad litem* concerning the sale of any real estate and the value of that real estate)

Personal service of the petition, notice of hearing and guardian *ad litem* order on the respondent is jurisdictional. It is essential that the guardian *ad litem* verify personal service prior to the hearing. Service can be made by the Sheriff, private process server or by the guardian *ad litem*. The advantage to having the guardian *ad litem* serve the respondent is that the guardian *ad litem* is absolutely certain that the service was personal and need not check the court file before drafting the report stating that proper service was made. There is the additional benefit of a modest cost savings for the petitioner. The disadvantage of service by the guardian *ad litem* will arise if the respondent is able to read the documents. An immediate barrier is created if on the one hand you deliver documents announcing "We may take away your rights" and on the other you say to the

respondent "I am here to protect your rights." The choice as to serve or not rests with the guardian *ad litem* and should be made only after careful consideration.

It is clear that the guardian *ad litem* has a critical role in the guardian/conservator appointment process and a considerable amount of professional time may be involved in fully carrying out the required responsibilities. The court will decide how much the guardian *ad litem* should be paid, and order that this sum be paid by either the respondent or the Commonwealth or in part by each.

In order for the Commonwealth to pay the guardian *ad litem* fee, there must be a finding in the final order that the incapacitated person is indigent, and the court sets the fee based upon the in court/out of court rates set forth by the Supreme Court for appointed counsel. The guardian *ad litem* submits a completed List of Allowances form (DC-40) to the court and the completed packet is sent by the Clerk of the Court for payment by the Supreme Court.

It might appear that the guardian *ad litem* will determine the outcome of the petition for guardianship/conservatorship, but that is assuredly not the case. While full consideration will be given to the report and recommendations of the guardian *ad litem*, the court will require independent proof of each element required by statute, exercise independent judgment concerning the evidence and appoint a guardian or conservator only upon clear and convincing evidence of the need.

Additionally, some of the information essential to the progress of the court proceeding may be available most conveniently to the guardian *ad litem*, such as medical and financial information. If the order of appointment of the guardian *ad litem* is drafted with the proper statutory references and phrasing, the guardian *ad litem* will have access to that information.

For example, the language "Pursuant to the provisions of §37.2-1003(D) and §32.1-127.1:03(D)(11), of the Code of Virginia; as amended and HIPAA Regulations 45CFR 164.512(e)(1)(i), the guardian *ad litem* may have complete access to the respondents' Protected Health Information including but not limited to, medical, psychological and intellectual testing records that are dated within the 12 months preceding the date of this order, and up to and including the date this order is presented, upon presentation of this order to any health care provider or physician" is the key to unlock the most secure medical records.

If "in furtherance of the responsibility set forth in § 37.2-1003(c)(v), the guardian *ad litem* has full authority to question any who may have information relevant to this proceeding and may review all relevant bank, stock, brokerage or other records and the custodian of all such records may make them available upon presentation of a copy of this order" language is in the order of appointment of the guardian *ad litem*, financial information unfolds.

Counsel for the Respondent

The Virginia statutes governing the appointment of a guardian or conservator recognize that unique circumstances may be present in the life of the respondent, so as to justify the services of independent counsel. Such issues as existing or potential litigation, ownership of assets of unique character or value, or involvement in an on-going business would suggest an attorney might be necessary to protect property rights for the respondent, and such representation could continue, as directed by the court, should a conservator be appointed.

The need for independent counsel is less likely in the area of guardianship, but it is still within the realm of possibility. If, for example, the respondent has had a long history of travel, or religious affiliation, and the proposed guardian has quietly but clearly stated intentions to terminate those activities based on the guardian's prejudices, a significant issue of personal preference is at stake. An attorney might then be necessary to serve as the advocate for the respondent. It should be noted, at this point, that the role or responsibility of the attorney is to articulate the wishes of the respondent as an advocate, while the responsibility of the guardian *ad litem* is to advocate a course of action which is in the *best interests* of the respondent. These two courses may be wildly divergent as to any one issue.

The most likely instance when the guardian *ad litem* will recommend to the court that an attorney should be appointed to represent the respondent, then, is when the guardian *ad litem* learns that the respondent wants to exercise his or her right to fully contest each and every step of the guardianship-conservatorship proceeding. The respondent suffering from Alzheimer's, alcohol-related dementia, or a severe closed head injury may be able to function adequately in many regards, yet fail to understand or appreciate his or her limitations, or the clear risk to person or property as a result of those limitations and may express fervent opposition to the proceeding itself, or to the proposed guardian or conservator.

