

An Overview of the Role of Attorney-Guardians: Key Considerations and Strategies

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Attorneys serving as a guardian have a unique responsibility to the adults they serve, which is somewhat different than that of non-attorneys. Understanding the duties, ethical considerations, and potential challenges in this position is essential to maximize the relationship with the adult, and the ability of the attorney to properly serve in the highest capacity possible. This white paper, in conjunction with the Virginia Guardian Training, provides an overview of the roles and responsibilities of an attorney serving as a guardian for an incapacitated adult in Virginia, and the significance of an attorney serving in this role.

Understanding the Roles of an Attorney in the Guardianship System

A judge of the circuit court appoints a guardian to be responsible for the management of the personal affairs of an incapacitated person, sometimes referred to as the '*ward*.' The Code of Virginia, § 64.2-2000 defines incapacitated person as:

“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**.”

In Virginia, attorneys can serve in several different roles in the guardianship process:

- **Representing the Petitioner or Respondent:** An attorney may file a petition and pursue the petition on behalf of the person seeking guardianship of another. The person filing is referred to as *the petitioner*, and the person alleged in the petition as needing a guardian is *the respondent*. The petitioner's attorney has a loyalty to the petitioner.
- **Guardian ad litem:** When a petition for guardianship is filed, the judge must appoint a *guardian ad litem*, often referred to as a "GAL." The GAL does not represent either the petitioner or the respondent. Instead, they must represent the interests of the respondent and must investigate the statements in the petition, as well as the other facts of the case. They serve as an independent third-party with duties which are laid out in the Virginia Code. The GAL is required to file a report of their findings with the Court.
- **Representing the Respondent:** Virginia does not automatically provide an attorney in every guardianship matter, but every respondent in a guardianship action has a right to

be represented by an attorney of their choosing. The court may appoint counsel at any time during the proceeding (prior to entry of the order appointing a guardian). The respondent may hire their own attorney to represent them, or a judge may appoint an attorney, especially if the GAL recommends such appointment or the respondent makes such a request.

- **Court Appointed Guardian:** A judge may appoint an attorney to serve as guardian for an incapacitated person.

This guide will focus on the role of an **attorney-guardian** who is responsible for the personal affairs of an incapacitated person. It does not address the role of the conservator who manages property or financial affairs of an incapacitated person.

Navigating the Role of an Attorney-Guardian

An attorney-guardian must be a zealous advocate for the expressed wishes of the incapacitated person they represent. Guardians serve in a fiduciary role, meaning the attorney-guardian is obligated to act in the best interest of the incapacitated person, putting their interests first and maintaining confidentiality. Therefore, an attorney-guardian must advocate on behalf of the incapacitated person and their wishes but must also make decisions on behalf of the incapacitated person when, at times, their wishes may be unknown or are not in their best interest. An attorney-guardian should consider the decisions the adult would have made when they had capacity, even after that capacity is gone or diminished. The attorney-guardian must consider the incapacitated person's need for protection and to avoid harm, while simultaneously promoting the incapacitated person's rights and preferences, while respecting their autonomy. Ultimately, the role of every guardian is to protect and advocate on behalf of their adult, and to assist with management of the adult's affairs, in accordance with the court's Order.

Attorney-guardians are guided by their commitment to the Virginia State Bar [Rules of Professional Conduct](#) and, to the extent applicable, the American Bar Association [Model Rules](#). An attorney-guardian should also be familiar with the National Guardianship Association's [Standards of Practice](#) and [Ethical Principles](#) to influence their actions as guardian. While not mandatory in Virginia, they provide a good framework and direction for service as an attorney-guardian.

Key Considerations for an Attorney-Guardian

An attorney-guardian should:

1. Use Person-Centered Approaches

An attorney-guardian has a fiduciary duty to the incapacitated person to act in their best interests. This means making decisions that prioritize the incapacitated person's health, safety, comfort, and dignity while honoring the person's values, beliefs, and wishes. In most instances, the attorney-guardian may not be familiar with the incapacitated person prior to the appointment. A vital first step for an attorney-guardian is to meet with the person to assess their needs and learn about their values, wishes, culture, and goals. These person-centered characteristics will be applied to any decisions made moving forward and should be assessed regularly.

