REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Legal Guardianship

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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HJR 171

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Report of the
Joint Subcommittee Studying
Legal Guardianship
(HJR 171/SJR 42)
To
The Governor and the General Assembly of Virginia
January, 1989

To: Honorable Gerald L. Baliles, Governor of Virginia
and
The General Assembly of Virginia

INTRODUCTION

The joint subcommittee was established by House Joint Resolution No. 171 and Senate Joint Resolution No. 42 during the 1988 Session of the General Assembly to evaluate the status of the system of guardianship in the Commonwealth and to make recommendations to enhance such a program to ensure that the citizens who entrust their lives and property to such a system are indeed being protected. The subcommittee met throughout the year to hear testimony and discuss problems identified with the guardianship system. The members received input from many state agencies, including the Department of Social Services, which had recently completed its own preliminary study of the guardianship system, individuals, and advocacy organizations. Research from other states was also utilized for comparative study.

Copies of the enabling resolutions are contained in Appendices A and B of this report.

SUMMARY

The joint subcommittee looked at various aspects of guardianship, not only as it affected the elderly but also those with mental retardation and mental illness. The numbers of persons falling into these categories are increasing due to a variety of reasons and circumstances. Unfortunately, the system has not kept up with the demand, and there are those who are not receiving the treatment and protection to which they are entitled.

Many factors have been cited for the problems in the current system, including money, personnel and a general reluctance by some to get involved in what they see as a personal family affair. But families are not always willing or able to cope with situations such as this, and even when they are there are more than a few cases of abuse and neglect by the person appointed as guardian. In other cases, when guardians cannot be found to act, then sheriffs must act as guardians of last resort and they admittedly do not have the resources, time or particular skills to act in such capacity.

Guardianship is a serious procedure whereby persons give up their rights to control their lives and/or their property, usually on a permanent basis. Legally these persons are reduced to a "minor" with regard to rights and responsibilities. In many cases, a guardian not only can make financial

decisions for a ward, but he may also decide where the ward lives and how and even when he may die. Abuses do occur with regard to mistreatment of the individual as well as misuse of the ward's estate, but there are procedures in place to prevent such abuses and the failure of the system to protect may well be a failure to establish safeguards to assure that the procedures established are adhered to. Such procedures include enforcement of compliance with court orders, requirement for corporate sureties, as well as intervention by social service agencies, families, hospital personnel, physicians, ministers and other intimately involved in the care and well-being of a ward.

It was also made clear that the problems with guardianship in the Commonwealth are not unique and that virtually every other state in the United States is currently experiencing some problems in this area and trying to deal with them in innovative ways which provide more protection for their citizens. This nationwide problem was documented in an Associated Press series in September of 1987 which involved participation of more than sixty-seven staff writers who did research in all fifty states and the District of Columbia. They found "a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect."

The AP estimated that there are approximately 300,000 to 400,000 persons under guardianship at any one time in the United States, but this is merely an estimate since there are neither federal nor state tracking methods of these types of cases. Guardianship proceedings are strictly local affairs, and most localities cannot determine how many guardianships are being monitored at any one time. To add to this are the numbers of people evaluated as needing a guardian but who, for some reason, do not have one, and the numbers vary according to who performs the estimate.

To begin solving the problems at hand, the subcommittee has made several recommendations which generally deal with the grounds for the establishment of a guardianship, increased oversight of the guardianship once granted to evaluate the overall condition of the ward, the ability to modify a court order for guardianship to reflect the changing conditions and needs of the ward, and the evaluation and further study of some form of alternative guardianship for those who have no one to serve as guardian or whose estates are negligible.

RECOMMENDATIONS

The Joint Subcommittee Studying Legal Guardianship makes the following recommendations:

- That the term "advanced age" be removed from all statutes dealing with findings of incompetency, incapacity and with consent to medical treatment for certain persons. Case law has specifically stated that age alone is not a justifiable reason for the granting of a guardianship. If the term advanced age were deleted from the statute the court will have to find that the proposed ward was mentally or physically impaired, not just old, before imposing guardianship. (Copy of legislation in Appendix C)

• That the duties of the guardian ad litem in the court process imposing a guardianship regime be statutorially described. Current law only requires the court to appoint a guardian ad litem for every proposed ward without any clear, detailed mission of the duties of that guardian ad litem. The guardian ad litem, in the court process imposing a guardianship system, should have to make good faith effort to visit the proposed ward and to interview the proposed ward's family, doctor and proposed guardian.

• That the fees for payment of guardians ad litem be increased to more accurately reflect the costs of such representation. Current §8.01-9 of the Code of Virginia provides that the fee be paid from the ward's estate. This payment procedure presents a problem if the ward's estate is negligible. The subcommittee discussed the payment of the guardian ad litem from the funds appropriated to the Supreme Court under §37.1-89 which currently reimburses special justices representing clients in involuntary commitment cases. Currently there are insufficient funds to accomplish this and substantial increases in the Supreme Court budget would be required. Current §8.01-9 of the Code states that the court, if satisfied that the guardian ad litem has rendered substantial service in representing the interests of the person under a disability, may allow such guardian reasonable compensation and expenses to be paid out of the estate of such person. However, if such estate is inadequate for the purpose of paying such compensation and expenses, all or any part thereof may be taxed as "costs" in the proceeding. Current statute does not provide for "fees" to be paid out of public funds for guardians ad litem.