It is certainly the responsibility of the guardian *ad litem* to report to the court when the respondent is opposed to the appointment of a guardian or conservator, or to report the respondent's preference of guardian or conservator, but it is just as certainly *not* the responsibility of the guardian *ad litem* to represent the respondent before a jury in a trial on the merits. In a complex guardianship matter, exploring and evaluating the allegations in the petition for guardianship/conservatorship, marshaling of witnesses, obtaining expert testimony and developing a trial strategy can be an expensive, time intensive process and will require the services of an attorney.

The mere fact that the respondent states he or she wishes to fully contest each allegation does not necessarily mean that the facts will justify such a fight. It would be appropriate for the guardian *ad litem* to offer an opinion to the court as to the probable validity of any objections expressed by the respondent, so as to assist the court in narrowing the issues to those genuinely in controversy. For example, the respondent may initially vow to wage unmitigated war against the appointment of a conservator, when the real issue is an objection to the nominated conservator. The guardian *ad litem* enjoys the best position from which to speak to all the parties, including those represented by counsel, and to the respondent, and present an objective opinion to the court.

While not recognized specifically in the guardian/conservator statutes, the guardian *ad litem* may recommend to the court that mediation be entered into by the parties, should the facts be appropriate. If it is apparent a battle is brewing, the stated reasons for litigating may not be the real reasons. It is not unusual for a contested guardianship/conservatorship matter to have, at its center, resentment over unresolved family disputes decades old, or an expectation that visitation with a declining respondent will be denied. The skilled guardian *ad litem* may determine such underlying issues and, by a referral to mediation, save time for the court and time, money and emotional resources for the parties. When the opportunity presents itself, the guardian *ad litem* can, and should, serve as an honest broker to expedite resolution.

Evaluation Report

An essential element in the appointment process is the Evaluation Report prepared by a licensed physician, psychologist or other professional skilled in the assessment or treatment of the physical or mental condition of the respondent as alleged in the petition. The Evaluation Report should be completed and a copy provided to the guardian *ad litem* and filed with the court

prior to the hearing. If the guardian *ad litem* or attorney for the respondent objects to contents of the Evaluation Report, it may be necessary for the counsel for the petitioner to subpoena medical records and the licensed professional to appear and testify at the appointment hearing. In the overwhelming majority of hearings, however, the Evaluation Report alone is sufficient.

By statute, the guardian *ad litem* is permitted access to the medical records of the respondent (§ 37.2-1003(D)). By statute, counsel for the respondent (but NOT counsel for the petitioner) is permitted access to the medical records of the respondent (§ 32.1-127.1:03(D)(11)). By statute, the licensed professional is exempt from liability for any breach of patient confidentiality by completing this Evaluation Report, in the absence of bad faith or malicious intent (§ 37.2-1005(C)).

By Federal regulation, a covered entity has the authority to disclose protected health information without the written authorization of the individual (HIPPA 45 CFR 164.512(e)).

The Evaluation Report form, following, sets out the two most persuasive statutory references for the licensed professional completing the evaluation and should answer any concern about confidentiality. The form itself closely tracks the statute as to language and the requisite information. For your convenience, and that of the medical community and the court, this form, or another identical in sequence and content, should be utilized.

EVALUATION REPORT

RE: _____

Respondent

DOB: _____

Pursuant to the provisions of Section 37.2-1005 of the Code of Virginia, this report evaluating the condition of the Respondent is prepared by a licensed physician, psychologist or professional skilled in the assessment and treatment of the physical or mental condition of the Respondent as alleged in the petition and shall be filed with the Court and provided to the Guardian *ad litem* prior to the hearing.

In the absence of bad faith or malicious intent, the person performing the evaluation shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section. Section 37.2-1005(c). For the authority of a covered entity to disclose protected health information without the written authorization of the individual, see HIPPA 45 CFR 164.512(e).