When assessing the incapacitated person's needs, the attorney-guardian should follow the decision-making approaches as outlined in the Virginia Guardian Training. Such approaches highlight the importance to act on behalf of the incapacitated person in accordance with their wishes, and not how the attorney-guardian would act in the incapacitated persons' position. The attorney-guardian may need to consult with the person's natural or informal support systems, healthcare providers, and other professionals if available. This interdisciplinary approach ensures that all aspects of the incapacitated person's care are addressed comprehensively and thoughtfully. The attorney-guardian should strike a balance between consulting with others, exchanging information to gather relevant information, and learn about the incapacitated person's history while maintaining the person's confidentiality.

2. Avoid Conflicts of Interest

Attorney-guardians should be careful to avoid conflicts of interest. This includes situations where personal interests or professional duties could influence their decisions. For instance, if an attorney-guardian is representing the incapacitated person in other legal matters, they should be cautious to ensure that these roles do not intersect in ways that would compromise the incapacitated person's well-being or inappropriately benefit the attorney-guardian.

3. Effectively Manage Guardian's Duties and Responsibilities

An attorney-guardian is responsible for making medical decisions for the incapacitated person, including selecting healthcare providers, making decisions regarding treatment options, and ensuring that the person's living conditions are safe and appropriate. These decisions should be made in accordance with the incapacitated person's preferences and best interests, with consideration for their dignity and autonomy. Ongoing, the attorney-guardian must advocate for the incapacitated person in various settings, including housing, health care and long-term

care discussions, family meetings, and any legal matters that arise. The attorney-guardian's role as an advocate is crucial in ensuring that the incapacitated person's rights are upheld and that their preferences are considered whenever possible. Due to their specialized legal knowledge and expertise, attorney-guardians bring unique advantages to ensure the incapacitated person's affairs are handled with both care and legal precision.

There are several items that an attorney-guardian may wish to address immediately following the appointment. Those include, but are not limited to, the following actions:

- Notify current service and health care providers of guardianship appointment.
- Complete a change of address notice.
- Arrange for a health evaluation if primary care is not established.
- Contact Social Security and Medicare, and other insurance carriers.
- Apply for any benefits the incapacitated person may be entitled to.
- Establish an initial plan of care, including plan to meet immediate needs.
- Locate or obtain copies of any existing leases, contracts, or other legal documents executed by the incapacitated person.
- Review previously executed Advance Directives or Power of Attorney documents, if applicable.

The attorney-guardian may also wish to consider developing a care plan following the appointment as guardian. The care plan should be referred to regularly to ensure the incapacitated person's needs are continuously met, and updated annually, at minimum.

4. Keep Detailed Records

Attorney-guardians are responsible for maintaining detailed records of the decisions and actions taken on behalf of the incapacitated person, and the care they have arranged for the person. Information derived from such records will need to be reflected in an initial guardianship report, and annual guardianship reports thereafter, submitted to the local department of social services (LDSS) where the incapacitated person resides. Once reviewed, the reports are forwarded to the circuit court where guardianship was appointed. Guardians who fail to submit their reports timely may be subject to an Adult Protective Services (APS) investigation. Twice each year, all LDSS must file a list of all guardians who are more than 90 days delinquent in filing an annual guardianship report with the clerk of circuit court. The court may issue a summons or rule to show cause why the guardian has failed to file an annual guardianship report.

5. Maintain Objectivity and Professionalism

Acting as a guardian requires a high level of objectivity and professionalism. Attorney-guardians must avoid letting personal emotions or biases influence their decisions. The attorney-guardian's role is to serve as a neutral party who focuses solely on the incapacitated person's

best interests, free from external pressures or personal interests. In addition, as a legal professional, the attorney-guardian is bound by ethical guidelines that require them to act with integrity, transparency, and accountability. These ethical obligations ensure that the incapacitated person's interests are prioritized, and that the attorney-guardian's decisions align with the highest legal and moral standards.