• That some form of judicial review or oversight be developed to guarantee not only the rights of due process for the proposed ward prior to the guardianship hearing but also that evaluation of the ward, both personally and financially, is regularly made. The evaluator could be an ombudsman, perhaps the guardian ad litem in an expanded role if the question of payment can be resolved, who would be responsible not only for representing the best interests of the client, the proposed ward, prior to the hearing but making regular, either semi-annual or annual, evaluations of the ward's condition. The courts have suggested the possible development of some form of ombudsman system with trained professionals who have ongoing responsibilities for all cases arising in a jurisdiction due to the possibility of lack of training by the attorney acting as the guardian ad litem and the criticisms of the current system of handling such court orders with regard to guardianships and involuntary commitments. Currently, once a guardianship is granted the role of the guardian ad litem is finished, but under a new system his role could be ongoing for the life of the guardianship order. There was a suggestion that these guardians ad litem could be paid out of the fund appropriated to the Supreme Court. In short, these guardians ad litem would provide immediate protection as well as ongoing oversight.

• That the courts further implement and strongly encourage the use of the model form of order for guardianships which would carry out the spirit of the law regarding the finding of incapacity (§37.1-128.1). There currently is a model form which is found in the Handbook for Judges and Clerks in Virginia. (Copy in Appendix D) The current law stipulates that after clear and convincing evidence has been provided to the court that the proposed ward is in need of a guardian, the order shall "(i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian so as

to permit the incapacitated person to care for himself and manage his property to the extent that he is capable; (iii) specify whether the determination of incapacity is perpetual or limited to a specific length of time as the court in its discretion may determine; and (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity." It was the judgment of the subcommittee that such an order be detailed as possible with regard to all aspects of the condition of the proposed ward and not merely a cursory statement.

- That the courts consider the use of some form of standardized assessment for determining incapacity or incompetency to provide guidelines for use across the state and to provide the courts with more useful information with regard to the proposed ward's actual condition and disabilities. Such standardized assessment form probably should be developed by persons who have expertise in physical and mental disabilities, gerontologists, and others, in cooperation with the courts.

- That sheriffs should not be appointed as guardians of last resort but this move will be contingent upon developing an alternative system of guardian of last resort to supplement the current system.

- That the principle of "least restrictive alternative" as found in case law be formalized to the extent that the court order covers all points including exhaustion of all other alternatives prior to the appointment of a guardian.

- That the procedure for the restoration of competency be made more accessible to the ward by codifying the equity procedure similar to that found in domestic relations whereby the court retains jurisdiction over the case and may make any alterations at any time to such court order granting guardianship as the circumstances may require. Currently a new petition must be filed and a hearing held in order to determine whether a person will be restored to competency, either wholly or partially. Such recommendation could be broadened to provide that the original court retains jurisdiction but would have the ability to transfer venue for the convenience of the ward or the parties. (Copy of legislation is found in Appendix E.)

- That some type of information form be required of the fiduciary and made a part of the court record which includes the social security number, address, employer history and other pertinent information.

- That a standardized accounting form for property be developed for use by Commissioners of Accounts for guardianships of property along with detailed explanation and information about the duties, powers and responsibilities of a guardian. This would also include more intense scrutiny of accounts of wards by Commissioners in an attempt to rule out irregularities in spending by the guardian.

- That the public at large needs intensive education as to the alternative to guardianship which can be arranged prior to need while the individual is still competent to make such decisions. This in many cases would eliminate or reduce the need for guardianship orders. Alternatives include the Virginia Natural Death Act (Living Will), regular or durable power of attorney, a living trust, designating a representative payee, and direct deposit or a joint bank account.

• That a state agency be designated to provide training for all state agencies which provide counselors who work with elderly clients or those clients in need of services relating to guardianship in order that those agencies may: consistently and comprehensively devise policies and procedures for the screening and training of providers of services, including volunteers; clearly define services which are provided by that agency; develop guidelines to eliminate conflicts of interests or perceptions of unethical gain which are not rigid or difficult to interpret; promote early referral to services to delay deterioration; and provide training on guardianship alternatives and implementation. This could be promulgated by one service agency, the State Supreme Court, or other state entity for consistent use by all state agencies involved and should also be made available to the private agencies who provide similar services to those in need.

• Endorse the passage of several carry-over bills from the 1988 Session of the General Assembly which address problems brought to the attention of the subcommittee with regard to guardianship proceedings and substitute decision-making. Senate Bill No. 201 spells out the responsibilities of the guardian ad litem more specifically so that the ward is protected from conflicts of interests of the committee or guardian and would require that the guardian ad litem visit the "allegedly incapacitated person and interview the proposed (committee or guardian) and the person's immediate family members who are reasonably accessible, his doctor and any person providing protective services pursuant to §63.1-55-1." This bill also removes the criterion of "advanced age" as a reason for the finding of incompetency or incapacity. House Bill No. 413 provides a procedure for substitute decision-making for medical or mental health treatment for those individuals in need to enable a responsible, designated person to make certain decision for health care for that person without having to resort to a court procedure. House Bill No. 415 would make the court the substitute decision-maker for mental health and medical treatment.

• That the state institute a systematic procedure for reporting all facets of guardianship in order that data will be available for continued oversight and further development. Numerous studies both within the state and from other states cite the lack of information as a crucial problem which needs to be addressed before direction can be developed for remedial action and planning for the future. At the present time, no one really knows how many persons are living under guardianship orders, much less what is happening to those individuals and their estates.

• That the Department of Social Services under the direction of the Office of the Secretary of Human Resources continue its interagency task force looking at guardianship and specifically the concept of public guardianship as that of last resort. The subcommittee feels that the concept of public guardianship warrants further evaluation with recommendations contingent on the findings with regard to structure and costs. Any system of guardianship of last resort would serve as an alternative to sheriffs being appointed in the localities to serve and would provide a system whereby persons with no available guardian would receive the protection and care they deserve. The Department of Social Services is to report the details of its findings and recommendations back to the 1990 Session of the General Assembly by November 1, 1989. (A copy of the current task force membership is included as Appendix F).