1(A) Please provide a description of the nature, type and extent of the Respondent's incapacity, including the Respondent's specific functional impairment:

1(B) Does the Respondent lack the capacity to receive and evaluate information or to respond to people, events and environments to such an extent that he/she lacks the capacity to:

(i) Meet the essential requirements for his/her health, care, safety or therapeutic needs:

Circle One: Yes No

(ii) Manage property or financial affairs or provide for his/her support or the support of his/her dependents:

Circle One: Yes No

2(A) Please provide the diagnosis or assessment of the Respondent's mental and physical condition, including a statement as to whether the Respondent is on any medications which may affect his actions or demeanor:

2(B) If appropriate, please provide an evaluation of the Respondent's ability to learn self-care skills, adaptive behavior and social skills:

2(C) Please provide a prognosis for improvement:

3. Please provide the date or dates of the examinations, evaluations and assessments upon which the report is based:

4. If specifically requested, please provide an assessment as to the Respondent's capacity to:

-Hold a Virginia operator's license:

-Vote:

-Purchase, possess or transport a firearm:

-Declare a Last Will and Testament:

-Execute a Power of Attorney or Advance Medical Directive:

5. Please provide any other information about the Respondent that you feel is pertinent to the issue of whether a Guardian or Conservator should be appointed:

6. Please specify the professional licensing you hold:

To my best information and belief, the information provided is accurate and correct.

Signature

Print Name

Date: _____

Address

Telephone and Fax Number

Section 37.2-1000 Definitions

As used in this chapter, unless the context requires a different meaning:

"Advance directive" shall have the same meaning as provided in the Health Care Decisions Act (Sec. 54.1-2981 et seq.).

"Conservator" means 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." The term includes (i) a local or regional program designated by the Department for the Aging as a public conservator pursuant to Article 2 (Sec. 2.2-711 et seq.) of Chapter 7 of Title 2.2 or (ii) any local or regional tax-exempt charitable organization established pursuant to Sec. 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 Virginia Department for the Aging as a public conservator, it may also serve as a conservator for other individuals.

"Estate" includes both real and personal property.

"Guardian" means 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 a (i) local or regional program designated by the Department for the Aging as a public guardian pursuant to Article 2 (Sec. 2.2-711 et seq.) of Chapter 7 of Title 2.2 or (ii) any local or regional tax-exempt charitable organization established pursuant to Sec. 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 Virginia Department for the Aging as a public guardian, it may also serve as a guardian for other individuals.

"Incapacitated person" means 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 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. A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.

"Limited conservator" means a person appointed by the court who has only those responsibilities for managing the estate and financial affairs of an incapacitated person as specified in the order of appointment.

"Limited guardian" means 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.

"Property" includes both real and personal property.

"Respondent" means an allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.

(1997, c. 921, Sec. 37.1-134.6; 1998, cc. 582, 787; 2004, c. 858; 2005, c. 716; 2006, c. 724.)

Section 37.2-1001 Filing of petition; jurisdiction; instructions to be provided

A. A petition for the appointment of a guardian or conservator shall be filed with the circuit court of the county or city in which the respondent is a resident or is located or in which the respondent resided immediately prior to becoming a patient, voluntarily or involuntarily, in a hospital, including a hospital licensed by the Department of Health pursuant to Sec. 32.1-123, or a resident in a nursing facility or nursing home, convalescent home, assisted living facility as defined in Sec. 63.2-100, or any other similar institution or, if the petition is for the appointment of a conservator for a nonresident with property in the state, in the city or county in which the respondent's property is located.

B. Article 2 (Sec. 37.2-1037 et seq.) of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act provides the exclusive jurisdictional basis for a court of the Commonwealth to appoint a guardian or conservator for an adult.

C. Where the petition is brought by a parent or guardian of a respondent who is under the age of 18, the petition may be filed no earlier than six months prior to the respondent's eighteenth birthday. Where the petition is brought by any other person, the petition may be filed no earlier than the respondent's eighteenth birthday.

D. Instructions regarding the duties, powers, and liabilities of guardians and conservators shall be provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court, and the clerk shall provide that information to each guardian and conservator upon notice of appointment.

E. The circuit court in which the proceeding is first commenced may order a transfer of venue if it would be in the best interest of the respondent.

(1997, c. 921, Sec. 37.1-134.7; 2001, c. 274; 2002, c. 736; 2005, c. 716; 2006, c. 552; 2011, c. 518.)

Section 37.2-1002 Who may file petition; contents

A. Any person may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, 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 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;
3. 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;
4. 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, with a copy of any such documents, if available, attached by the petitioner;
5. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;
6. 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 arrangement and treatment plan;
7. 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;
8. 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;
9. The native language of the respondent and any necessary alternative mode of communication;
10. 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 respondent's anticipated annual gross income, other receipts, and debts;
11. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and
12. A request for appointment of a guardian ad litem.

