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Guardianship in Virginia with an Emphasis on Public Guardianship

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Index

- ▶ What is Guardianship in Virginia
- ▶ Senior Connections, CAAA Public Guardianship Program
- ▶ Before and After Court Hearing
- ▶ Program Slots
- ▶ A Day in The Life of a Public Guardian

Disclaimer

- ▶ All comments and information is presented from Edward P. Richards as a representative of the Senior Connections the Capital Area Agency on Aging (CAAA) Public Guardianship program and not of any other local, state, or federal organizations or programs
- ▶ The information presented is a reflection of knowledge from the Virginia Public Guardianship program but basic concepts are used as best-practices for other types of guardianship

What is Guardianship



Four Types of Guardians

- ▶ Guardian
- ▶ Public Guardian
- ▶ Private Guardian
- ▶ Conservatorship

What is Guardianship

- ▶ Guardian" means a person appointed by the court who *has the powers and duties set out in § [64.2-2019](#), or § [63.2-1609](#) if applicable, and 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.

What is Guardianship Cont.

- ▶ "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.

Retrieved from Code of Virginia Section § 64.2-2000. Definitions.

What is a Public Guardian

- ▶ Public guardians fall under the same legal definition as a guardian per the Code of Virginia section 64.2-2000. Definitions, but must follow a few additional sets of standards.
- ▶ A public program is defined in the Code of Virginia's Administrative Code section 22VAC30-70-10. Definitions as: "Public guardian program" means a local or regional public or private nonprofit entity or program designated by the department as a public guardian, a public conservator or both, pursuant to §§ [51.5-150](#) and [51.5-151](#) of the Code of Virginia, and operating under a contract entered into with the department.

Retrieved from Code of Virginia Section 22VAC30-70-10

- ▶ Virginia's public safety net includes public guardianship for adults who are:
 - ▶ Incapacitated;
 - ▶ Indigent; and
 - ▶ In need of someone to help them make medical, financial, or daily living decisions, but who have no suitable person to serve as their guardian.

[Retrieved from DARS](#)