BACKGROUND

Current Guardianship Procedure

The Code of Virginia in §37.1-128.01 et seq. provides the procedure for the determination of whether a person is able to care for himself and his property and appointment of someone to provide that care should such a determination be made. The Code differentiates between "legally incompetent" as a person who is adjudicated incompetent because of a mental condition where the person is totally incapable of caring for himself and his estate and "legally incapacitated" where one is adjudicated incapacitated because of a mental or physical condition which renders him wholly or partially incapable of taking care of himself or his estate. This study concerned itself primarily with the system of legal guardianship. (To clarify terms which are often used interchangeably, a "committee" is appointed by the court to care for an adjudged incompetent person while a "guardian" is appointed for an adjudged incapacitated person.) Although the term "advanced age" is used as one of the criteria for a finding of incapacity, case law proscribes that mere old age of the party in question, as well as eccentricities or oddities, is not in itself sufficient to show mental incapacity, but it is only one of many contributing factors. Unfortunately it seems to be a criteria frequently misused.

Any person can petition the circuit court in the district where the alleged incapacitated person lives for an order of guardianship. The person is required to be notified of the pending action as well as is a member of the immediate family should any be known. Representation by an attorney is guaranteed if desired by the subject of the petition and a guardian ad litem is appointed to represent the "best interests" of the client in the process. Prior to the hearing the court may order that an evaluation be done by a community services board or a state facility with regard to medical, psychiatric, psychological and social information. Clear and convincing evidence that the person is incapacitated must be presented to the court, who shall then appoint a guardian for an adjudged incapacitated person. Any such order may be appealed to the Supreme Court by the proposed ward. In an order for incapacity, the order may find the person either wholly or partially unable to care for himself and must delineate the specifics of which rights that person will retain and which ones he will lose. Statute provides that the court shall give regard to the wishes or preferences of the incapacitated person when selecting a guardian. If the court appoints a guardian, the court is authorized to dissolve or terminate that guardianship following a petition and the presentation of evidence that guardianship is no longer needed. If there is no one else available to serve as a guardian, then the sheriff in the local jurisdiction can serve in that capacity.

A standby guardian can be appointed by parents or the legal guardian of a mentally ill or retarded person. The guardianship is reaffirmed every two years and is activated upon the death or adjudication of incompetency of both parents or the legal guardian.

Court-ordered medical treatment when there is no guardian or committee (§37.1-134.2) requires legal representation, presentation of evidence of need of treatment and description of the exact treatment required. The physician must report back to the court and the person's attorney any change in condition resulting in restoration to competency.

In Virginia, there are various types of guardianship based on need. The guardian of the person may make decisions concerning living arrangements, daily activities and health care. The guardian of the estate makes decisions regarding the person's financial affairs. A plenary guardian has control over both the person and the estate and virtually controls all facets of the person's life subject to any limitation placed on that power by the courts. Guardianships may be limited in that restrictions may be placed on specifically what powers the guardian may have, what rights the ward retains and possibly the specific time period for which the guardianship will be valid.

The guardian must post bond with the Clerk of the Circuit Court in which the guardianship order was granted and provide a total accounting of the property belonging to the ward within four months of qualification. Line item accountings are required every year thereafter showing income and disbursements. Some financial decisions must have specific court approval. A final accounting is required when the guardianship responsibility is terminated, either by substitution of guardian, death or court order.

The Virginia Experience

There are 871,000 persons over the age of sixty living in the Commonwealth of Virginia and most are able to care for themselves. Some of these persons may need assistance in a variety of ways but the need falls far short of being submitted to an order of guardianship. They may only need services such as being reminded to pay bills or of doctors' appointments, meal services or such other things which are necessary to living but which do not require that a person give up all rights and responsibilities of an adult. Most persons value the freedom to live on one's own and maintain the dignity of an independent life as precious and to be protected at all costs. Therefore, guardianship is viewed as an alternative of last resort.

With impaired health or physical disability there are clinical measurements which determine a decision as to whether a person needs a guardian, but courts have often invoked only the criterion of "advanced age" to determine the future of these persons, seemingly out of context with the spirit of the statutory provisions. To clarify this, advanced age is a proper criterion for consideration if the advanced age results in either mental or physical incapacity so that the ward cannot manage his or her person or affairs. Medical personnel cite the fact that age and function are not necessarily linked and that function should be the only criterion used to determine guardianship. Unfortunately, thirty-five states list age as a determinant for incompetency or incapacity, and a 1986 study sponsored by the American Bar Association's Commission on Legal Problems of the Elderly found that "there was a tendency among judges in states where old age is grounds for a finding of incompetence to view the terms as similar." Advanced age seems to be equated with numbers of birthdays instead of a mental or physical condition which prevents a person from caring for himself. In the Associated Press study, "advanced age" was given as the reason for incompetence in eight percent of the cases. Other case files showed the determination to be based on the terms "spendthrift," "improvidence" and "habitual drunkard."

"An Associated Press survey of more than 200 guardianship files opened between 1980 and 1987 in Virginia found that, besides a court order, the only document that was part of every file was a medical statement. Very few

contained any statement of the proposed ward's living conditions, or an evaluation by a psychologist, psychiatrist, or trained social worker of the proposed ward's mental state." Such medical statements can often be lacking as well in that many consist of a one paragraph statement or description often done by someone who is not trained to make such an evaluation. In all, the system is seen to need an evaluation and some overhaul to guarantee that persons are not being placed under guardianship orders indiscriminately and that their rights are being protected along the way.