(1997, c. 921, Sec. 37.1-134.8; 2005, c. 716; 2006, c. 471.)

Section 37.2-1003 Appointment of guardian ad litem

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include: (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to Sec. 37.2-1006 and 37.2-1007, and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel should be appointed for the respondent, pursuant to Sec. 37.2-1006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, and filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences.

C. In the report required by subsection B (iv), the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether or not a guardian or conservator is needed; (iii) the extent of the duties and powers of the guardian or conservator, such as personal supervision, financial management, or medical consent only; (iv) the propriety and suitability of the person selected as guardian or conservator, after consideration of geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent.

D. A health care provider shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that the guardian ad litem determines necessary to perform his duties under this section.

(1997, c. 921, Sec. 37.1-134.9; 2004, cc. 66, 1014; 2005, c. 716.)

Section 37.2-1004 Notice of hearing; jurisdictional

A. Upon the filing of the petition, the court shall promptly set a date, time, and location for a hearing. The respondent shall be given reasonable notice of the hearing. The respondent may not waive notice, and a failure to properly notify the respondent shall be jurisdictional.

B. A respondent, whether or not he resides in the Commonwealth, shall be personally served with the notice, a copy of the petition, and a copy of the order appointing a guardian ad litem pursuant to Sec. 37.2-1003. A certification, in the guardian ad litem's report required by subsection B of Sec. 37.2-1003, that the guardian ad litem personally served the respondent with the notice, a copy of the petition, and a copy of the order appointing a guardian ad litem shall constitute valid personal service for purposes of this section.

C. A copy of the notice, together with a copy of the petition, shall be mailed by first class mail by the petitioner at least seven days before the hearing to all adult individuals and to all entities whose names and post office addresses appear in the petition. For good cause shown, the court may waive the advance notice required by this subsection. If the advance notice is waived, the petitioner shall promptly mail by first class mail a copy of the petition and any order entered to those individuals and entities.

D. The notice to the respondent shall include a brief statement in at least 14-point type of the purpose of the proceedings and shall inform the respondent of the right to be represented by counsel pursuant to Sec. 37.2-1006 and to a hearing pursuant to Sec. 37.2-1007. Additionally, the notice shall include the following statement in conspicuous, bold print.

WARNING

AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. A GUARDIAN MAY BE APPOINTED TO MAKE PERSONAL DECISIONS FOR YOU. A CONSERVATOR MAY BE APPOINTED TO MAKE DECISIONS CONCERNING YOUR PROPERTY AND FINANCES. THE APPOINTMENT MAY AFFECT CONTROL OF HOW YOU SPEND YOUR MONEY, HOW YOUR PROPERTY IS MANAGED AND CONTROLLED, WHO MAKES YOUR MEDICAL DECISIONS, WHERE YOU LIVE, WHETHER YOU ARE ALLOWED TO VOTE, AND OTHER IMPORTANT RIGHTS.

E. The petitioner shall file with the clerk of the circuit court a statement of compliance with subsections B, C and D.

(1997, c. 921, Sec. 37.1-134.10; 2001, c. 30; 2005, c. 716.)

Section 37.2-1005 Evaluation report

A. A report evaluating the condition of the respondent shall be filed with the court and provided to the guardian ad litem within a reasonable time prior to the hearing on the petition. 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. If a report is not available, the court may proceed to hold the hearing without the report for good cause shown and absent objection by the guardian ad litem or may order a report and delay the hearing until the report is prepared, filed, and provided to the guardian ad litem.

B. The report shall evaluate the condition of the respondent and shall contain, to the best information and belief of its signatory:

1. A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;

2. A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;

3. The date or dates of the examinations, evaluations, and assessments upon which the report is based; and

4. The signature of the person conducting the evaluation and the nature of the professional license held by that person.

C. In the absence of bad faith or malicious intent, a person performing the evaluation shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section.

D. A report prepared pursuant to this section shall be admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein, unless counsel for the respondent or the guardian ad litem objects.

(1997, c. 921, Sec. 37.1-134.11; 2005, c. 716.)

Section 37.2-1006 Counsel for respondent

The respondent has the right to be represented by counsel of the respondent's choice. If the respondent is not represented by counsel, the court may appoint legal counsel, upon the filing of the petition or at any time prior to the entry of the order upon request of the respondent or the guardian ad litem, if the court determines that counsel is needed to protect the respondent's interest. Counsel appointed by the court shall be paid a fee that is fixed by the court to be taxed as part of the costs of the proceeding.

