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REFORM OF ADULT GUARDIANSHIP LAW

*John E. Donaldson**

I. INTRODUCTION

A. *Scope and Overview*

The past two years have been especially significant for those subject to or involved in Virginia's system for providing court-appointed fiduciaries for incapacitated adults. Major legislation enacted in the 1997 Session of the Virginia General Assembly substantially reformed, clarified and restated the statutory system.[1] Generally, the 1997 legislation became effective January 1, 1998. Further changes and refinements were made in the 1998 Session.[2] The new system is more rational, coherent, unified and sensitive to the needs and rights of incapacitated adults than the system it replaces.

This article begins with a brief description of the essential features of prior law. Next, it briefly portrays the national context in which guardianship reform efforts have developed and culminated and relates the recent history of guardianship reform efforts in Virginia. The article then moves to its primary focus. Part II reviews the revised adjudicative system for determination of incapacity and appointment of fiduciaries and ex-

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1. *See* Act of Apr. 28, 1997, ch. 921, 1997 Va. Acts 2503 (codified as amended at VA. CODE ANN. §§ 8.01-2, 8.01-68, 11-9.1, 13.1-506, 13.1-562, 14.1-112, 18.2-308, 18.2-308.1:2 (Cum. Supp. 1998)).

2. *See* Act of Mar. 13, 1998, ch. 76, 1998 Va. Acts 148 (codified at VA. CODE ANN. § 37.1-134.13.1 (Cum. Supp. 1998)); Act of Apr. 15, 1998, ch. 582, 1998 Va. Acts 1373 (codified as amended at VA. CODE ANN. §§ 24.2-230, 24.2-232, 24.2-410, 37.1-134.6, 37.1-134.14, 37.1-134.15, 37.1-134.18, 37.1-137.2 (Cum. Supp. 1998)); Act of Apr. 22, 1998, ch. 787, 1998 Va. Acts 1891 (codified at VA. CODE ANN. §§ 2.1-1.6, 9-6.25:1, 37.1-134.6, 37.1-134.19, 2.1-373.1 to -373.14, 37.1-134.14:1 (Cum. Supp. 1998)).

amines the redefined roles of guardian ad litem, guardian of the person, and conservator of the estate of the incapacitated person. Part III discusses other components of the reformed system, including 1998 legislation implementing a public guardianship program.

B. *Significant Aspects of Pre-Reform Law in Virginia*

Under the previous system in Virginia, fiduciaries for incapacitated adults were appointed under three separate statutory methods, each involving different standards and differing, though basically similar, procedures and evaluation methods. One method applied to proceedings affecting an individual sought to be adjudicated "legally incompetent" (totally incapacitated) and for whom a "committee" would be appointed and entrusted with the individual's personal custody and estate.[3] A second method applied to proceedings affecting an individual sought to be determined "by reason of mental illness or mental retardation . . . incapable, either wholly or partially, of taking care of himself or his estate."[4] The petitioner in such a proceeding sought the appointment of a "guardian of [the incapacitated individual's] person or property, or both,"[5] whose powers and duties would be "limited to matters within the areas where incapacity is determined" (a "limited" guardianship).[6] A third method applied where the petitioner sought a determination that an individual has become "mentally or physically incapable of taking care of himself or his estate."[7] The petitioner would request the appointment of a "guardian of [the incapacitated individual's] person or property, or both," having the same rights and powers of a committee of an adjudicated incompetent "unless otherwise limited by the court."[8]

Each of the three systems used a petition procedure, but none had specific requirements regarding the contents of the petition. Each required the appointment of a guardian ad litem,

3. *See* VA. CODE ANN. § 37.1-128.02 (Repl. Vol. 1996).
4. *Id.* § 37.1-128.1(A) (Repl. Vol. 1996).
5. *Id.*
6. *Id.* § 37.1-128.1(B) (Repl. Vol. 1996).
7. *Id.* § 37.1-132 (Repl. Vol. 1996).
8. *Id.*

but none specified significant duties nor adequately dealt with the potential need for separate counsel for the incapacitated person. Each required a hearing and notice but with little specificity. Each contemplated use of data, evaluating the condition of the incapacitated individual under a "clear and convincing evidence" standard but with little specificity regarding credentials or qualifications of evaluators or the assessment process. None of the three methods, in conferring authority on fiduciaries over the persons and the estates of the incapacitated individual, specified fiduciary duties and powers in detail.[9] Each, while contemplating fiduciary accountability with respect to management of the estate of the incapacitated,[10] failed to impose any duty to report periodically or to account to any agency regarding the personal condition or circumstances of the incapacitated individual. These and other features of the pre-1998 system invited reform efforts, when examined in light of emerging national norms related to due process, adequate protection of the interests of incapacitated adults, and concerns for human dignity.

C. *Guardianship Law Reform in a National Context*

In recent years, reform of adult guardianship laws has been a "hot topic" with state legislatures.[11] Since 1988, approximately twenty states have made comprehensive changes in their guardianship systems.[12] The attention given this topic by state legislatures is attributable to a number of causes and developments. The more important include the following: (i) the American Bar Association and National Judicial College efforts resulting in a 1986 Statement of Recommended Judicial Practices in guardianship proceedings;[13] (ii) a 1987 Associated Press re-

9. *See id.* §§ 37.1-138 to -147 (Repl. Vol. 1996) (listing fiduciary duties and powers under prior law).

10. *See id.* § 26-17.4 (Repl. Vol. 1997).

11. *See* A. Frank Johns, *Guardianship Folly: The Misgovernment of* Parens Patriae *and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1 (1997).

12. *See* Sally B. Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143 (1995-1996).

13. *See* ABA COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY & NATIONAL JUDICIAL COLLEGE, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES (Erica F. Wood

lease,[14] widely published in newspapers across the country, which identifies, on the basis of a review of 2200 probate files, a number of procedural and substantive deficiencies in the probate systems of the various states; (iii) the American Bar Association efforts leading to formulation of comprehensive recommendations for reform in 1989;[15] (iv) the 1993 development by the National College of Probate Judges of standards to govern guardianship and conservatorship matters;[16] and (v) developments leading to the 1997 revision of article V of the Uniform Probate Code[17] and its free-standing counterpart, the Uniform Guardianship and Protective Proceedings Act,[18] by the National Conference of Commissioners on Uniform State Laws.