In short, case law recognizes what most older persons do in that the ability to be foolish, to be eccentric or odd, or to live one's life as one wishes is not a privilege to be reserved only for the young. Being cared for is also not to be equated to being taken advantage of by a system or by those unscrupulous persons who would utilize the shortfalls in such system to their own advantage.

No one knows how many elderly or other disabled persons are under guardianships in the Commonwealth because neither localities nor the state keeps records on guardianship orders. The Task Force on Guardianship organized by the Department of Social Services identified 886 social service clients who have legally appointed guardians and 2,174 others who have an unmet need for a guardian. Staff of the Joint Subcommittee attempted to survey other agencies and organizations which might not be covered by the social services survey, but response was poor. The facilities under the Department of Mental Health, Mental Retardation and Substance Abuse Services did respond and identified most of the 2,649 persons they felt to need guardians. There was no feature to eliminate duplication between the two surveys. Another survey was done of the Commissioners of Accounts in the localities but of the ninety-five which were contacted, only sixteen responded. According to their figures they were currently auditing various types of guardianship accounts for 2,406 persons. The total lack of numbers and data on the types of persons requiring guardianship orders and their particular needs blocks effective planning and utilization of services where they are needed.

One consistent theme in all research involves increased and innovative funding for any of the programs discussed. Guardianship costs are high with the client remaining in the community and in need of extensive kinds and amounts of services, and national averages approximate $9,000 in costs. But the cost of institutionalization and loss of liberty has to also be considered. Current costs in a mental health/mental retardation (including geriatric) facilities are estimated to be $40,000 - 50,000 per year, of which 50% is paid by Medicaid. A word of caution that comes through in most of the literature is that guardianship, once granted, tends to be all-encompassing and that programs of long-term care tend to be biased toward institutional placement. Currently, 42% of the population in the state identified as having a guardian in the Department of Social Services survey were in a long-term care facility.

When guardians are not available to serve, someone else needs to make decisions for the incapacitated person. Decisions have been shown to be made by family or friends 45.1% of the time, by an agency 19.7%, by the client 17.1%, by an institution 17.2%, and by court order 0.9%.

The Department of Social Services has documented that there are five functional problems that generally lead to an agency decision to petition the court for the appointment of a guardian for a client. These are, in descending order, money management, protection of financial assets, medical decision-making, making appropriate living arrangements, and supervision of personal hygiene.

Alternatives to Guardianship

Case law generally refers to the principle of "least restrictive alternative" when dealing with guardianship. Any form, no matter how limited, is seen to be restrictive since one must give up personal liberty. Elderly persons often lack a combination of case management and money management that could keep them out of long-term care facilities. Many have an estate too small for banks to handle and too large to qualify them for public assistance. The dignity of the individual should be placed at the forefront of all strategies. Protective services should not necessarily be equated with guardianships or invoked only in situations of abuse. It should be viewed as a continuum of services encompassing all alternatives, but in many cases there are legal impediments as well as understaffed social service agencies, lack of funds, and many other problems in providing services for these individuals.

There are various other alternatives short of guardianship which can be utilized depending on the condition of the individual in question. They include:

- Power of attorney is a means by which a competent person may delegate any or all powers to act on his behalf to another person. There are several types of this, and they can be granted to anyone, barring certain residency requirements, willing to accept the responsibility and whom the person trusts to make honest decisions for that person. A general power of attorney allows another to act on the behalf of the person granting the power and ceases upon the grantor's disability, while a durable power of attorney allows for the continuance of the power even if the person becomes disabled or incapacitated. A special or limited power of attorney provides a particular time frame or set of circumstances for the person to act and ceases at the termination of those conditions or the disability of the person. A springing durable power of attorney, as provided in §11-9.1 of the Code of Virginia, if drawn with the proper language, provides that either the power of attorney does not terminate with the disability of the said person or that it takes effect only upon the determination of an incapacity.

- Direct deposit or a joint bank account provides assistance when a person can be served by a combination of human services and having their income directly deposited in the bank for automatic payment of utilities and other routine bills or by having a joint account with a trusted family member or friend.

- A representative payee involves only money management in that a person or organization is authorized by a federal agency to receive and manage the government benefits of an incapacitated person. Designated individuals or agencies usually receive a fee for acting as a "rep payee".

- A Living Trust provides an alternative to persons who have assets. The legal title to a person's assets is changed so that the legal owner is the trustee. The beneficial owner remains the person who established the trust so that if and when disability occurs, business and financial decisions can continue to be made. A trustee can be either an individual, a trust company or a bank with trust powers but larger institutions are not usually interested in trusts of less than $150,000. A fee is charged for the management based usually on the size of the trust.

- A "living will," for example the Virginia Natural Death Act, is not an alternative to guardianship but it is a method of making a health care decision which regulates the way in which one will die. The Virginia Natural Death Act (Living Will) is authorized by §54-325.8:1 et seq. of the Code of Virginia to provide a procedure whereby a competent adult is declared to have the "fundamental right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calculated to prolong their lives provided, withheld or withdrawn." A person can designate a physician or another individual to make such decisions for him in the event such person is diagnosed as suffering from a terminal condition even after he is no longer able to participate actively in that decision. One drawback is that a health care professional or any other person is not legally compelled to honor the living will.

