

HANDLING AN ADULT GUARDIANSHIP CASE  
FROM PETITION TO ORDER  
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INTRODUCTION

This outline is an abbreviated attempt at the nuts and bolts of how to do an Adult guardianship in the Roanoke area in 2008. It consists of an outline, generally in order of function, a forms list and procedural checklist, the forms themselves, and a copy of the part of 37.2 of the Code of Virginia related to Adult Guardianships. Adult Guardianships are primarily governed by 37.2-1000, *et seq* of the Code of Virginia; unless otherwise noted, all references are to 37.2

I learned document drafting from my father, Col. James P. Hart, Jr. (1907 – 1991). He taught me to draft documents, not just for lawyers or judges, but for any lay people whom it is expected would see and have to rely on that document. In a guardianship, the order will be reviewed by doctors and their staff, banks, nursing homes, insurance companies, title insurance companies (if there's real estate to sell) and so forth.

An order establishing a guardianship should have specific findings of fact (supported by clear and convincing evidence) see §1007 (last paragraph), a conclusion and then actions and directives of the Court based on that conclusion. My specific format lists facts in short, choppy, Arabic number identified paragraphs; the actions of the court are listed in short, choppy, alphabetically identified paragraphs. Pleadings follow the same format: facts are Arabic numerals; action requested from the court is alpha paragraphs.

FORMS:

Following the outline is, first, a checklist of forms and a summary of the steps to process a guardianship. Form names are cryptic; the forms follow the checklist in order.

For the benefit of the paralegal or secretary (who do the real work), each form is available on my website [www.hhatty.com](http://www.hhatty.com) in three formats: "clickable" to a PDF format (*nnnn.pdf*); WORD '97 format (*nnnn.doc*); and plain text (*nnnn.txt*). All I ask is that if you encounter a problem, find an error or have a suggestion for improvement, let me know by sending an email to [office@hhatty.com](mailto:office@hhatty.com). Forms will be updated on an irregular basis as errors are found, brilliant suggestions incorporated, or as the spirit moves.

- I DEFINITIONS 37.2-§1000 (paraphrased; see §1000 for actual statutory language) *[note: all further references, unless noted, are to title 37.2]*
  - A Guardian – in charge of the BODY of the incapacitated person
  - B Conservator – in charge of the MONEY and PROPERTY of the incapacitated person
  - C Incapacitated person – a person found by a court to be incapable of receiving and evaluating information effectively . . . [and] lacks capacity to meet requirements for own health/safety OR cannot manage property or financial affairs. NOTE “Poor Judgment”, by itself, does not equal incapacity.
  - D There are other definitions in section; above the key
- II GATHER & EVALUATE INFORMATION:
  - A Initial interview
    - 1 *FORM: gdn-interview*
    - 2 If BRLS referral, they will have given client the interview form and medical certification form.
    - 3 Otherwise, consider sending form to client to complete for initial interview.
    - 4 Form designed to obtain information that is required by §1002 to be in petition.
    - 5 Ask client to bring in bank statements, other financial statements, copies of deeds, other papers if available.
  - B Medical Evaluation
    - 1 *FORM: gdn-medcert*
    - 2 Follows requirements of §1005 B
    - 3 BRLS will have given this to client to deliver to doctor for completion; it may or may not be available

- 4 HIPPA (Medical privacy law) problem:
  - a Some doctors will not release the form because of HIPPA.
  - b Ask them to complete it and hold it for the GAL, whose court order of appointment should have language in it to allow the GAL to get the form. See also §1003D "A health care provider shall disclose or make available to the guardian *ad litem* . . . " anything the GAL deems appropriate.
  - c See also §1005 C: "In 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."
- 5 The Court requires the original signed medical certification; facsimiles and photocopies are not acceptable.

C Evaluate facts

- 1 Is Guardianship appropriate?
  - a Incapacitated as defined in §1000?
  - b Standard is "Clear and Convincing" §1007 (5<sup>th</sup> paragraph)
  - c Is there a less restrictive choice, e.g. power of attorney?
  - d Is there an advance medical directive (§54.1-2981)? See §1009 (third paragraph)
  - e TRUST YOUR GUT!
- 2 Is a Conservatorship appropriate?
  - a See above for criteria, plus:
  - b Property?
    - Bank accounts
    - Real Estate

- c Income?
  - Private Pension
  - Social Security/VA/Fed benefits – If only asset/income is this category, then usually a ‘representative payee’ can be appointed and no conservatorship needed.
  - Other
- d If only a guardianship (without conservatorship) is begun, it’s fairly easy to have the court appoint a conservator if assets discovered.