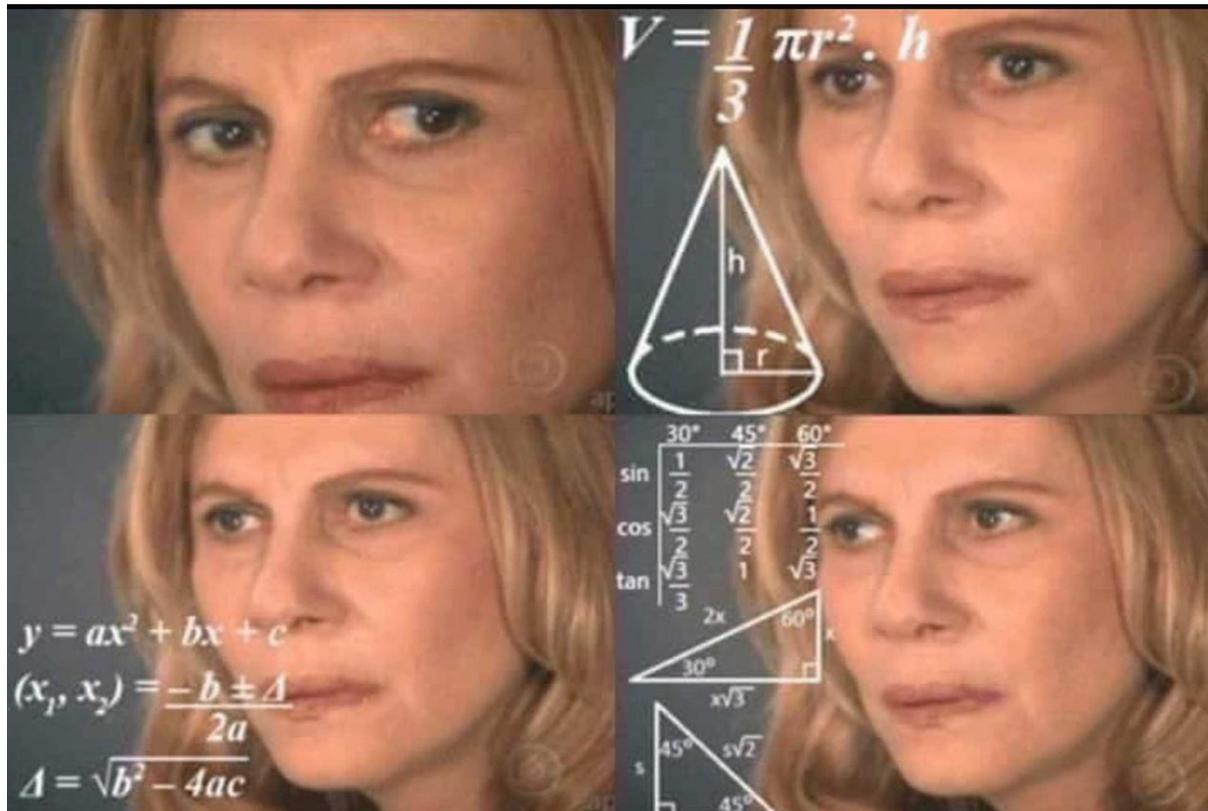
Public Guardian Referrals

- ▶ Referrals are made to the local provider that serves the geographic area where the allegedly incapacitated person resides at the time of the initial referral.
- ▶ Before any local public guardianship provider can accept an individual for public guardianship services, 22VAC30-70-30 requires that the provider's multi-disciplinary panel ("MDP") must review the referral to determine whether the individual is an appropriate candidate for that provider's program. Specifically, the MDP must review the referral to ensure that:
 - ▶ The individual cannot adequately care for himself;
 - ▶ The individual is indigent;
 - ▶ There is no alternative less restrictive than guardianship to meet the individual's needs;
 - ▶ The needs of the individual are consistent with the priorities of the public guardian program; and
 - ▶ No other proper and suitable person or entity can be identified who is willing and able to serve as the guardian.

Common Misconceptions

- ▶ Can a local public guardianship provider sometimes serve clients who reside outside of their geographic service area?
 - ▶ Yes

What is a Private Guardian



What is the Difference Between Public & Private Guardians

- ▶ Unlike the work of private guardians, the work of public guardians is subject to regulation and oversight by DARS. High quality public guardianship services are maintained through regulations and contract provisions requiring that:
 - ▶ The ratio of any provider's public guardianship clients to full-time direct service staff not exceed 20:1 (22VAC30-70-30, see Appendix C);
 - ▶ Each client receives a monthly face-to-face visit;
 - ▶ Each provider has an MDP consisting of local professionals knowledgeable about human service needs in that geographic area and may include representatives from the local departments of social services, community services boards ("CSBs"), area agencies on aging, health departments, licensed attorneys, physicians, and administrators of local hospitals, nursing homes, assisted living facilities, and group homes (22VAC30-70-30);
 - ▶ Person-centered planning is utilized to ensure that decisions made on behalf of clients are as individualized as possible (22VAC30-70-30);
 - ▶ Providers report to DARS quarterly regarding the number of clients served;
 - ▶ DARS conduct periodic on-site monitoring of local providers (22VAC30-70-60); and
 - ▶ Specified staff attends DARS-sponsored public guardianship training sessions (22VAC30-70-40). DARS provides multi-day training sessions annually.

What is the Difference Between Public & Private Guardians Cont.

- ▶ The differences between Public and Private Guardians are:
 - ▶ Private guardians are not subject to the special rules that apply to public guardians that I just described.
 - ▶ The individuals served by private guardians may or may not be indigent.
 - ▶ Private guardians and conservators may be paid a fee for their services from the funds of the incapacitated person. Public guardians may not take any fees from the incapacitated person's funds. They are paid by DARS. The fees paid to private guardians from the funds of the incapacitated person are established by the court. A private guardian may be paid by someone other than the incapacitated person by a third party.
 - ▶ The person designated by a court to be a private guardian may not be the only person who is available to serve to in that role.
 - ▶ **MOST IMPORTANTLY**, unlike public guardians, private guardians are not regulated by the state. Beyond the court order itself, there are no state rules or regulations regarding the operation of private guardianships. If someone is dissatisfied with the decisions made by or the work done by a private guardian, their only recourse is the courts, or APS if they believe the actions of the guardian rise to level of abuse, neglect, or exploitation.
 - ▶ The court and APS are remedies for those who are concerned about the performance of public guardians, too. But in addition to these remedies, a complaint can be made to DARS, which will attempt to address concerns involving the work of public guardians.

Common Misconceptions

- ▶ Anyone appointed to serve as a guardian for an incapacitated person who is not a member of the incapacitated person's family or is not a friend of the incapacitated person is a public guardian.
- ▶ This is not correct.

Conservatorship

- ▶ "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." *Conservator* includes:
 - ▶ (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.

Conservatorship Cont.

- ▶ "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.