Other Alternatives

The provision of a continuum of services is seen by most as being the best of all possible worlds in providing both the protection and care necessary for the well-being of the person in question as well as providing the maximum amount of independence and dignity possible. Research has identified several programs in other states which provide this type of service. The Guardianship Diversion Program in Florida is run by a church and other programs are run by communities and receive federal dollars to maintain their services. The Support Services for the Elderly in California is a state agency separate from other social service agencies. These programs basically cover four areas of concern: housing, nutrition, money management and public benefits assistance. They do not take on the role of provider of services but only as an assistance services whereby available programs and persons needing services are brought together. Active participation is limited to such things as bill paying, shopping assistance, contact with Meals-on-Wheels or special transportation, reminding the person of various appointments, etc. Money management requires a contract which is voluntary and detailed accounts are always available to the client.

These programs are seen to be saving not only dollars with regard to court procedures for guardianship proceedings and institutionalization but intangible costs in terms of liberty. Social services in most states are seen to be too understaffed and underfunded to have the smaller caseload required for personal involvement. These described programs report that 80-94% of their clients have been served with alternatives to guardianship and only 16% of those not served are in convalescent hospitals.

Problems Identified With the Current System

Throughout the course of this study many problems have been identified through testimony and research and they cover the spectrum of the whole guardianship procedure, both conceptually and procedurally. It is with these problems that the Joint Subcommittee attempted to evaluate and propose rectification.

- There are no available data to document exactly how many individuals are living under a guardianship order and how many are in need of a guardian to provide services and decision-making to an incapacitated or incompetent person. This hinders planning in terms of funds for services and personnel to provide the services for those in need. Because of this, there are insufficient numbers of social services and court workers to provide adequate protection and services to these individuals and coordination between agencies.

- The petition for guardianship is thought to be too vague, and often evaluations are either not done by qualified individuals or not done at all. Some evaluations are done by the petitioner alone. Many petitions consist of one short paragraph stating that the person is unable to care for himself, with no qualitative description of the nature and severity of the condition.

- The statute requires that the proposed ward be given notice of the guardianship proceeding by mail but in many situations the person in question is confused by the legal terminology and ramifications of the hearing. Sometimes medication alone can cause confusion on the part of an elderly person and impair his judgment.

- The statute guarantees legal representation for the proposed ward but it can be waived, often without the person being fully cognizant of the consequences. According to the Associated Press investigation, about 87% were given notice of the hearing, but 44% went through the court process without legal representation. About 3/4 of the individuals had hearings, but only 8% of the files in the national study indicated that the person in question was present at the hearing. Judges approved 97% of the petitions.

- In guardianship proceedings, a guardian ad litem is appointed by the court to represent the "best interests of the client". Often these guardians ad litem are designated with little or no time for preparation and many are unwilling to serve as such due to the miniscule fee provided for their services. Many of these legal representatives often go to court without ever having talked to the proposed ward or to anyone who can provide information in addition to what is contained in the petition. Representing the "best interests" of the client has come under attack because there seems to be disagreement as to exactly what "best interests" constitutes - is it what is best for the client according to the judgment of others or what the client would have wanted for himself were he competent to make such a decision?

- A guardianship order can be appealed to the State Supreme Court but this happens very rarely. Oftentimes even guardians ad litem admit to not being aware that such a provision exists and in the period 1980-1987 the AP study found no instances of appeal.

• Currently under state statute sheriffs in the localities can be designated as guardians of last resort should there not be any other person to serve in that capacity. This is a problem due to the lack of personnel and particular expertise needed to meet the needs of this particular situation. Since it is a discretionary duty, many sheriffs refuse to be named as guardian.

• A guardianship order may be reversed at any time that the ward can provide evidence to the court that it is no longer necessary or at least no longer is needed in the form designated. This happens very infrequently and the ward must go through the same process as the original guardianship hearing. The burden of proof is on the ward to prove the guardianship no longer necessary rather than on the state or the petitioner to prove that the order is. Many find this system cumbersome, intimidating, and therefore prohibitive.

• Citizens are not informed about the alternatives to guardianship and the process for dealing with such prior to disability occurring. Education in this area is vitally necessary in order to provide people with more information to deal with anticipated situations in such a manner that decisions are personally acceptable. By doing this, the number of guardianships may be reduced and the number of cases with no willing guardian reduced as well.

• There is a need for a guardian of last resort, in lieu of the sheriff, to provide protection for those who have no family or anyone willing to serve in that capacity. Guardians are usually much harder to find when there is no estate involved. There are currently twelve volunteer guardianship organizations in Virginia who provide such services, but, according to the Department of Social Services study, they are hampered by high turnover in volunteers, lack of targeted funding, lack of persons willing to serve a guardians, lack of recognition of volunteer services as a vital agency service, lack of a system to monitor the quality and appropriateness of services provided, and the absence of any standards by which the performance of the guardian is measured.

A public guardianship system is a publicly funded and operated program which assures the availability of a suitable person to assume guardianship responsibilities ordered by the court when there is no one else to serve, no estate involved, and when all other alternatives have been investigated and are considered inappropriate. A majority of the states have some form of public guardianship but not all programs are active. There are four models identified by current research: (i) court official; (ii) an independent state office; (iii) a division of a social service agency; and (iv) a freestanding office at the local level. Several recommendations from a national study on public guardianship include: adequate funding and staff, including specified staff/ward ratios; specification that it is the alternative of last resort; incompetency determination should be within a strictly adversarial proceeding; increased provision for partial, voluntary, and time-limited guardianships; the public guardian should be empowered and equipped to manage the person and property of the ward, but the office should not be dependent on the collections of fees charged for services; the functions of the office should include the coordination of services, serving as advocates, educating professionals and the public, and developing private guardians whenever possible.