### III PREPARATION OF DOCUMENTS

#### A Petition

- 1 *FORM: gdn-petition*
- 2 Filed by “any person” §1002A
- 3 Must include (to extent available) all items in §1002B

#### B Guardian ad litem appointment

- 1 *FORM: gdn-galorder*
- 2 Absolutely Required §1003A
- 3 Counsel for Petitioner should arrange
  - a List of ‘certified’ GAL’s on web, by circuit, at  
*<http://www.courts.state.va.us/mlist.html>*
  - b No statute requires use of a ‘certified GAL’, however for indigent cases, Supreme Court will not pay ‘off list’ GAL’s.
  - c Call candidate and confirm availability and willingness

C Notice of hearing – Two types

1 To Proposed Incapacitated Person

a *FORM: gdn-noticeward* See §1004

b Must be in 14 point type and contain statutory warning language in §1004D in “**CONSPICUOUS, BOLD PRINT**”.

c Must contain a brief statement of the purpose of the proceedings

d Must contain notice of right to counsel pursuant to §1006

e Must contain notice of hearing pursuant to §1007

f Attach copy of to the notice

- Petition
- GAL Order

g (NOTE: most of this outline is Verdana 12 point; this section is 14 point to emphasize the difference)

2 To Family

a *FORM: gdn-noticfam*

b Sent to all family members identified in petition §1004C

c Mailed First Class Mail at least SEVEN days before hearing (unless waived by Court for cause) §1004C

d Must include copy petition; good idea to add photocopy of GAL order

IV FILING PETITION & GETTING UNDERWAY

A Jurisdiction §1001 A

1 Where respondent normally resides

2 Where respondent is presently located

- 3 Court can transfer "if in best interest of respondent" §1001D
  - 4 If respondent a Minor – within 6 months of 18<sup>th</sup> Birthday §1001B
- B Fees & Costs
- 1 Waiver available by Court Order "if estate of respondent is unavailable or insufficient" §1008
  - 2 Frankly, at only \$22.00 to file, the time to do affidavit and get Court Order exceeds benefit; I'll frequently advance as donation.
- C Required Addendum for confidential information
- 1 *FORM: gdn-coninfo OR see <http://www.courts.state.va.us/forms/circuit/cc1642.pdf>*
  - 2 Purpose is to protect the social security number but give clerk necessary information for post-hearing duties.
- D Get GAL Order entered & Schedule Hearing
- 1 Obviously check w/ GAL before setting date
  - 2 Generally set hearing at least 14 – 21 days in advance
  - 3 Judges like minimum 5-days notice to proposed incapacitated person; statute says "reasonable" §1004A
  - 4 Seven days notice to family usually required , §1004C, but can be less "For good cause shown" and can even take place AFTER the hearing.
- E Let everyone know what's going on
- 1 Send Package of info to GAL
    - a Cover letter
    - b Copies of BOTH notices of hearing (Proposed incap. person and family)
    - c Copy of Interview form
    - d Copy of Medical Evaluation

- e Anything else in file that could help – copies bank statements, deeds, car titles, etc. Basically, if you think it's interesting, send it.
  - f Package for Service on Proposed Incapacitated Person §1004 B
    - Notice Hearing (Incapacitated Person version)
    - Petition
    - Copy GAL Order
  - g GAL can serve the papers on proposed incapacitated person and certify personal service in their report – §1004B
- 2 Send package to family members
    - a Notice hearing (family version)
    - b Copy Petition
    - c Copy GAL order
  - 3 Don't forget to send this stuff to client w/ reminder must be at hearing
- F Pre-Hearing Package to Clerk
- 1 ORIGINAL Medical Evaluation
  - 2 Certification of Compliance §1004E *FORM: gdn-certcompl*
  - 3 Cover letter to Clerk with Conspicuous Hearing Date.
- V GUARDIAN AD LITEM ["GAL"]
- A Frequently does more work than petitioning attorney.
- 1 Field trip to personally visit and serve respondent §1003 B(i)
  - 2 Field trip to banks to uncover assets
  - 3 Call, meet with family, doctors, other witnesses
  - 4 Review real estate records
  - 5 File written report §§1003 B (iv) and 1003 C
  - 6 Personally appear at all court proceedings
- B GAL written report (*FORM gdn-galresp*) must address, per §1003 C
- 1 Jurisdiction of Court