Retrieved from Code of Virginia Section § 64.2-2000. Definitions.

What is an Incapacitated Person

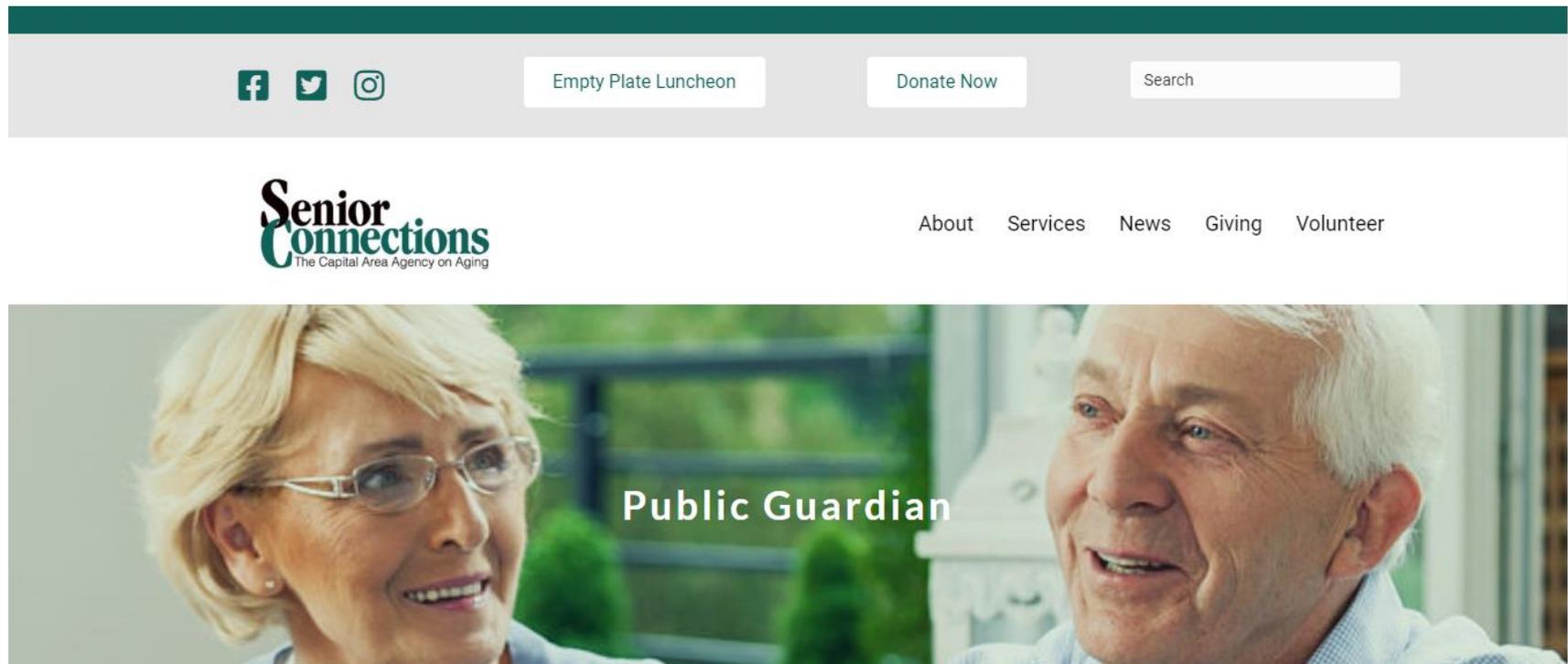
- ▶ "Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to
 - ▶ (i) meet the essential requirements for his health, 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 of the Code of Virginia unless the court order entered pursuant to this chapter specifically provides otherwise. Incorporated by reference to this definition is the definition of "incapacitated person" found in § [37.2-1000](#) of the Code of Virginia and any successor language thereof

What is an Indigent Person

- ▶ "Indigency" means the client is a current recipient of a state-funded or federally funded public assistance program for the indigent or as otherwise defined in § [19.2-159](#) of the Code of Virginia.