A health care provider shall disclose or make available to the attorney, upon request, any information, records, and reports concerning the respondent that the attorney determines necessary to perform his duties under this section, including a copy of the evaluation report required under Sec. 37.2-1005.

(1997, c. 921, Sec. 37.1-134.12; 2004, cc. 66, 1014; 2005, c. 716.)

Section 37.2-1007 Hearing on petition to appoint

The respondent is entitled to a jury trial, upon request, and may compel the attendance of witnesses, present evidence on his own behalf, and confront and cross-examine witnesses.

The court or, if one is requested, the jury 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 proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

In determining the need for a guardian or a conservator and the powers and duties of any needed guardian or conservator, consideration shall be given to the following factors: the limitations of the respondent; the development of the respondent's maximum self-reliance and independence; the availability of less restrictive alternatives, including advance directives and durable powers of attorney; the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; the actions needed to be taken by the guardian or conservator; and the suitability of the proposed guardian or conservator.

If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person, who may be the spouse of the respondent, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent.

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered.

(1997, c. 921, Sec. 37.1-134.13; 2005, c. 716; 2009, c. 433.)

Section 37.2-1008 Fees and costs

The petitioner shall pay the filing fee, as provided in subdivision A 43 of Sec. 17.1-275, and costs. Service fees and court costs may be waived by the court if it is alleged under oath that the estate of the respondent is unavailable or insufficient. If a guardian or conservator is appointed and the estate of the incapacitated person is available and sufficient therefor, the court shall order that the petitioner be reimbursed from the estate for all costs and fees. If a guardian or conservator is not appointed and the court nonetheless finds that the petition is brought in good faith and for the benefit of the respondent, the court may direct the respondent's estate, if available and sufficient, to reimburse the petitioner for all costs and fees.

In any proceeding filed pursuant to this article, if the adult subject of the petition is determined 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.

(1998, c. 76, Sec. 37.1-134.13:1; 2005, c. 716.)

Section 37.2-1009 Court order of appointment; limited guardianships and conservatorships

The court's order appointing a guardian or conservator shall: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify whether the appointment of a guardian or conservator is limited to a specified length of time, as the court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity, including but not limited to mental competency for purposes of Article II, Section 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed appropriate following consideration of the factors specified in Sec. 37.2-1007; and (vi) set the bond of the guardian and the bond and surety, if any, of the conservator.

The court may appoint a limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for his care for the limited purpose of medical decision making, decisions about place of residency, or other specific decisions regarding his personal affairs.

Unless the guardian has a professional relationship with the incapacitated person or is employed by or affiliated with a facility where the person resides, the court's order may authorize the guardian to consent to the admission of the person to a facility pursuant to Sec. 37.2-805.1, upon finding by clear and convincing evidence that (i) the person has severe and persistent mental illness that significantly impairs the person's capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed psychiatrist; (ii) such condition is unlikely to improve in the foreseeable future; and (iii) the guardian has formulated a plan for providing ongoing treatment of the person's illness in the least restrictive setting suitable for the person's condition.

A guardian need not be appointed for a person who has appointed an agent under an advance directive executed in accordance with the provisions of Article 8 (Sec. 54.1-2981 et seq.) of Chapter 29 of Title 54.1, unless the court determines that the agent is not acting in accordance with the wishes of the principal or there is a need for decision making outside the purview of the advance directive.

The court may appoint a limited conservator for an incapacitated person who is capable of managing some of his property and financial affairs for limited purposes specified in the order.

A conservator need not be appointed for a person (i) who has appointed an agent under a durable power of attorney, unless the court determines pursuant to Sec. 26-72 that the agent is not acting in the best interests of the principal or there is a need for decision making outside the purview of the durable power of attorney or (ii) whose only or major source of income is from the Social Security Administration or other government program and who has a representative payee.

(1997, c. 921, Sec. 37.1-134.14; 1998, c. 582; 2005, c. 716; 2009, cc. 211, 268; 2010, cc. 455, 632.)