- 2 Whether or not guardian or conservator needed
- 3 Extent of duties of guardian or conservator
- 4 Propriety and suitability of proposed guardian/conservator, considering:
  - a Geographic location
  - b Familial or other relationship with respondent
  - c Ability to carry out duties
  - d Commitment to promoting respondent's welfare
  - e Possible conflicts of interest, wishes of respondent, recommendations of relatives
  - f Recommendation of bond and surety
  - g Recommendation of placement of respondent
- 5 §1003 D directs health care providers to disclose or make available to the GAL, upon request, "any information, records and reports concerning the respondent" that the GAL determines necessary to perform duties.

## VI HEARING

### A Draft Order -- EVERY ONE IS DIFFERENT

- 1 Track the allegations in petition
- 2 Add language regarding GAL investigation and report
- 3 Hearing does not have to be at courthouse – can be in hospital or "where the respondent is located" §1007 (2<sup>nd</sup> Paragraph).
- 4 Special Issues:
  - a Voting – Declaration of incompetence is *prima facie* ineligibility to vote under Art II §1 of the Virginia Constitution. §24.2-410 requires clerk to send copy of guardianship order to State Board of Elections UNLESS Court order says not to.
  - b Real Estate §1023B sets out various ways of handling; see below, "Other Issues" for further discussion.

## B At Hearing

### 1 Client is witness

- a Run through petition allegations – respondent's name, date birth, known assets, known income.
- b describe incidents leading to petition
- c describe personal observations of respondent – ability to communicate, get around, eat, etc.

### 2 Other witnesses

- a Hospital social worker, Adult Protective Services Worker, etc.
  - Describe personal observations of respondent – ability to communicate, get around, eat, etc.
  - List medical providers; confirm that Doc doing medical evaluation is among those following respondent.
  - Observation of family concern, interaction, leading to suitability of who should serve as guardian and/or conservator.
- b Other family members – such additional facts as needed; opinion as to who should become guardian and/or conservator.

## VII POST HEARING

### A Review court order with client

### B Call bondsman to arrange surety if required.

- 1 HINT: Get proposed conservator name, address, date of birth, social security number and call bonding company ahead of hearing to see if that person can GET a bond.
- 2 Provide clerk with information form so answers to clerk's questions are readily available. FORM *clerkinfo*

### C Mark follow-up dates on office tickler for conservatorship inventory and accounting due dates

## VIII OTHER ISSUES

### A Counsel for respondent §1006

- 1 Optional
- 2 Respondent has absolute right to counsel – can hire own or have appointed
- 3 GAL should certify none is needed

### B Real Estate

- 1 Most of the judges in this area do NOT like a conservator to have absolute authority to sell real estate.
- 2 Thus the sample order requires court review and an order before a sale.
- 3 The conservator does NOT need an order to list the property; only one that confirms that a proposed sale is appropriate, and that can frequently be done without notice and hearing.
- 4 This process actually protects the conservator from being accused, after the fact, of disposing of someone's property for too little a price.
- 5 While beyond the scope of this outline, contact me for forms if you need them.

### C Driving – §46.2-314 No license to drive may be issued to a person adjudged incapacitated or who has been released from mental hospital. 46.2-400 requires DMV to immediately suspend license.

### D Guns – §18.2-308.1:2 & 1:3 An Incapacitated person or person involuntarily committed (mental health warrant) cannot purchase, possess or transport firearms

## IX CONCLUSION

- A Time: An uncontested, uncontroverted, adult guardianship proceeding will take a petitioner's attorney between four and eight hours of time, spread over three to five weeks.
- B This outline, and forms attached, are designed toward the minimum of that time estimate.
- C There are between fifteen and twenty-five Roanoke Valley lawyers who practice in this area regularly; all are available for a quick consultation should you have a question.