The pattern of reform found in the recent comprehensive revisions of the guardianship systems of many states reflects several common approaches and shared values. Recently adopted revisions stress improved procedural protections for the incapacitated person, use of limited, rather than plenary guardianship arrangements, application of "functional" rather than "medical" standards in determining incapacity, and greater accountability by and oversight of guardians.[19]

D. *Foundations and Recent History of Virginia Reform Efforts*

Virginia did not remain idle while guardianship reform activity occurred elsewhere. A joint subcommittee, established by the 1988 General Assembly to examine guardianship issues, submitted a fairly comprehensive report detailing a number of problems in the existing guardianship system and setting forth recommendations for reform.[20] The more important reforms

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ed., 1986).

14. *See* Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System*, ASSOC. PRESS, Sept. 20, 1987.

15. *See* ABA COMMISSION ON THE MENTALLY DISABLED & ABA COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AN AGENDA FOR REFORM (1989).

16. *See* COMMISSION ON NATIONAL PROBATE COURT STANDARDS, NATIONAL PROBATE COURT STANDARDS (1993).

17. UNIF. PROBATE CODE § 5-101 to -505 (amended 1998), 8 U.L.A. 321 (1968).

18. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 101-503 (amended 1998), 8A U.L.A. 439 (1968).

19. *See* Hurme, *supra* note 12, at 145.

20. *See* REPORT OF THE JOINT SUBCOMMITTEE STUDYING LEGAL GUARDIANSHIP, S. Doc. No. 29 (1989).

called for: (i) a statutory prescription of the duties of guardians ad litem; (ii) greater focus and oversight of the incapacitated person's well-being, both financially and personally, following adjudication; (iii) use of uniform, standardized assessment methods to determine incapacity; (iv) elimination of "advanced age" as a factor in such determinations; (v) use of "model" court orders where findings regarding degree of incapacity, powers of fiduciaries, and legal disabilities are set forth in greater detail; and (vi) consideration of alternatives, including use of a "public guardianship" system and the practice of using sheriffs as guardians of last resort.[21] This report led to a further study of methods of providing a public "guardianship of last resort" system.[22]

In 1991, two important advocacy groups were established to take up the banner of reform. A citizens' group including guardians, care-givers, fiduciaries, social workers, and attorneys formed the Virginia Guardianship Association with goals of strengthening the guardianship process and guardianship services in Virginia.[23] In the same year, the Governor's Advisory Board on Aging formed the Virginia Guardianship Task Force ("Task Force"), an interdisciplinary group, to examine issues raised in the earlier studies. The Task Force included "representatives from the Virginia Department for the Aging, Department for the Rights of Virginians with Disabilities, Department of Social Services, Department of Mental Health Retardation and Substance Abuse, Association of Community Service Boards, Association of Area Agencies on Aging, Virginia Guardianship Association, Virginia State Bar, Commissioners of Accounts, and the American Association of Retired Persons."[24] Efforts of the Task Force led to modest legislation in the 1992 Session of the Virginia General Assembly, which strengthened notice requirements and expanded hearing rights.[25]

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21. *See id.* at 4-8.

22. *See* REPORT OF THE DEPARTMENT OF SOCIAL SERVICES ON PUBLIC GUARDIANSHIP: PROGRAM DESIGN OPTIONS FOR VIRGINIA, S. Doc. No. 23 (1990).

23. *See* Letter from Roy S. Bredder, Board Member, Virginia Guardianship Association, to Whittington W. Clement, President, Virginia Bar Association (Oct. 6, 1993) (on file with the author).

24. VIRGINIA GUARDIANSHIP TASK FORCE, VIRGINIA VOICES ON GUARDIANSHIP AND ALTERNATIVES: REPORT ON THE TOWN MEETING OF THE VIRGINIA GUARDIANSHIP TASK FORCE 3 (1993) [hereinafter TASK FORCE REPORT].

25. *See* Act of Apr. 3, 1992, ch. 660, 1992 Va. Acts 970; Act of Apr. 3, 1992, ch.

The Task Force made an especially important contribution in 1993 by sponsoring a series of ten Town Meetings on Guardianship and Alternatives and publishing a report representing the composite views of a large number of attendees.[26] The report identified needs for: (i) broader and improved guardianship services for indigents;[27] (ii) better education and training for guardians and guardians ad litem;[28] (iii) improved accountability by guardians and greater attention to the well-being of incapacitated persons following adjudication;[29] (iv) procedural changes to better protect the rights of incapacitated persons, including a more defined role for guardians ad litem;[30] and (v) greater uniformity in guardianship procedures, including procedures involving the sale of lands of incapacitated persons.[31]

In 1992, a law review article made a major contribution to the reform effort by carefully and critically examining the Virginia system in light of norms underlying reform efforts in other jurisdictions and deficiencies noted in earlier Virginia studies.[32] The article concluded with a compelling call for comprehensive reform of Virginia's guardianship system, incorporating changes recommended in previous Virginia studies and stressing the need for an expanded role for guardians ad litem and the establishment of a public guardianship program.[33]

In 1994, a Guardianship Code Revision Committee (the "Committee"), established under the joint auspices of the Virginia Guardianship Task Force and the Virginia Guardianship Association assumed a major role in the reform effort. Roy Bredder, an elder law attorney from Northern Virginia, served as chairman of the Committee, which included lawyers who were elder law practitioners, directors of legal aid organizations,

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664, 1992 Va. Acts 976 (amending VA. CODE ANN. §§ 37.1-128.01, -128.1, -132 and adding § 37.1-133.1 (Repl. Vol. 1996)).

26. *See* TASK FORCE REPORT, *supra* note 24, at 4.

27. *See id.* at 6-7.

28. *See id.* at 10-13.

29. *See id.* at 14-16. The report noted that Virginia was one of approximately seven states which did not require guardians to report on the personal status of the ward.

30. *See id.* at 18-19.

31. *See id.* at 21.

32. *See* Harriette Haile Shivers, *Guardianship Laws: Reform Efforts in Virginia*, 26 U. RICH. L. REV. 325 (1992).

33. *See id.* at 362-65.

members of advocacy groups, members of state advisory boards, and appointees representing the Virginia Bar Association.[34] Over the course of two years, the Committee developed a draft statute which formed the basis of Senate Bill 408,[35] which was introduced in the 1996 General Assembly by Senator Gartlan, chairman of the Senate Courts of Justice Committee. The bill was carried over until 1997 to permit further study and refinement.[36] In the summer and fall of 1996, a Joint Subcommittee of the House and Senate Courts of Justice Committees, aided by a drafting committee including representatives of the Virginia Guardianship Association and the Wills, Trusts, and Estates section of the Virginia Bar Association, worked out a final draft, which was enacted in 1997, and became effective January 1, 1998.[37]

II. THE 1997 GUARDIANSHIP REFORM ACT—S.B. 408

A. *Summary and Overview*

The major changes effected by the 1997 Guardianship Reform Act (the "Act") are described below. The features, however, are more fully described in the sections which follow.