Section 37.2-1012 Petition for restoration, modification or termination; effects

A. Upon petition by the incapacitated person, the guardian or conservator, or any other person or upon motion of the court, the court may declare the incapacitated person restored to capacity; modify the type of appointment or the areas of protection, management, or assistance previously granted or require a new bond; terminate the guardianship or conservatorship; order removal of the guardian or conservator as provided in Sec. 26-3; or order other appropriate relief. The fee for filing the petition shall be as provided in subdivision A 43 of Sec. 17.1-275.

B. In the case of a petition for modification to expand the scope of a guardianship or conservatorship, the incapacitated person shall be entitled to a jury, upon request. Notice of the hearing and a copy of the petition shall be personally served on the incapacitated person and mailed to other persons entitled to notice pursuant to Sec. 37.2-1004. The court shall appoint a guardian ad litem for the incapacitated person 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 person, as alleged in the petition, to conduct an evaluation. Upon the filing of any other such petition or upon the motion of the court and after reasonable notice to the incapacitated person, any guardian or conservator, any attorney of record, any person entitled to notice of the filing of an original petition as provided in Sec. 37.2-1004, and any other person or entity as the court may require, the court shall hold a hearing.

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

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

D. If, on the basis of evidence offered at the hearing, the court finds by a preponderance of the evidence that the incapacitated person has, in the case of a guardianship, substantially regained his ability to care for his person or, in the case of a conservatorship, to manage and handle his estate, it shall declare the person restored to capacity and discharge the guardian or conservator.

In the case of a petition for modification of a guardianship or conservatorship, if the court finds by a preponderance of the evidence that it is in the best interests of the incapacitated person to limit or reduce the powers of the guardian or conservator, it shall so order; if the court finds by clear and convincing evidence that it is in the best interests of the incapacitated person to increase or expand the powers of the guardian or conservator, it shall so order.

The court may order a new bond or other appropriate relief upon finding by a preponderance of the evidence that the guardian or conservator is not acting in the best interests of the incapacitated person or of the estate.

E. The powers of a guardian or conservator shall terminate upon the death, resignation, or removal of the guardian or conservator or upon the termination of the guardianship or conservatorship.

A guardianship or conservatorship shall terminate upon the death of the incapacitated person or, if ordered by the court, following a hearing on the petition of any interested person.

F. The court may allow reasonable compensation from the estate of the incapacitated person to any guardian ad litem, attorney, or evaluator appointed pursuant to this section. Any compensation allowed shall be taxed as costs of the proceeding.

(1997, c. 921, Sec. 37.1-134.16; 2005, c. 716.)

Section 37.2-1024 Estate planning

A. In the order appointing a conservator entered pursuant to Sec. 37.2-1009 or in a separate proceeding brought on petition, the court may authorize a conservator to: (i) make gifts from income and principal not necessary for the incapacitated person's maintenance to those persons to whom the incapacitated person would, in the judgment of the court, have made gifts if he had been of sound mind or (ii) disclaim property as provided in Chapter 8.1 (Sec. 64.1-196.1 et seq.) of Title 64.1. A guardian ad litem shall be appointed to represent the interest of the incapacitated person, and reasonable notice of the hearing shall be given to the incapacitated person and to all persons who would be heirs or distributees of the incapacitated person, if he were dead as of the date of the filing of the petition, or beneficiaries under any known will of the incapacitated person. The court may authorize the hearing to proceed without notice to any beneficiary who would not be substantially affected by the proposed gift or disclaimer. The court shall determine the amounts, recipients, and proportions of any gifts of the estate and the advisability of any disclaimer after considering: (i) the size and composition of the estate; (ii) the nature and probable duration of the incapacity; (iii) the effect of the gifts or disclaimers on the estate's financial ability to meet the incapacitated person's foreseeable health, medical care, and maintenance needs; (iv) the incapacitated person's estate plan; (v) prior patterns of assistance or gifts to the proposed donees; (vi) the tax effect of the proposed gifts or disclaimers; (vii) the effect of any transfer of assets or disclaimer on the establishment or retention of eligibility for medical assistance services; and (viii) other factors that the court may deem relevant.

B. The conservator may make a gift, not to exceed \$100 to each donee in a calendar year and not to exceed a total of \$500 per calendar year from such income and principal, without the requirements of a court-appointed guardian ad litem, of notification to the incapacitated person or to any person who would be an heir or distributee of the incapacitated person, if he were dead, or a beneficiary under any known will of the incapacitated person, and of a court hearing. Prior to the making of such a gift, the conservator must consider conditions (i) through (viii) as set forth in subsection A of this section and must also find that the incapacitated person has shown a history of giving the same or a similar gift to a specific donee for the previous three years prior to the appointment of the conservator.