Retrieved from Code of Virginia Section 22VAC30-70-10

Senior Connections, CAAA Public Guardian Program



<https://seniorconnections-va.org/services/advocacy-support/public-guardian/>

Background

- ▶ A public guardian is an entity appointed to serve as guardian and/or conservator that has contracted with DARS (the Virginia Department for Aging and Rehabilitative Services) to serve as a public guardian and/or conservator as part of Virginia's Public Guardian and Conservator Program, which is established and operated under the program created by the Virginia Code (Va. Code §§ 51.5-149 - 51.5-151).
 - ▶ DARS contracts with 13 entities/social service agencies across the Commonwealth to provide public guardianship services to 1,049 individuals.
 - ▶ All public guardianship clients must have been found by a Virginia circuit court to be incapacitated and indigent, with no other proper or suitable person willing and able to serve as guardian
- ▶ The program is an extension of Department of Aging & Rehabilitative Services (DARS) through a contract with Senior Connections, Capital Area Agency on Aging but is not apart of DARS. DARS provides oversight and technical assistance to the program but does not directly supervise day to day operations, although if there is a concern our state affiliates will be happy to help if they can.
- ▶ The public guardian program is separate from all other programs at Senior Connections programs and works independently, although supervision and oversight is managed by Senior Connections.

Public Guardian Cont.

DARS administers the Program through contracts with 13 local providers. They maintain 24-hour-a-day, 365-days-a-year coverage for the individuals served. The 13 local providers are:

- ▶ Alleghany Highlands Community Services Board
- ▶ Appalachian Agency for Senior Citizens
- ▶ The Arc of Northern Virginia
- ▶ Autumn Valley Guardianship
- ▶ Bridges Senior Care Solutions
- ▶ Catholic Charities of Eastern Virginia
- ▶ Commonwealth Catholic Charities
- ▶ District Three Governmental Cooperative
- ▶ Family Service of Roanoke Valley
- ▶ Jewish Family Services (Richmond)
- ▶ Jewish Family Service of Tidewater
- ▶ Mountain Empire Older Citizens
- ▶ Senior Connections-Capital Area Agency on Aging.

Common Misconceptions

- ▶ Anyone appointed to serve as a guardian for an incapacitated person who is not a member of the incapacitated person's family or is not a friend of the incapacitated person is a public guardian.
- ▶ This is not correct.

Before & After Court



Before Court

- ▶ There must be sufficient findings to support that the person is incapacitated, meaning they are 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 meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian.
 - ▶ 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.”
- ▶ The court reaches this determination based on evidence presented to the court which generally includes report on capacity. Va. Code § 64.2-2005.
 - ▶ The capacity report must 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” that are purported to have created the alleged incapacity. Va. Code § 64.2-2005.

Before Court Cont. Capacity Evaluation

- ▶ The capacity report should include:
 - ▶ (i) a description of the nature, type, and extent of the individual's incapacity, including the individual's specific functional impairments;
 - ▶ (ii) a diagnosis or assessment of the individual's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor;
 - ▶ (iii) an evaluation of the individual's ability to learn self-care skills, adaptive behaviors, and social skills and a prognosis for improvement; and (iv) the date(s) of the examination(s) and assessment(s) on which the report is based. Va. Code § 64.2-2005.

Before Court Cont. Indigence Findings

- ▶ The circuit court must find the person to be indigent:
 - ▶ The circuit court may appoint a public guardian if the incapacitated person's resources are insufficient to fully compensate a private guardian. Va. Code §64.2-2010.
 - ▶ If the incapacitated individual would be eligible for court appointed counsel in a criminal case, the circuit court will find that the person is indigent for the purposes of appointing a public guardian. Va. Code §64.2-2010.
 - ▶ An individual who is receiving state or federally funded public assistance (e.g., SSI or Medicaid) is presumed to be indigent. Va. Code §19.2-159.B.
 - ▶ An individual who is not currently receiving public assistance may also be found to be indigent if the value of her income, personal property assets readily convertible to cash, and real property assets (valued at the amount which could be raised by a loan on the property) after deducting exceptional expenses (which include the costs of medical care, family support obligations, and child care) does not exceed 125% of the federal poverty income guidelines. Va. Code §19.2-159.B. In 2017, 125% of the poverty guideline for a single person household is \$15,075. <https://aspe.hhs.gov/poverty-guidelines>.

Before Court Cont. No one Else to Serve

- ▶ The circuit court must find that there is no one else to serve as guardian:
 - ▶ The circuit court may appoint a public guardian if it determines that there is no other proper and suitable person willing and able to serve in such capacity. Va. Code §64.2-2010. This is largely determined by the guardian *ad litem's* report, and the family's participation in the hearing
 - ▶ The Virginia Code and the regulations governing the public guardian program also provide that a local public guardian program cannot serve unless public guardianship is determined to be the least restrictive alternative available to assist the individual. Va. Code §15.1-151; 22VAC30-70-30.E.1.a.
 - ▶ Less restrictive alternatives include: money management services; representative payee services; care management; and services provided under a financial or health care power of attorney (e.g., a durable power of attorney executed while the individual had capacity). 22VAC30-70-10.