1. The Act consolidates the three former committee-guardianship, adjudication, and appointment schemes into a single procedural scheme applicable to incapacitated adults with varying degrees and types of functional incapacity and varying needs for court-appointed fiduciaries. To that end, the Act creates and redefines essential terms, creating a new vocabulary for the guardianship process.[38]

2. The Act provides clearer delineation of the respective roles, powers and duties of "guardians," who are entrusted with re-

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34. The author, a member of the Virginia Bar Association section on Wills, Trusts, and Estates, was one of several Virginia Bar Association appointees to the Committee.

35. *See* S.B. 408, Va. Gen. Assembly (Reg. Sess. 1996).

36. *See* S.B. 408, Va. Gen. Assembly (Reg. Sess. 1997) (enacted as Act of Apr. 28, 1997, ch. 921, cl. 2, 1997 Va. Acts 2503).

37. *See id.*

38. *See* VA. CODE ANN. § 37.1-134.6 (Cum. Supp. 1998); *see also infra* notes 52-58 and accompanying text.

sponsibility for an incapacitated person's personal affairs,[39] and of "conservators," who are entrusted with the management and conduct of an incapacitated person's property and financial affairs.[40] The Act provides for the granting of expanded powers to conservators.[41]

3. The Act requires greater specificity of information to be contained in the allegations of petitions seeking determinations of incapacity and appointment of fiduciaries.[42] In addition, the Act addresses in greater detail the evidence used in assessing capacity.[43]

4. The Act clarifies the role and duties of guardians ad litem and specifies areas of concern to be addressed in required reports.[44]

5. The Act imposes annual reporting duties on guardians regarding the incapacitated person's physical and mental condition, living arrangements, needs, and other related matters.[45]

6. The Act clarifies and establishes additional procedural requirements and protections, including improved notice to relatives[46] and right to counsel.[47]

7. The Act reduces distinctions between real and personal property by defining "estate" and "property" to include all types of property,[48] and by permitting the court to empower conser-

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39. *See* VA. CODE ANN. § 37.1-137.1 (Cum. Supp. 1998); *see also infra* notes 118-32 and accompanying text.

40. *See* VA. CODE ANN. § 37.1-137.4 (Cum. Supp. 1998); *see also infra* notes 133-37 and accompanying text.

41. *See* VA. CODE ANN. § 37.1-137.5 (Cum. Supp. 1998); *see also infra* notes 142-44 and accompanying text.

42. *See* VA. CODE ANN. § 37.1-134.8 (Cum. Supp. 1998); *see also infra* section II.B.3.

43. *See* VA. CODE ANN. § 37.1-134.13 (Cum. Supp. 1998); *see also infra* note 96 and accompanying text.

44. *See* VA. CODE ANN. § 37.1-134.9(B)-(C) (Cum. Supp. 1998); *see also infra* notes 66-68 and accompanying text.

45. *See* VA. CODE ANN. § 37.1-137.2 (Cum. Supp. 1998); *see also infra* notes 128-32 and accompanying text.

46. *See* VA. CODE ANN. §§ 37.1-128.1, -132 (Cum. Supp. 1998).

47. *See id.* § 37.1-134.12 (Cum. Supp. 1998); *see also infra* notes 86-88 and accompanying text.

48. *See* VA. CODE ANN. § 37.1-134.6 (Cum. Supp. 1998).

vators to sell and encumber realty without resorting to special procedures in equity.[49]

8. The Act imposes an education and training qualification on guardians ad litem[50] and provides for educational materials to be made available to newly-appointed guardians and conservators.[51]

B. *Adjudicative Procedure for Determining Incapacity and Appointment of Fiduciaries*

1. Definitions

The reformed adjudicative process, a consolidation of three former systems, is driven largely by terms contained in a "definitions" section[52] of new article 1.1 (replacing old article 1) of chapter 4 of title 37.1 of the Virginia Code. Among the more important terms are the following:

An "incapacitated person" is defined 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 or her 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.[53]

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49. *See id.* § 37.1-137.4(B) (Cum. Supp. 1998); *see also infra* notes 145-52 and accompanying text.

50. *See* Act of Apr. 28, 1997, ch. 921, cl. 3, 1997 Va. Acts 2503; *see also infra* notes 160-65 and accompanying text.

51. *See* VA. CODE ANN. § 37.1-134.15(3) (Cum. Supp. 1998).

52. *See id.* § 37.1-134.6 (Cum. Supp. 1998).

53. *Id.*

The definition contains within itself a functional, as opposed to medical or psychological, test for determining capacity.

A "respondent," is defined as "an allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed."[54]

A "conservator," is defined as "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.'"[55]

A "guardian," is defined as:

> 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, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian."[56]

A "limited conservator" and a "limited guardian" are defined as persons "who ha[ve] only those responsibilities . . . specified in the order of appointment."[57]

"Estate" and "property" are defined as including "both real and personal property."[58]

2. Jurisdiction and Filing of the Petition

Jurisdictional rules are largely unchanged. A petition seeking a guardianship or conservatorship must be filed with the circuit court where the respondent is located or resides, or in which the respondent resided immediately before becoming a patient or resident of certain defined facilities.[59] The new law does

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *See id.* § 37.1-134.7(A) (Cum. Supp. 1998).

provide expressly that a proceeding for the appointment of a conservator for a non-resident with property in the state may be brought where the respondent's property is located.[60] The Virginia Code also provides authority for the circuit court where the proceeding is brought to order a transfer of venue if it is in the best interest of the respondent.[61]

A fee of $10.00 is required to file the petition.[62] The new law, while contemplating that fees and costs will be paid by the petitioner, provides for waiver of service fees and court costs by the court where there is an allegation under oath that the estate of the respondent is unavailable or insufficient, and provides for court-ordered reimbursement of the petitioner if a guardian or conservator is appointed and the estate of the incapacitated person is sufficient.[63] As under prior law, "[a]ny person may file a petition."[64]

3. Contents of the Petition

The new law greatly expands the amount of information that must be set forth in the petition. Previously, the statutorily required detail was limited to information regarding persons entitled to notice and information regarding the native language of the respondent. Additional allegations required under the new law include information about the petitioner's identity, address and relationship to the respondent, and to the extent known, information regarding the following: (i) personal data regarding the respondent, including, date of birth, residence, post office address and social security number; (ii) identifying data regarding the name, location and post office address of any person or facility that is responsible for or has assumed responsibility for the respondent's care and custody; (iii) identifying data regarding attorneys-in-fact and agents under durable powers of attorney or advance medical directives of which the respondent is principal, and information regarding any guardian or conservator currently acting, whether within the state or not,