• Currently there is no oversight function by the state or anyone else to evaluate the condition of wards under guardianship orders. Once an order is entered, the proceedings end with respect to the welfare and personal condition of the ward. Commissioners of Accounts do a yearly accounting of the financial aspect of a guardianship, but in most cases that accounting is a cursory one. No attention is given to the actual personal welfare of the client with respect to living conditions, personal health and welfare, suitability of the guardian and how the guardian is performing his functions, and other considerations crucial to the well-being of the ward. Some states have developed review boards at the local level or some other system to review all guardianship orders on a regular basis to constantly review the condition of wards and to make reports on suspected abuses as well as making recommendations for the guardianship either to be vacated or modified should circumstances warrant such changes. In this way the mental health of the ward is being evaluated as well as the financial health.

One recommendation to address this problem might be for the creation of an ombudsman guardian ad litem who would have on-going duties to investigate and report to the court on a regularly scheduled basis the status of guardianships ordered by the court. These individuals could be established from a list developed by circuit court judges and appointed from that list by the special justice or district or circuit court judges and would be an officer of the court. This ombudsman could regularly visit persons for whom a guardian or committee has been appointed to assure the court that the ward is receiving proper care.

• Persons selected to be guardians are in many cases ill prepared to handle such responsibilities. There currently is no evaluation of possible conflicts of interests between the guardian and the potential ward, whether the guardian would be acceptable to the ward and whether the guardian has the knowledge and skills to meet the needs of the ward. Some reports have been made of guardians being appointed who could not read or write, thereby limiting their usefulness regardless of their intentions. There is no training of guardians in their responsibilities except where a locality has developed its own forms and information regarding duties and powers. There have been cases where guardians have paid themselves substantial salaries for providing such services, made gifts to themselves and other family members or others and generally have depleted estates which they were entrusted to protect. Abuses are not uncommon but in many cases they are discovered only by accident or when a bill is not paid or when the final accounting is done after the ward's death.

• Many hospitals and nursing homes have no protocols for substitute decision-making for medical treatment and decisions that mean the end of life. Currently, mental health facilities have to resort to a provision in the Code of Virginia to utilize the court process to authorize treatment, a process which is costly in time and money. Carry-over House Bill No. 413 addresses this issue.

RESEARCH

With the increasing numbers of persons requiring guardianship orders for various reasons, numerous studies have been done on the issue of guardianship

during recent years. Persons in the United States are living longer, and families are generally spread apart geographically and socially, a situation which eliminates or decreases the amount of familial care available should a family member become disabled. Studies have been particularly prevalent since the Associated Press study guardianship which pointed out some disturbing facts about the state of the system.

One of the most comprehensive evaluations done on a national basis was the National Guardianship Symposium co-sponsored by the American Bar Association's Commissions on the Mentally Disabled and Legal Problems of the Elderly. Their study offered a set of 33 draft recommendations centered on procedural due process before and during the hearing, the special role assumed by attorneys who represent disabled persons, and the determination of incompetency or incapacity. Some examples of their recommendations include:

- Institute a specific set of rules to govern applicable judicial determination.

- Develop an easy-to-use standard petition form that requires certain information such as the functional limitations, as well as the physical and mental conditions of the proposed ward to, justify why a petition is requested, the steps taken to find less restrictive alternatives to guardianship, the guardianship powers being requested, and the qualifications of the person proposed to serve as the guardian.

- Counsel should be appointed in every case unless waiver is knowing and voluntary. (There is some question here as to whether an incompetent or incapacitated person may not be able to make a knowing and voluntary waiver and the ability of a judge to make such a determination without hearing evidence. Counsel could be appointed and then dismissed if circumstances decreed that this was the proper course.)

- Notice to the proposed ward should be in plain language and in large type to indicate the time and place of the hearing, the possible adverse consequences to the respondent and a list of rights to which the respondent is entitled.

- The role of the attorney representing a proposed ward has generally been interpreted as looking out for the "best interests" but the modern role has the attorney serving as a "zealous advocate" representing the client's expressed or implied desires. The ABA's Model Rules of Professional Conduct favors the role of the zealous advocate, but at no time should an attorney also serve as the guardian ad litem. (The interpretation of this is not yet clear and possibly refers to having both a guardian ad litem and an attorney involved in guardianship proceedings to guarantee that procedural due process is observed and that the best interests as well as the wishes of the client are advocated.)

- Attorneys who deal with guardianship clients should be trained regarding the disabilities and how to deal with such disabilities of proposed clients. Training should be required for attorneys wishing to represent persons in guardianship cases and states should consider certifying legal specialists in guardianship law. Training programs should also be available to judges who hear guardianship cases.

- Five elements should be included in any definition of incapacity: it is a legal, not a medical term; evidence of functional impairment should be documented over a period of time; incapacity may be partial or complete; proposed wards must be shown to be likely to suffer substantial harm due to their specific inabilities; and mere labels describing age or eccentricities should not be sufficient to justify a finding of incapacity.

- Rules of evidence, since guardianship proceedings are considered to be adversarial with some modifications, include that: formal rules of evidence should be applied to guardianship hearings with exceptions that allow admission of medical information; expert testimony should be allowed from professionals whose training and expertise aid the functional assessment; and assessments should be done in a setting that is as close as possible to the respondent's usual environment.