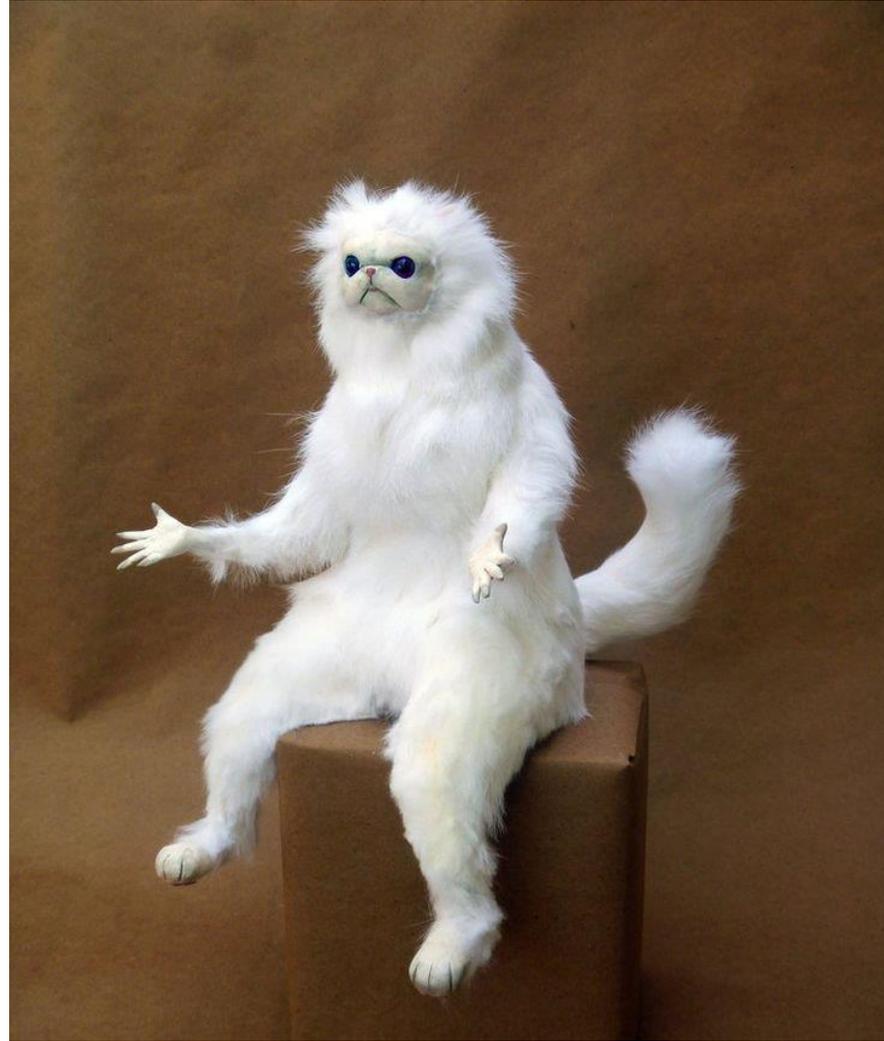
Court Proceedings

- ▶ All public guardianship clients must have been found by a Virginia circuit court to be incapacitated and indigent, with no other proper or suitable person willing and able to serve as guardian.
- ▶ Finding someone to be incapacitated and depriving them of decision-making authority is fundamentally a legal process. It is something that is not undertaken lightly in a society like ours that places significant value on individual rights. Great care is, and should be, taken to consider the rights of the individual who has been alleged to be incapacitated.
- ▶ *A guardian ad litem is appointed by the court to represent the best interests of the allegedly incapacitated person.* The allegedly incapacitated may also be represented by a second attorney who represents the allegedly incapacitated person's wishes. The allegedly incapacitated person also is entitled to a jury trial upon request.
- ▶ The petitioner in the case is required to identify family members in the petition to the court, along with the addresses, so they can be notified of the proceeding and participate

Common Misconceptions

- ▶ Unfortunately, we do not have the exact figures as to how many adults in Virginia are subject to guardianship, but DSS estimates that there are over 13,000.
- ▶ Approximately 1,000 of these individuals have a public guardian. The rest are served by private guardians.
- ▶ Children - minors under 18 years old -- are the largest group of incapacitated people in the State. They lack legal capacity to make legal decisions. They can't enter into contracts. They cannot give consent. They cannot enroll in school. Their parents, or a person designated by a court as having legal custody of the child, has authority to act on behalf of the child. A finding by a court that an adult is incapacitated is essentially a determination that the person will be treated as a child in the eyes of the law (but not necessarily for the purposes of criminal law). Generally, they will lose the right to enter into contracts, make decisions regarding their medical care, to vote, drive, or own a firearm.