60. *See id.*
61. *See id.* § 37.1-134.7(B) (Cum. Supp. 1998).
62. *See id.* § 37.1-134.7(C) (Cum. Supp. 1998).
63. *See id.*
64. *Id.* § 37.1-134.8(A) (Cum. Supp. 1998).

together with copies of relevant documents; (iv) a statement of the type of guardianship or conservatorship requested, a brief description of the nature and extent of the alleged incapacity and, if appointment of a guardian is sought, a brief description of current services relating to the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and a treatment plan (if a limited guardianship or conservatorship is sought, a statement of specific areas of protection, assistance and management is to be included in the order of appointment); (v) identifying data regarding any proposed guardian or conservator or any guardian or conservator nominated by the respondent, if any, and the person's relationship to the respondent; (vi) a statement of the financial resources of the respondent which, to the extent known, lists the approximate value of the respondent's property, anticipated annual gross income, and other receipts and debts; (vii) a statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to respondent's health, care, or safety; (viii) a request for appointment of a guardian ad litem; and (ix) identifying data regarding at least three of respondent's relatives.[65]

4. Appointment and Role of Guardian Ad Litem

Upon filing of the petition, the court is to appoint a guardian ad litem, who will ultimately be compensated through a fee fixed by the court to be paid by the petitioner or taxed as costs, as the court may direct.[66] The guardian ad litem represents the interests of the respondent by functioning as the eyes and ears of the court. His duties have been clarified and enlarged to include: (i) personally visiting the respondent; (ii) advising the respondent regarding statutory rights to counsel and hearing rights, and certifying to the court the fact of having done so; (iii) recommending appointment of legal counsel, if necessary; (iv) investigating the petition and evidence; (v) requesting further evaluation, if necessary; (vi) appearing personally at all court proceedings and conferences; and (vii) filing a required

65. *See id.* § 37.1-134.8(B) (Cum. Supp. 1998).
66. *See id.* § 37.1-134.9(A) (Cum. Supp. 1998).

report.[67] The required report must address specified areas of concern, including: (i) whether the court has jurisdiction; (ii) whether a guardian or conservator is needed; (iii) the extent of the duties and powers of any appointed fiduciary; (iv) the propriety and suitability of the particular person selected as fiduciary, taking into account specified factors such as familial relationships, ability, conflict of interest, and wishes of the respondent; (iv) a recommendation as to the amount of surety on the conservator's bond; and (vi) a proper residential placement of the respondent.[68]

5. Notice of Hearing

Under the new law, the requirements for notice of hearing are specified in considerably more detail than under the former system. Upon filing of the petition, the court is required to promptly set the date, time and location for the hearing.[69] The respondent must be given reasonable notice of the hearing.[70] Waiver of notice by the respondent is not permitted, and failure to properly notify the respondent is jurisdictional.[71] Personal service of notice of the hearing on the respondent is mandated, whether the respondent is a resident or a nonresident with property in the state.[72] Service is to include copies of the petition and the order appointing the guardian ad litem.[73] In addition, the petitioner is to send copies of the notice and petition by first class mail, at least seven days (increased from five days) before the hearing, to all adults and entities whose names and post office addresses appear in the petition.[74] Advance notice to such adults and entities may be waived for good cause shown, but in the event of such waiver, the petitioner must promptly send by first class mail a copy of the petition and any order entered by the court following the hearing.[75]

67. *See id.* § 37.1-134.9(B) (Cum. Supp. 1998).
68. *See id.* § 37.1-134.9(C) (Cum. Supp. 1998).
69. *See id.* § 37.1-134.10(A) (Cum. Supp. 1998).
70. *See id.*
71. *See id.*
72. *See id.* § 37.1-134.10(B) (Cum. Supp. 1998).
73. *See id.*
74. *See id.* § 37.1-134.10(C) (Cum. Supp. 1998).
75. *See id.*

The form and content of the notice required to be given to the respondent is specified in considerable detail. The notice must include "a brief statement in at least fourteen-point type of the purpose of the proceedings."[76] The notice must inform the respondent of statutory rights to counsel and to a hearing, and must include a prescribed warning in bold print advising of the possible consequences of the hearing, including loss of rights.[77] The petitioner, upon satisfying the notice requirements, files a statement of compliance with the clerk of the court.[78]

6. Evaluation Report

The new law specifies in greater detail the minimal contents required for the evidentiary record in the usual case. The statute requires the filing with the court of a report evaluating the condition of the respondent and the provision of such report to "the guardian ad litem within a reasonable time prior to the hearing on the petition."[79] If the report is not available at the hearing, the court may proceed "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 forthcoming.[80] The evaluation report is to "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."[81] The report is to contain, on the best information and belief of the signatory, the following information: (i) a description of the nature, type and extent of the respondent's incapacity, including specific functional impairments; (ii) a diagnosis or assessment of the respondent's mental and physical condition, including a statement regarding whether medications affect actions or demeanor, an evaluation of ability to learn self-care skills, adaptive behavior and social skills, and a prognosis for improvement; (iii) "[t]he date or dates of the examinations,

76. *Id.* § 37.1-134.10(D) (Cum. Supp. 1998).
77. *See id.*
78. *See id.* § 37.1-134.10(E) (Cum. Supp. 1998).
79. *Id.* § 37.1-134.11(A) (Cum. Supp. 1998).
80. *Id.*
81. *Id.*

evaluations and assessments upon which the report is based;"[82] and (iv) the signature of the evaluator and the nature of the professional license held.[83] In performing duties in connection with the contents of the evaluation report, the evaluator enjoys immunity, in the absence of bad faith or malice, from civil liability for breach of patient confidentiality.[84] The evaluation report is admissible in the proceeding 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."[85]

7. Respondent's Right to Counsel and to Participation at Hearing

Although such representation is likely to be rare, respondent is assured "the right to be represented by counsel of the respondent's choice."[86] Furthermore, "if the respondent is not represented by counsel, the court may appoint . . . counsel, upon the filing of the petition or at any time prior to entry of the order [on] request of [either] the respondent or the guardian ad litem if the court determines . . . counsel is needed to protect . . . respondent's interest."[87] If counsel is appointed, the fee is fixed by the court and "taxed as part of the costs of the proceeding."[88] The respondent also is assured rights to a jury trial on request, to compel the attendance of witnesses, to present evidence, and to confront and cross-examine witnesses.[89]