Guardianship can be very involved and emotionally challenging. The attorney-guardian must be willing and able to dedicate the necessary time and effort to the role without letting it interfere with their other professional responsibilities.

Challenges for an Attorney-Guardian

While serving as an attorney-guardian can be a rewarding and important role, it can also present several challenges for attorney guardians to consider.

- The attorney-guardian must navigate complex legal and medical matters often with limited resources accessible by the incapacitated person.
- Guardianship can also be time-consuming, particularly when the incapacitated person's health or living conditions change unexpectedly, or if the person lives out of the attorney-guardian's general service area or practice region. Attorney-guardians may coordinate with staff like paralegals or legal assistances to help manage their guardian duties and responsibilities. In doing so, the attorney-guardian needs to ensure all staff are well-informed about the incapacitated person's status, their needs, and their wishes; complete required training such as the Virginia Guardian Training; and thoroughly document their communication, visits, and interactions with the incapacitated person and others involved.
- Attorney-guardians must deal with the emotional weight of making difficult decisions on behalf of a person who is no longer able to advocate for themselves. This responsibility can be taxing, requiring a great deal of empathy, patience, and dedication.
- Guardianship often involves complex family dynamics, as relatives may have differing views on what is best for the incapacitated person. An attorney-guardian must be sensitive to these relationships while still prioritizing the person's best interest. It is important for the attorney to communicate effectively with family members or natural support, keeping them informed about the incapacitated person's care and decisions, when appropriate. Attorney-guardians should manage these relationships with care, ensuring that the family's involvement does not conflict with the attorney-guardian's fiduciary duties. In some instances, the attorney-guardian may limit communication with others *only when necessary* to protect the incapacitated person from physical, mental, emotional harm, or financial exploitation, *and* after consideration of the person's wishes. Regardless, it is essential to communicate with the incapacitated

person concerning who receives updates about their care and consider the person's wishes about who is involved in this process.

- In some cases, another person such as a family member or natural support person may be appointed to serve as a co-guardian alongside the attorney-guardian, meaning all guardians must work collaboratively to best serve the incapacitated person. In addition, another person could also be appointed as the incapacitated person's conservator. The attorney-guardian must work in conjunction with any conservator appointed to ensure the incapacitated person has access to vital items such as clothing, food, medication, etc.

Resources for Attorney-Guardians

Decision-making may present as a challenge, particularly in complex situations. Using a case interview or case analysis tool may help, such as the American Bar Association Commission on Law and Aging's [PRACTICAL Tool](#). While geared towards identifying decision-making options that are less restrictive than guardianship, the nine-step approach can be altered to support attorney-guardians through the decision-making process on behalf of the incapacitated person.

Additional resources that attorney-guardians may find useful:

- [Making Medical Decisions for Someone Else](#) – American Bar Association, 2009.
- [IDEAL Tool](#) – Maryland Judiciary, 2024.
- [National Guardianship Association](#).
- [The Center for Guardianship Excellence](#).
- American Bar Association [Commission on Law and Aging](#).
- Justice in Aging: [Guardianship](#).

Conclusion

An attorney serving as a guardian plays a pivotal role in ensuring that the incapacitated person's needs are met and that their rights are protected. Attorney-guardians bring valuable legal expertise, impartiality, and a commitment to protecting the incapacitated person's rights and well-being. The guardianship process itself is highly regulated to ensure that the incapacitated person's best interests are always at the forefront, and attorney-guardians are uniquely equipped to navigate these legal waters.

While the role can be challenging, it is also deeply meaningful, as it allows the attorney-guardian to make a positive impact on the life of someone who is vulnerable. Understanding the legal, ethical, and practical responsibilities involved is crucial for all attorneys involved in the guardianship system to ensure that the guardianship process is handled appropriately and in accordance with the law.