What to do After Once Appointed



Core Duties of a Guardian

- ▶ All guardians are required by the Virginia Code to:
 - ▶ Maintain sufficient contact with the incapacitated person to know his capabilities, limitations, needs, and opportunities and visit the incapacitated person as often as necessary to maintain the guardian's knowledge of the incapacitated person's situation;
 - ▶ Obtain court approval before moving the incapacitated person to another state, consenting to the termination of the person's parental rights, or initiating a change in the person's marital status;
 - ▶ To the extent feasible, encourage the incapacitated person to participate in decision-making about their affairs, act on their own behalf, and work to develop or regain capacity. All guardians should consider the expressed desires and personal values of the incapacitated person to the extent feasible when making decisions on their behalf;
 - ▶ Avoid placing unreasonable restrictions on the incapacitated person's visitation or communication with a person with whom the incapacitated person has an existing relationship; and
 - ▶ File periodic reports with the local DSS office reporting on the status of the incapacitated person. Conservators must file very detailed periodic reports with the Commissioner of Accounts concerning the incapacitated person's income, assets, liabilities, and expenditures made by the conservator on the incapacitated person's behalf.

Program Slots



Program Slot Definitions

- ▶ Public guardianship slots are divided among four eligibility categories that correspond to the four funding categories established by the General Assembly. These are:
 - ▶ DBHDS-ID/DD - For adults identified by the Virginia Department of Behavioral Health and Developmental Services (“DBHDS”) who have an intellectual or other developmental disability and need public guardianship services;
 - ▶ DBHDS-MI - For adults identified by DBHDS who have a mental illness and need public guardianship services. To date, these slots have been used exclusively for individuals treated at state hospitals;
 - ▶ MI/ID - For adults with either mental illness or an intellectual disability, including individuals who have been identified as needing public guardianship services by a source other than DBHDS; and
 - ▶ Unrestricted - For adults who meet the statutory criteria for public guardianship services regardless of the diagnosis or circumstances underlying their incapacity or the referral source. For example, individuals incapacitated by dementia or an acquired brain

Program Slots Cont.

- ▶ Program Slots:
 - ▶ 454 of these slots (approximately 43% of all public guardian slots) are reserved for adults who have an ID/DD diagnosis.
 - ▶ 98 slots are reserved for individuals who are receiving treatment in state mental health institutes.
 - ▶ The remaining slots 497 slots are held by individuals who are incapacitated by variety of other disorders including dementia, cognitive impairment, traumatic brain injury, and severe mental illness
 - ▶ There is a strict limit on the number of clients that our local providers can serve. Their client to staff ratio cannot exceed 20:1.

Program Slots Cont.

**NUMBER OF INDIVIDUALS SERVED – PUBLIC GUARDIAN PROGRAM
ACTIVE CLIENTS
(As of 6/30/2019)**

Eligibility Category	Total Slots Available	Active Clients	In-Process Clients	Open Slots
Unrestricted	457	415	27	15
DBHDS-ID/DD	454	411	43	0
DBHDS-MI	98	85	6	7
MI/ID	40	39	1	0

AGE DISTRIBUTION - PUBLIC GUARDIAN PROGRAM ACTIVE CLIENTS (As of 6/30/2019)

Eligibility Category	Age Group	Age Range	Percentage
Public Guardian and Conservator Program/All Funding Categories (950 Active Clients)	Young Adult	18 – 29	7.89%
	Middle Aged	30 – 59	42.74%
	Older Adult	≥60	49.37%
	Total		100.00%
Unrestricted (415 Active Clients)	Young Adult	18 – 29	6.75%
	Middle Aged	30 – 59	31.56%
	Older Adult	≥60	61.69%
	Total		100.00%
DBHDS-ID/DD (411 Active Clients)	Young Adult	18 – 29	9.49%
	Middle Aged	30 – 59	54.99%
	Older Adult	≥60	35.52%
	Total		100.00%
DBHDS-MI (85 Active Clients)	Young Adult	18 – 29	7.06%
	Middle Aged	30 – 59	37.65%
	Older Adult	≥60	55.29%
	Total		100.00%
MI/ID (39 Active Clients)	Young Adult	18 – 29	5.13%
	Middle Aged	30 – 59	43.59%
	Older Adult	≥60	51.28%
	Total		100.00%