8. Conduct of the Hearing

Prior law provided little specificity regarding elements of the hearing on the petition for appointment of a fiduciary. The new law imposes detailed requirements[90] designed to protect the

82. *Id.* § 37.1-134.11(B)(3) (Cum. Supp. 1998).
83. *See id.* § 37.1-134.11(B) (Cum. Supp. 1998).
84. *See id.* § 37.1-134.11(C) (Cum. Supp. 1998).
85. *Id.* § 37.1-134.11(D) (Cum. Supp. 1998).
86. *Id.* § 37.1-134.12 (Cum. Supp. 1998).
87. *Id.*
88. *Id.*
89. *See id.* § 37.1-134.13 (Cum. Supp. 1998).
90. *See id.*

interests of the respondent in the context of a policy favoring the "least restrictive" alternative. The hearing, while typically in the usual forum, may be at "such convenient place as the court directs, including the place where the respondent is located."[91] The petition is heard by the court unless a jury trial has been requested. "The proposed guardian or conservator [must] attend the hearing except for good cause shown and, where appropriate, [must] 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."[92] The respondent's presence is required if either the respondent or the guardian ad litem requests such presence.[93] Whether or not present, the respondent, for purposes of the proceeding, is regarded as having denied the allegation in the petition (there is no default judgment or decree pro confesso).[94]

The court or jury in determining the need for a guardian or conservator is required to consider specified factors, including: (i) limitations of the respondent; (ii) development of maximum self-reliance and independence; (iii) availability of a less restrictive alternative, such as durable powers of attorney and advance health care directives; (iv) the extent to which protection of the respondent from neglect, exploitation, or abuse is necessary; and (v) suitability of the proposed guardian or conservator.[95] If the court or jury, on consideration of the evidence presented at the hearing, determines under a "clear and convincing" evidentiary standard that the respondent is incapacitated and in need of a guardian or conservator, or both, the court shall, giving due deference to the wishes of the respondent, appoint a suitable person to serve.[96]

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91. *Id.*
92. *Id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*

9. Orders

The new law requires considerably greater specificity in orders making incapacity determinations and appointing fiduciaries. Orders must contain "specific findings of fact and conclusions of law in support of each provision of . . . the order."[97] The order appointing a fiduciary must: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the fiduciary so as to permit the person to care for himself or herself and manage assets to the extent of capability; (iii) specify whether the appointment is limited to a prescribed duration; (iv) specify the legal disabilities suffered by reason of the finding of incapacity; (v) include limitations deemed appropriate in light of the factors specified for consideration at the hearing; and (vi) specify "the bond of the guardian, and the bond and surety, if any, of the conservator."[98]

In crafting orders in connection with incapacity hearings, the court is permitted to forego plenary conservatorships and guardianships in order to implement policies favoring least restrictive alternatives.[99] For instance, the new law provides that a court may appoint a limited guardian for an incapacitated person, who has partial capabilities, for the limited purpose of making decisions regarding medical, residential, and other personal concerns.[100] Likewise, the court may appoint a limited conservator for an incapacitated person with partial management capabilities for limited purposes specified in the order.[101] The court, in its discretion, need not appoint a guardian for an incapacitated person who has executed a defined type of advance heath care directive "unless the court determines that the agent is not [following] the wishes of the principal or there is a need for decision-making [beyond] the purview of the directive."[102] Similarly, the court need not appoint a conservator for a person having an agent under a durable power of attorney "unless the court determines . . . that the agent is not

97. *Id.*
98. *Id.* § 37.1-134.14 (Cum. Supp. 1998).
99. *See id.*
100. *See id.*
101. *See id.*
102. *Id.*

acting in the best interests of the principal or there is a need for decision-making [beyond] the purview of the [instrument]."[103] Also, a conservator need not be appointed where the person's "only or major source of income is from the Social Security Administration or other government program and . . . [the person] has a representative payee."[104]

C. *Procedure for Modifications and Terminations of Guardianships and Conservatorships: Restoration of Rights*

Prior law authorized proceedings for restoration of capacity[105] and the reinstatement on the docket of former cases for purposes of modification,[106] but provided little specificity. The new law provides more comprehensive procedural rules. Under a broad grant of jurisdiction, the court on its own motion may declare a restoration of capacity, modify the type of appointment or the areas of protection, management or assistance previously granted, require a new bond, terminate the guardianship or conservatorship, remove the particular guardian or conservator, or order other appropriate relief.[107]

Where the petition for modification seeks to expand the scope of the guardianship or conservatorship, the procedure is much like an original proceeding. Notice requirements to the incapacitated person and to others are comparable; the incapacitated person is entitled to a jury trial on request; the court appoints a guardian ad litem; and the court may appoint licensed professionals to conduct an evaluation.[108] The court then will hold a hearing on the petition. If, on the basis of evidence offered, it finds by a preponderance of the evidence that the incapacitated person has substantially regained ability to care for his person or to manage and handle his estate, the court is to declare the person restored to capacity and discharge the guardian or conservator.[109]

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103. *Id.*
104. *Id.*
105. *See id.* § 37.1-134.1 (Repl. Vol. 1996).
106. *See id.* § 37.1-134.3 (Repl. Vol. 1996).
107. *See id.* § 37.1-134.16(A) (Cum. Supp. 1998).
108. *See id.* § 37.1-134.16(B) (Cum. Supp. 1998).
109. *See id.* § 37.1-134.16(D) (Cum. Supp. 1998).

With respect to petitions for modification, under a "best interests of the incapacitated person" standard, the court, on a preponderance of the evidence, may limit or reduce the powers of the fiduciary and, based on clear and convincing evidence, may increase or expand the powers of the fiduciary.[110] The court also may order appropriate relief, including a new bond, if a preponderance of the evidence shows that the fiduciary is not acting in the best interests of the incapacitated person or his estate.[111] The new law also clarifies that the powers of the fiduciary terminate upon the death, resignation or removal of the fiduciary, or upon the termination of the guardianship or conservatorship.[112] The guardianship or conservatorship terminates upon the death of the incapacitated person or when ordered by the court, following a hearing on petition for termination by an interested party.[113]

D. *Qualification Requirements and Procedures*

A fiduciary, upon appointment following a determination of incapacity, must undergo a "qualification" process before assuming office.[114] In the usual case where both a conservator and guardian are appointed, one individual holds both offices and qualifies as to both. To qualify and assume either or both offices the appointee must do the following: (i) subscribe to an oath of office; (ii) post a bond, in the case of a guardian, without surety and, in the case of a conservator, with or without surety, depending upon the court order; and (iii) accept in writing any educational materials provided by the court.[115] The clerk then issues to the guardian or conservator a certificate, with a copy of the order appended, and records the order in the same manner as a power of attorney is recorded.[116] In the case of a guardian, the clerk forwards a copy of the order to the local department of social services where the respondent resides.[117]