- Court orders are encouraged to be consistent with the functional impairments of the client and no more authority should be granted than is absolutely necessary. Medical diagnoses alone should not be used to make functional assessments. Orders must recognize the values of the respondent and that he has the right to choose a risk-associated lifestyle. An underlying premise must be the doctrine of least restrictive alternative and that decisions must maximize the ward's autonomy. Limited dispositions are favored over plenary but it is recognized that the implementation of such dispositions is not happening. Orders must be as specific as possible with respect to powers and duties of the guardian. And there needs to be a relatively easy process for the court to extend, limit or dissolve guardianships.

- The concept of substitute decision-making should be implemented as often as is possible. This would imply that the previously expressed wishes of the client are considered and that the decision is made on the basis of what a reasonable person with the same background, training, and moral and religious values would do in the same instance.

- Standards for restoration should be prompt and the burden of proof should shift to those who would continue the guardianship rather than on the ward. These reviews might also be made automatic to prevent the status quo from becoming the accepted norm.

Pending Federal Legislation

Two bills were introduced into the 100th Congress before adjournment regarding guardianship and all patrons plan to reintroduce their bills in the 101st Congress. The "National Guardianship Rights Act of 1988" was introduced by Congressmen Pepper and Bonker (HR 5266) with Senators Glenn and Simon (S. 2765). Congresswoman Snowe introduced the "Guardianship Rights and Responsibilities Act of 1988" (HR 5275). Both bills require essentially the same things: adequate and timely notice of the guardianship hearing; right to representation by counsel acting as an advocate unless voluntarily waived; right to jury trial upon request; right to be present at all stages of the process; the finding of incapacity must be based on clear and convincing evidence; no finding of incapacity can be based on age; the scope of the guardianship must be commensurate with the ward's abilities; right to appeal

the initial determination and the right to request modification at any time; guardians to file annual reports on the financial status of the estate and the condition and well-being of the ward; the court must review all guardianship reports as well as independent review of guardianships; guardians must be trained before appointment and cannot be convicted felons; and provision of transfer of jurisdiction when the ward is moved to another location.

The Pepper bill allows for the creation of an independent evaluation, at the request of the person or counsel, made up of qualified individuals who report their findings back to the court. The team makes a determination of incapacity and if it finds none then the petition must be dismissed. If the incapacity differs from that alleged in the petition, the petition must be amended or dismissed.

Enforcement differs between the two bills. The Pepper bill places enforcement under the Attorney General, who would review state implementation laws. Noncompliance could mean the withholding of payments for administrative costs. The Snowe bill would tie compliance with eligibility for receipt of Medicaid funds and also provide for two-year grants for the establishment and operation of guardianship advocates and investigators to assist the court in investigating guardianship petition and monitoring the same.

Respectfully submitted,

HJR 171

Joseph V. Gartlan, Jr., Chairman
Elmon T. Gray
Emilie Miller
Franklin P. Hall
J. Samuel Glasscock
Warren G. Stambaugh
W. Tayloe Murphy, Jr.
Robert S. Bloxom
Frank R. Conner
Wilda M. Ferguson
Joy S. Mason
Honorable Kenneth E. Trabue

SJR 42

Joseph V. Gartlan, Jr., Chairman
Elmon T. Gray
Emilie Miller
J. Samuel Glasscock
Warren G. Stambaugh
William P. Robinson, Jr.
W. Tayloe Murphy, Jr.
Jerrauld C. Jones
Frank R. Conner
Wilda M. Ferguson
Joy S. Mason
Honorable Kenneth E. Trabue

SENATE JOINT RESOLUTION NO. 42 Appendix A

Establishing a joint subcommittee to assess the adequacy of the provisions for guardianship and the effectiveness of protective services programs for citizens of the Commonwealth.

Agreed to by the Senate, February 2, 1988
Agreed to by the House of Delegates, March 12, 1988

WHEREAS, the Commonwealth of Virginia has an adult protective services law and local departments of social services are required to provide protective services to persons sixty years of age and older who are abused, neglected, or exploited and to incapacitated persons who are eighteen years of age and older and are abused, neglected or exploited; and

WHEREAS, the requests for investigations and the need for adult protective services have shown a steady increase and that a recent study by the Department of Social Services indicates that over 2,000 citizens have an unmet need for a guardian at present; and

WHEREAS, the current provisions for guardianship are vague and do not adequately define issues of concern such as the role and compensation of the guardian ad litem, the requirements for accountability, and other such issues; and

WHEREAS, many concerned professionals agree that we must examine our protective services and guardianship provisions and programs to ensure that the rights of self-determination and privacy for impaired persons are protected, and, at the same time, that the Commonwealth's responsibility for protecting its vulnerable citizens is maintained; and

WHEREAS, the sheriff of each jurisdiction is presently appointed as the guardian of last resort; and

WHEREAS, sheriffs, court personnel, adult protective services workers and other social work professionals often express frustration as a result of the lack of adequate resources for protective services and the lack of appropriate alternatives to guardianship; and

WHEREAS, an interagency, community-wide response in providing services to and protecting the rights of persons vulnerable to abuse, neglect, and exploitation is needed; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee be established to study protective services and guardianship programs of the Commonwealth, to include information on: the demand for adult protective services and guardianship in the Commonwealth; the number of guardians currently serving by appointment; the possibility of public guardianship to include the use of local departments of social services as guardians of last resort; the adequacy of resources available to local departments of social services for the provision of protective services and guardianship; the roles of human services agencies in guardianship; and new policies and administrative procedures to more adequately protect the rights and privacy of the person and to increase the capacity of protective service workers in providing quality protective services and the capacity of the Commonwealth to provide guardianship, where necessary and appropriate.