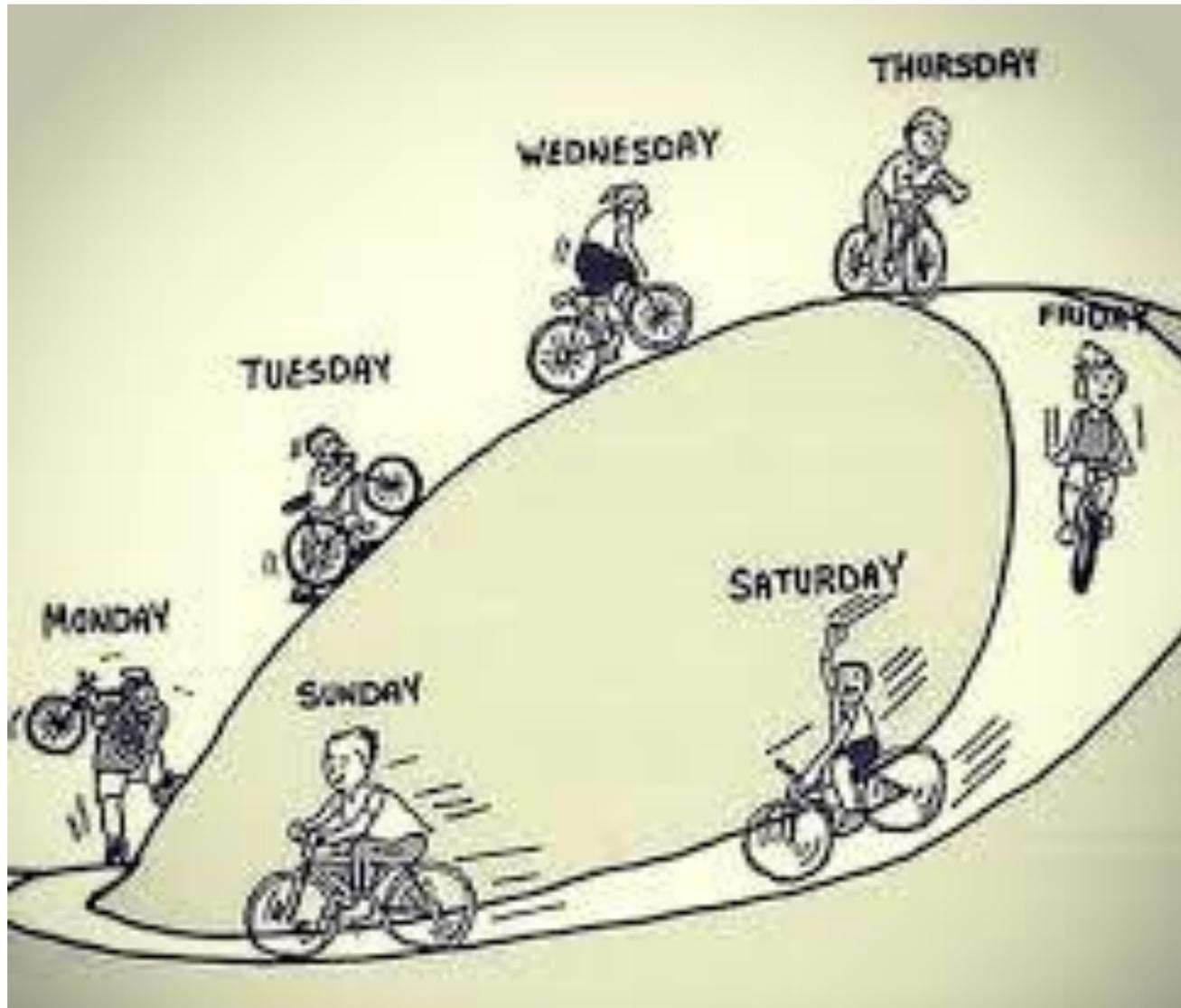
Living Arrangement Statistics

- ▶ At the end of State Fiscal Year 2019, the 950 Active Clients lived in the following situations:
 - ▶ 48.42 percent in group homes;
 - ▶ 16.84 percent in nursing homes;
 - ▶ 12.74 percent in sponsored residential homes;
 - ▶ 12.32 percent in assisted living facilities;
 - ▶ 4.95 percent in state hospitals;
 - ▶ 2.53 percent in independent living settings;
 - ▶ <0.50 percent in training centers; and
 - ▶ 2.11 percent in other community settings (e.g., private hospitals, REACH stabilization homes, 1 or adult foster care).