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110. *See id.*
111. *See id.*
112. *See id.* § 37.1-134.16(E) (Cum. Supp. 1998).
113. *See id.*
114. *See id.* § 37.1-134.15 (Cum. Supp. 1998).
115. *See id.*
116. *See id.*
117. *See id.*

E. *Office of Guardian: Role, Duties and Powers*

The new law defines the role of the guardian in greater detail.[118] Although a guardian is defined as a person "who is responsible for the personal affairs of an incapacitated person" with "responsibility for making decisions regarding the person's support, care, health, safety, [and] habilitation,"[119] the powers granted a guardian include only those which are enumerated in the court order.[120] The guardian stands in a fiduciary relationship and may be personally liable to the incapacitated person for breach of fiduciary duty.[121] A guardian, however, is not "liable for the acts of the incapacitated person, unless the guardian is personally negligent."[122] A guardian has no duty to spend his own personal funds on behalf of the incapacitated individual.[123] Specified duties include the following: (i) maintaining sufficient contact with the incapacitated person to know of his capabilities, limitations, needs and opportunities; (ii) encouraging, to the extent feasible, the incapacitated person to participate in decisions, to act on his own behalf, and to gain capacity to manage personal affairs; (iii) giving consideration, when making decisions, to the express wishes and personal values of the incapacitated person when known; and (iv) acting otherwise in the best interests of the incapacitated person and with the exercise of reasonable care, diligence and prudence.[124]

The new law limits the authority of guardians in ways important to the autonomy and dignity of the incapacitated person. The guardian's authority does not extend to decisions addressed in valid advance health care directives or durable powers of attorney.[125] The guardian, however, may seek court authorization to revoke or modify a durable power of attorney and the designation of an agent under an advance health care directive, but such modification shall not affect directives regarding

118. *See id.* § 37.1-137.1 (Cum. Supp. 1998).
119. *Id.* § 37.1-134.6 (Cum. Supp. 1998).
120. *See id.* § 37.1-134.15 (Cum. Supp. 1998).
121. *See id.* § 37.1-137.1 (Cum. Supp. 1998).
122. *Id.*
123. *See id.*
124. *See id.*
125. *See id.*

the provision or refusal of specific medical treatment or procedures.[126] Also, a guardian is not permitted to change the incapacitated person's residence to another state, to consent to termination of the person's parental rights, or to initiate a change in the person's marital status without prior court approval.[127]

The most important change respecting the role and duties of a guardian is the imposition of a reporting requirement enabling greater "public" monitoring of the incapacitated person's personal condition.[128] Under the new system, a guardian must file an annual report on a prescribed form with the local social service department for the jurisdiction where he or she was appointed.[129] The report must be accompanied by a payment of five dollars.[130] The report must: (i) describe the mental, physical and social condition of the incapacitated person; (ii) describe the person's living arrangements during the reporting period; (iii) indicate the medical, educational, vocational and other professional services provided to the person, including the guardian's opinion as to the adequacy of such care; (iv) state the frequency and nature of the guardian's visits with and activities on behalf of the person; (v) state whether the guardian agrees with the current treatment or habilitation plan; (vi) make recommendations as to the need for continued guardianship or changes in the scope of the guardianship; (vii) provide any other information useful in the opinion of the guardian; and (viii) state the compensation requested and the reasonable and necessary expenses incurred.[131] The guardian must certify that the information in the report is true and correct to the best of his or her knowledge and belief.[132]

126. *See id.*
127. *See id.*
128. *See id.* § 37.1-137.2 (Cum. Supp. 1998).
129. *See id.* § 37.1-137.2(A) (Cum. Supp. 1998).
130. *See id.*
131. *See id.*
132. *See id.*

F. *Office of Conservator: Role, Powers and Duties*

1. Role Generally

The new law defines the office of conservator with greater precision, defines duties in greater detail, and confers, subject to court-ordered limitations, more extensive powers and authority. The conservator, subject to limitations in the order, has a broad mandate to care for and preserve the estate of the incapacitated person and to manage it to its best advantage. He is to use the income first and then, if needed, the corpus to pay debts and reasonable compensation for himself and the guardian, if any.[133] He also is to provide maintenance for the incapacitated person and his or her legal dependents.[134] In the performance of these functions, the conservator, like the guardian, is to encourage the incapacitated person to participate in decisions, act on his own behalf, and regain capacity to manage property and finances.[135] In making decisions, the conservator is directed to consider a number of factors, including accustomed standard of living and other known resources.[136] As a court-appointed fiduciary entrusted with the management of the property of another, a conservator, as under prior law, has the general duties imposed by fiduciaries under title 26 of the Virginia Code, which include duties to account to commissioners of account under Virginia's system of supervision.[137]

2. Liability and Claims

A conservator is in a fiduciary relationship to the incapacitated person and may be liable for breaches of fiduciary duty.[138] Unless the particular contract provides otherwise, a conservator is personally liable on contracts he enters into during the course of administration unless he reveals his representative capacity and identifies the estate in the contract.[139] Claims un-

133. *See id.* § 37.1-137.3(B) (Cum. Supp. 1998).
134. *See id.*
135. *See id.* § 37.1-137.3(C) (Cum. Supp. 1998).
136. *See id.*
137. *See id.* § 37.1-137.3(E) (Cum. Supp. 1998).
138. *See id.* § 37.1-137.3(D) (Cum. Supp. 1998).
139. *See id.* Even if personally liable to third parties by failure to show represen-

der contracts entered into in a fiduciary capacity, claims arising from ownership or control of the estate, and claims for torts committed in the course of administration may be asserted against the estate by suit against the conservator in his representative capacity, without regard to whether the conservator is personally liable.[140] A successor conservator is not personally liable for his predecessor's contracts or actions.[141]

3. Management Powers

The new law both clarifies and expands the management authority of conservators by providing specific grants of power, which can be exercised without prior court approval, except where otherwise provided in the order of appointment. Conservators are now given all the powers set forth in Virginia Code section 64.1-57[142] (the "incorporation of fiduciary powers by reference" is a device widely, perhaps uniformly, used by attorneys in drafting wills and trusts). These include extensive powers of investment and reinvestment, including the power to sell real estate, which formerly could be exercised only after cumbersome proceedings in equity.[143] Beyond this extensive listing, conservators are also empowered, among other matters, to: (i) ratify or reject contracts entered into by the incapacitated person; (ii) pay sums for the benefit of the incapacitated person or legal dependents under broad "facility of payment" mechanisms; (iii) maintain life, health and casualty insurance coverage; (iv) manage the estate following death of the incapacitated person or other termination of the conservatorship until delivery to successors; (v) execute and deliver all instruments and take all other actions that will serve the best interests of the person; (vi) initiate proceedings to revoke a power of attorney, obtain a divorce, or make an augmented estate election; and (vii) borrow and pledge or mortgage assets to secure borrowing, including borrowing from the conservator where the conservator

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tative capacity or to identify the estate, the fiduciary, nonetheless, should be able to claim a "credit" in the settlement of accounts if the obligation and outlay otherwise is proper.