C. The conservator may transfer assets of an incapacitated person or an incapacitated person's estate into an irrevocable trust where the transfer has been designated solely for burial of the incapacitated person or spouse of the incapacitated person in accordance with conditions set forth in subdivision A 2 of Sec. 32.1-325. The conservator also may contractually bind an incapacitated person or an incapacitated person's estate by executing a preneed funeral contract, described in Chapter 28 (Sec. 54.1-2800 et seq.) of Title 54.1, for the benefit of the incapacitated person.

D. A conservator may exercise the incapacitated person's power to revoke or amend a trust or to withdraw or demand distribution of trust assets only with the approval of the court for good cause shown, unless the trust instrument expressly provides otherwise.

(1997, c. 921, Sec. 37.1-137.5; 2003, cc. 253, 528; 2005, c. 716.)

Section 37.2-1037 Definitions; significant connection factors.

(a) In this article:

"Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.

"Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

"Significant-connection state" means 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.

(b) In determining under Sec. 37.2-1039 and subsection (e) of Sec. 37.2-1046 whether a respondent has a significant connection with a particular state, the court shall consider:

1. The location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;
2. The length of time the respondent at any time was physically present in the state and the duration of any absence;
3. The location of the respondent's property; and
4. The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

(2011, c. 518.)

Section 37.2-1038 Exclusive basis.

This article provides the exclusive jurisdictional basis for a court of the Commonwealth to appoint a guardian or issue a protective order for an adult.

(2011, c. 518.)

Section 37.2-1039 Jurisdiction.

A court of the Commonwealth has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

1. The Commonwealth is the respondent's home state;
2. On the date the petition is filed, the Commonwealth is a significant-connection state and:
 - (A) 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
 - (B) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:
 - (i) A petition for an appointment or order is not filed in the respondent's home state;
 - (ii) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and
 - (iii) The court in the Commonwealth concludes that it is an appropriate forum under the factors set forth in Sec. 37.2-1042;
3. The Commonwealth does not have jurisdiction under either subdivision 1 or 2, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because the Commonwealth is the more appropriate forum, and jurisdiction in the Commonwealth is consistent with the constitutions of the Commonwealth and the United States; or
4. The requirements for special jurisdiction under Sec. 37.2-1040 are met.

(2011, c. 518.)

Section 37.2-1040 Special jurisdiction.

(a) A court of the Commonwealth lacking jurisdiction under the provisions of Sec. 37.2-1039 has special jurisdiction to do any of the following:

1. Appoint a guardian in an emergency for a term not exceeding 90 days for a respondent who is physically present in the Commonwealth;
2. Issue a protective order with respect to real or tangible personal property located in the Commonwealth; or
3. 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 under procedures similar to Sec. 37.2-1046.

(b) 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.

(2011, c. 518.)

Section 37.2-1041 Exclusive and continuing jurisdiction.

Except as otherwise provided in Sec. 37.2-1040, a court that has appointed a guardian or issued a protective order consistent with this Act has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

(2011, c. 518.)

Section 37.2-1042 Appropriate forum.

(a) A court of the Commonwealth having jurisdiction under Sec. 37.2-1039 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of the Commonwealth declines to exercise its jurisdiction under subsection (a), it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

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

1. Any expressed preference of the respondent;
2. 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;
3. The length of time the respondent was physically present in or was a legal resident of the Commonwealth or another state;
4. The distance of the respondent from the court in each state;
5. The financial circumstances of the respondent's estate;
6. The nature and location of the evidence;
7. The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
8. The familiarity of the court of each state with the facts and issues in the proceeding; and
9. If an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

(2011, c. 518.)

Section 37.2-1043 Jurisdiction declined by reason of conduct.

(a) If at any time a court of the Commonwealth determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court may:

1. Decline to exercise jurisdiction;
2. Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

3. Continue to exercise jurisdiction after considering:

(A) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(B) Whether it is a more appropriate forum than the court of any other state under the factors set forth in subsection (c) of Sec. 37.2-1042; and

(C) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of Sec. 37.2-1039.

(b) If a court of the Commonwealth determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against the Commonwealth or a governmental subdivision, agency, or instrumentality of the Commonwealth unless authorized by law other than this Act.

(2011, c. 518.)