Program Slots at Senior Connections, CAAA

- ▶ **Currently at 38-40**
 - ▶ **DBHDS currently 10-10:** Referrals come only from DBHDS through a referral from DARS. Once a slot is open, you are to contact DARS immediately to fill that slot.
 - ▶ Current Status: Full
 - ▶ **MH/MR currently 20-20:** Referrals come from DARS or community. You have the discretion in how to take referrals here but it is best practice to accept them only from an organization or entity that will follow-through with court proceedings.
 - ▶ Current Status: Full
 - ▶ **Unrestricted currently 8-10:** Referrals come from community only. These referrals are designed to be for Severe Mental Health, Alzheimer's, Dementia, Traumatic Brain Injury's, and dual diagnosis of the aforementioned with Intellectual disabilities.
 - ▶ Soon to pull from waiting list or conduct outreach to fill
- ▶ **Disclaimer:** We have discretion in who we decide to take into our program, it is preferred for us to take any individuals who meets the basic criteria but it is also up to the individual programs in how they do so.

A Day in The Life



Monthly Duties

- ▶ Client Visits
- ▶ Case Notes
- ▶ Record Keeping
- ▶ Provider Contact/Doctor Visits

Yearly Duties

- ▶ Annual Monitoring
- ▶ File Review
- ▶ File Purge
- ▶ Care Plans
- ▶ Values History

Reporting Duties

- ▶ DARS Report - submitted through files anywhere
 - ▶ Q1-covers July-September and due **October 20th**
 - ▶ Q2- covers October-December and due **January 20th**
 - ▶ Q3-covers January-March and due **April 20th**
 - ▶ Q4-covers April-June and due **July 20th**
- ▶ Department of Social Services Reports
- ▶ Multi-Disciplinary Panel Reports
- ▶ End of life in Public Guardianship clients

Conservatorship Duties

- ▶ Reporting
- ▶ Documenting
- ▶ Record Keeping
- ▶ End of Life
- ▶ Program Slots

Client Duties

- ▶ Monthly Visits
- ▶ Follow-up
- ▶ Gestures of Kindness

Waiting List Duties



Multi-Disciplinary Panel Duties

- ▶ Annual Reviews
- ▶ Referral Review
- ▶ Technical Assistance
- ▶ Confidentiality
- ▶ Volunteerism

Obligations

- ▶ Human Rights
- ▶ Mandated Reporter
- ▶ Adult Protective Services
- ▶ Non-Emergencies

Recap

- ▶ What is Guardianship in Virginia
- ▶ Senior Connections, CAAA Public Guardianship Program
- ▶ Before and After Court Hearing
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Final Note

- ▶ You will learn a lot about medical terms, conditions, diagnosis, processes, and will become very familiar with alternative medical procedures
- ▶ Everyone is not eligible for guardianship but those that are typically are the most vulnerable Virginia residents
- ▶ Court process can be short or long depending on petitioners, court dates, attorneys, and the immediate needs of the person
- ▶ No one day is the same, some are mundane, some are frustrating, some are uplifting, some are disgusting
- ▶ All public Guardians are active in pursuit of alternatives to Guardianship either before appointment or after

Submitted Questions

▶ General Questions

- ▶ 1. Please explain what the legal definition of guardianship is in the Commonwealth of Virginia, especially in light of the recent legislation passed.
- ▶ 2. What is the best way to be prepared, as we often do with our 5 Wishes/End of Life Directives, etc., in case we have to have a guardian?
- ▶ 3. Same as above but for a family member? A loved one to whom we are not related?
- ▶ 4. How can we guarantee that we have the person we want to be our guardian, rather than be assigned a guardian by, for example, a health care facility?

▶ Coronavirus Related Questions

- ▶ 5. In this time of coronavirus emergency, when loved ones might be physically separated and unable to take action in person/be notified of options in a timely manner, etc., what is the best way to proceed to protect ourselves re being assigned a guardian?
- ▶ 6. In a national emergency, like the current coronavirus, are there special circumstances that have been built into any legislation that either compromises individual rights or enables medical and other authorities to take actions that could be contrary to individual/family wishes/directives?

Q & A



Resources

- ▶ Department of Aging & Rehabilitative Services
 - ▶ <https://www.vda.virginia.gov/publicguardianship.htm>
- ▶ Senior Connections, CAAA
 - ▶ <https://seniorconnections-va.org/>

Contact

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