140. *See id.*

141. *See id.*

142. *Id.* § 37.1-137.4(A) (Cum. Supp. 1998).

143. *See id.* §§ 8.01-64 to -80 (Repl. Vol. 1992 & Cum. Supp. 1998).

is a bank (which, in the absence of the statute, might otherwise be impermissible self-dealing).[144]

4. Possible Limitations on Power to Sell Real Estate

Although the new system, in a major break with the past, contemplates authority to sell real estate without prior resort to a special proceeding in equity, the court, in an exercise of discretion, may treat real estate as requiring special caution.[145] The law expressly permits the court to impose requirements to be satisfied prior to conveyance which may include the following: (i) increasing the amount of the conservator's bond; (ii) obtaining an appraisal; (iii) providing notice to prescribed parties; and (iv) "consulting by the conservator with the commissioner of accounts and, if one has been appointed, with the guardian."[146] If any such requirement is imposed by the court, the conservator must file a report of compliance with the commissioner of accounts, who then will file his report with the court indicating whether the requirements have been met and whether the sale is otherwise consistent with the conservator's duties.[147] The conservator cannot close the conveyance until the report is confirmed by the court.[148]

A number of related provisions address potential marketability and title concerns. First, requirements to be met prior to the sale of real estate must be court-imposed and set forth in an order. The order is recorded by the clerk in the same manner that a power of attorney is recorded.[149] Second, a conservator who has the power to sell real estate is required to record the order in any jurisdiction in which the respondent owns real estate.[150] A copy of the order is appended to the certificate that is given to the conservator by the clerk upon qualification.[151] Third, any person conducting business in good faith with a conservator (or guardian) who presents a currently effective certifi-

144. *See id.* § 37.1-137.4(A) (Cum. Supp. 1998).
145. *See id.* § 37.1-137.4(B) (Cum. Supp. 1998).
146. *Id.*
147. *See id.*
148. *See id.*
149. *See id.* § 37.1-134.15 (Cum. Supp. 1998).
150. *See id.*
151. *See id.*

cate of qualification can presume that the fiduciary is properly authorized to act, except to the extent of limitations contained in the order of appointment.[152]

5. Estate Planning Powers

The new law continues and restates the authority of conservators to make gifts of less than one hundred dollars, subject to aggregate annual limits, without express court approval, and to make disclaimers and larger gifts following petition, notice, appointment of a guardian ad litem, and express court authorization pursuant to petition and hearing.[153] Under prior practice, however, the petition had to be brought by the fiduciary.[154] Thus, if there was no fiduciary, a separate "incapacity" proceeding to appoint a fiduciary had to precede the proceeding seeking estate planning authority. The new law permits, in the initial proceeding seeking appointment of a conservator, allegations and evidence which may result in "estate planning" powers being conferred in the order of appointment.[155]

G. *Effect Dates of Changes: Procedure, Powers and Duties*

The effective date of the 1997 reform legislation law was January 1, 1998.[156] Powers and duties imposed or conferred by the law apply prospectively to guardians and conservators appointed by court order on or after that date, or by order modified after that date, without regard to when the petition was filed.[157] Thus, in the absence of an order entered pursuant to a modification proceeding, fiduciaries who qualified prior to 1998 are not subject to the additional duties imposed, nor are they cloaked with the additional powers possible under the

152. *See id.*
153. *See id.* § 37.1-137.5 (Cum. Supp. 1998).
154. *See id.* § 37.1-142 (Repl. Vol. 1996).
155. *See id.* § 37.1-137.5 (Cum. Supp. 1998).
156. *See* Act of Apr. 28, 1997, ch. 921, cl. 2, 1997 Va. Acts 2503.
157. *See id.*

new law. If modification procedures affecting fiduciaries who qualified prior to 1998 are brought after 1997, the new law governs.[158]

H. *Standards for Selection of Guardians Ad Litem: Education of Guardians and Conservators*

The Virginia General Assembly recognized that guardians ad litem, conservators and guardians are critical components of the guardianship-conservatorship system. The General Assembly also recognized that increasing the skills and competence of these essential actors would improve the system. The 1997 reform act contained two important mandates addressing these concerns. With respect to guardians ad litem, the Act directed the Judicial Council of Virginia, in conjunction with the Virginia State Bar and Virginia Bar Association, to establish standards for attorneys appointed to serve as guardians ad litem in incapacity proceedings and to establish and maintain a list of attorneys qualified to serve under those standards.[159] The Act contemplates that circuit courts will make appointments from the list if qualified persons are reasonably available. The Judicial Council has adopted standards[160] that, among other conditions, require an application showing completion of a Virginia Continuing Legal Education course entitled *"Guardianship Reform: Requirements of Virginia's New Adult Guardianship Law."* The standards also require demonstrated familiarity with guardianship law, shown either by specified experience or a certificate of nomination by a circuit court judge.[161] The standards impose a "renewal" of credentials condition by requiring completion of an additional eight hours of continuing legal education on relevant topics every three years.[162]

Addressing the education and training of other participants in the guardianship-conservatorship system, the reform act directs the Virginia State Bar, in consultation with the Virginia

158. *See id.*
159. *See id.* at cl. 3.
160. *See Standards to Govern the Appointment of Guardians Ad Litem for Incapacitated Persons* (visited Sept. 9, 1998) <http://www.courts.state.va.us/stdrds.htm>.
161. *See id.*
162. *See id.*

Bar Association, the Virginia Guardianship Association, the Office of Executive Secretary of the Supreme Court, the Department of Social Services, and the Virginia Commissioner of Accounts Association, to prepare and make available to circuit court clerks educational materials for use by persons involved in guardianship and conservatorship proceedings.[163] These persons include petitioners, guardians ad litem, attorneys, evaluators, guardians and conservators.[164] Guardians and conservators are required, at the time of qualification, to accept in writing any educational materials provided by the court.[165]

III. 1998 LEGISLATION AFFECTING INCAPACITATED ADULTS

A. *Fiduciaries of Last Resort*

1. Background

Systems to protect the interests of incapacitated adults and their estates depend upon court-appointed fiduciaries and interested persons who are willing to bring such proceedings and to serve in fiduciary roles. During recent years, a substantial number of persons in need of the protections available through guardianship and conservatorships have not received such protection. Previously when an incapacitated adult suffered neglect—often because of poverty or lack of family—and the matter appropriately was brought to the attention of the court by an agency or concerned individual, the court had the power to appoint the sheriff as "guardian of last resort."[166]

Sheriffs have not welcomed such appointments. Thus, the Virginia Guardianship Association focused attention on the need for a "public guardianship" program and was instrumental in obtaining public funding for two pilot community-based projects beginning in 1995.[167] The 1997 guardianship reform law put

163. *See* Act of Apr. 28, 1997, ch. 921, cl. 4, 1997 Va. Acts 2503.

164. *See id.*

165. *See* VA. CODE ANN. § 37.1-134.15 (Cum. Supp. 1998).

166. *See id.* §§ 37.1-128.1, -130, -132 (Repl. Vol. 1996).

167. *See* Letter from Harriette Shivers, Counselor and Attorney at Law, to John E. Donaldson, Professor, Marshall-Wythe School of Law (June 2, 1998) (on file with author).

an initial "sunset" of January 1, 1999, and increased the pressure for change on the court's power to use sheriffs as guardians of last resort.[168] The "sunset" created a need for development of an alternative to using sheriffs as guardians of last resort.

2. *Virginia Public Guardian and Conservator Program*

With the encouragement of the Virginia Guardianship Association and other advocacy groups, the General Assembly enacted Senate Bill 394 to implement the Virginia Public Guardianship Program with funding effective July 1, 1998.[169] The Act contains a declaration of policy which provides that:

> [i]n order to ensure that the protection and assistance of a guardian or conservator are available to all incapacitated persons in the Commonwealth, there is hereby established the statewide Virginia Public Guardian and Conservator Program . . . within the Department for the Aging to (i) facilitate the creation of local or regional programs to provide services as public guardians or conservators and (ii) fund, coordinate, administer and manage such programs.[170]

The Act empowers the Department for the Aging (i) to contract with local or regional, public or private entities to provide services as guardians and conservators, (ii) to promulgate regulations, and (iii) to engage in oversight functions.[171] The Act creates a Public Guardian and Conservator Advisory Board of up to fifteen members[172] and imposes minimum requirements for participating in local programs.[173] The Act empowers a court to appoint a participating local or regional program as guardian or conservator for a resident found incapacitated if he is indigent, as defined, and no other suitable person is willing and

168. *See* VA. CODE ANN. § 37.1-134.19 (Cum. Supp. 1998).

169. *See* Act of Apr. 22, 1998, ch. 787, 1998 Va. Acts 1891 (codified at VA. CODE ANN. §§ 2.1-1.6, 9-6.25:1, 37.1-134.6, 37.1-134.19, 2.1-373.10 to -373.14, 37.1-134.14:1 (Cum. Supp. 1998)).

170. VA. CODE ANN. § 2.1-373.10 (Cum. Supp. 1998).

171. *See id.* § 2.1-373.12(B) (Cum. Supp. 1998).

172. *See id.* § 2.1-373.13 (Cum. Supp. 1998).

173. *See id.* § 2.1-373.14 (Cum. Supp. 1998).

able to serve.[174] The Act extends the "sunset" period for appointment of sheriffs as guardians of last resort until January 1, 2000.[175]

B. *Miscellaneous 1998 Legislation*

Two other enactments during the 1998 Session made technical changes in adult guardianship law. One enactment corrects an ineffective measure from the 1997 Session by providing, in proceedings where the incapacitated adult is determined to be indigent, for any fees and costs fixed by the court or taxed as costs to be borne by the Commonwealth.[176] The other enactment[177] amends various provisions defining the effect of "incapacity" determinations on eligibility for public office.[178] This enactment also imposes additional ministerial duties on clerks of court to better inform commissioners of accounts and local departments of social services of relevant orders.[179] Finally, the enactment requires a local department of social services to forward the annual guardianship report to the local department of social services of the jurisdiction where the incapacitated person, who is the subject of the report, resides.[180]

IV. CONCLUSION

The 1997 and 1998 Sessions of the Virginia General Assembly have brought to fruition efforts to reform and update Virginia's system for providing court-appointed fiduciaries for incapacitated adults and to improve the provision of needed protective services. The current system has more rational and

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174. *See id.* § 37.1-134.14:1 (Cum. Supp. 1998).

175. *See id.* § 37.1-134.19 (Cum. Supp. 1998).

176. *See id.* § 37.1-134.13:1 (Cum. Supp. 1998) (added by Act of Mar. 13, 1998, ch. 76, 1998 Va. Acts 148 (adopted as emergency legislation and effective from the date of passage)).

177. *See* Act of Apr. 15, 1998, ch. 582, 1998 Va. Acts 1373 (codified at VA. CODE ANN. §§ 24.2-230, 24.2-232, 24.2-40, 37.1-134.6, 37.1-134.14, 37.1-134.15, 37.1-134.18, 37.1-18, 37.1-137.2 (Cum. Supp. 1998)).

178. *See* VA. CODE ANN. § 24.2-230 (Repl. Vol. 1997) (removal from office); *see id.* § 24.2-232 (Repl. Vol. 1997) (vacancy occurring when mentally incompetent); *see also id.* § 37.1-134.6 (Cum. Supp. 1998) (defining incapacitated person).

179. *See id.* §§ 37.1-134.15, -134.18 (Cum. Supp. 1998).

180. *See id.* § 37.1-137.2 (Cum. Supp. 1998).

sensitive procedures for incapacity determinations and fiduciary selections. The essential actors—guardians ad litem, guardians, and conservators—have more defined roles and are equipped with powers appropriate and adequate to their roles. Improved reporting and oversight mechanisms are in place which, if properly used, should reduce abuses. Through the Public Guardian and Conservator Program, the Commonwealth has assumed a long-neglected essential role.

Although much improved, the revised and reformed system should not be regarded as a preferred "remedy" in the unfortunate event of incapacity. The system remains costly, and the essential component—the proceeding to determine incapacity—can be degrading to the individual and upsetting to family members. As in the past, the individual contemplating future vagaries and the ultimate frailties of mind and body should attempt to avoid the necessity of guardianship or conservatorship proceedings through the appropriate use of alternative mechanisms such as durable powers of attorney, revocable trusts, and health care directives.