The joint subcommittee shall be composed in the following manner: two members of the Senate Committee on Education and Health and one member of the Senate Committee for Courts of Justice, to be appointed by the Senate Committee on Privileges and Elections; three members of the House Committee on Health, Welfare and Institutions and two members of the House Committee for Courts of Justice, all to be appointed by the Speaker; and one representative each from the Judicial Conference of Virginia and the Long Term Care Council, one sheriff and one citizen at large, all to be appointed by the Governor. For purposes of this resolution, the terms "guardianship" and "guardian" shall be taken to include guardian ad litem, committee, and all other fiduciary relationships of one person over another.

The joint subcommittee shall complete its work and make its recommendations to the 1989 Session of the General Assembly.

The indirect costs of this study are estimated to be $10,650; the direct costs of this study shall not exceed $8,640.

GENERAL ASSEMBLY OF VIRGINIA -- 1988 SESSION

HOUSE JOINT RESOLUTION NO. 171

Establishing a joint subcommittee to assess the adequacy of the provisions for establishing a legal guardianship and the provisions for monitoring the status of the ward as well as the effectiveness of protective services programs for citizens of the Commonwealth.

Agreed to by the House of Delegates, March 11, 1988
Agreed to by the Senate, March 9, 1988

WHEREAS, the Commonwealth of Virginia has an adult protective services law and local departments of social services are required to provide protective services to persons sixty years of age and older who are abused, neglected, or exploited and to incapacitated persons who are eighteen years of age and older and are abused, neglected or exploited; and

WHEREAS, the requests for investigations and the need for adult protective services have shown a steady increase, and a recent study by the Department of Social Services indicates that over 2,000 citizens have an unmet need for a guardian at present; and

WHEREAS, the current provisions for guardianship are vague and do not adequately define issues of concern such as the role of the guardian ad litem, the requirements for accountability, and other such issues; and

WHEREAS, many concerned professionals agree that we must examine our protective services and guardianship provisions and programs to ensure that the rights of self-determination and privacy for impaired persons are protected, and, at the same time, that the Commonwealth's responsibility for protecting its vulnerable citizens is maintained; and

WHEREAS, the sheriff of each jurisdiction is presently appointed as the guardian of last resort; and

WHEREAS, sheriffs, court personnel, adult protective services workers and other social work professionals often express frustration as a result of the lack of adequate resources for protective services and the lack of appropriate alternatives to guardianship; and

WHEREAS, an interagency, community-wide response in providing services to and protecting the rights of persons vulnerable to abuse, neglect, and exploitation is needed; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study protective services and guardianship programs of the Commonwealth, such report to include but not be limited to the following:

1. Information on the demand for adult protective services and guardianship in the Commonwealth, and the adequacy of resources available to local agencies for the provision of protective services and guardianship;

2. Information on the number of guardians currently serving by appointment, the number of wards being served, and the scope and quality of services rendered to the wards;

3. Consideration of the use of local departments of social services as public guardians of last resort;

4. Identification of new policies and administrative procedures to more adequately ensure a minimum level of services to every ward;

5. Identification of new policies and administrative procedures to more adequately protect the rights and privacy of the ward;

6. Consideration of alternatives for increasing the capacity of protective service workers to provide quality protective services and the capacity of the Commonwealth to provide guardianship, where necessary and appropriate; and

7. Clarification of the roles of various state agencies in the delivery of adult protective services and the initiation, utilization and monitoring of guardianships.

The joint subcommittee shall be composed in the following manner: two members each from the House Committees on Health, Welfare and Institutions and Appropriations, and one member from the House Committee for Courts of Justice, all to be appointed by the Speaker of the House of Delegates; one member each from the Senate Committees on Finance, Courts of Justice and Education and Health, to be appointed by the Senate Committee on Privileges and Elections; and one representative each from the Judicial Conference of Virginia and the Long-Term Care Council, one sheriff and one citizen at-large, all to be appointed by the Governor.

The Departments of Social Services and Mental Health, Mental Retardation and Substance Abuse Services, the Department for the Aging and the Office of the Attorney General shall cooperate with the joint subcommittee in the conduct of this study.

The joint subcommittee shall complete its study and make its recommendations to the

1989 Session of the General Assembly.

The indirect costs of this study are estimated to be $10,650; the direct costs of this study shall not exceed $8,640.

1989 SESSION

LD6611118

SENATE BILL NO. 201

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice on January 19, 1989)

(Patron Prior to Substitute–Senator Gartlan)

A BILL to amend and reenact §§ 37.1-132 and 37.1-134.2 of the Code of Virginia, relating to incompetent and incapacitated persons.

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.1-132 and 37.1-134.2 of the Code of Virginia are amended and reenacted as follows:

§ 37.1-132. Person because of impaired health incapable of taking care of person or property.–On petition of any person to the circuit court of the county or the city in which a person is located or in which such person was a resident immediately prior to becoming a patient, voluntarily or involuntarily, in a nursing home, convalescent home, state hospital for the mentally ill or other similar institution , ~~and~~ *that* such person, by reason of ~~advanced age or~~ impaired health , or physical disability, has become mentally or physically incapable of taking care of himself or his estate, the court, after reasonable notice to such mentally or physically incapacitated person of the hearing and of his right to be present, and at least five days' notice by first class mail to an immediate family member, if any be known, shall hold a hearing to determine whether a guardian shall be appointed. At the hearing , the court shall consider evidence which may consist of comprehensive social and psychological information, as well as appropriate medical or psychiatric data assessing the proposed ward's capabilities.

If, after considering this and any other evidence presented in the hearing, the court or jury, if one be requested, determines on the basis of clear and convincing evidence that the person is incapacitated, the court shall appoint a suitable person to be the guardian of his person or property, or both. Clear and convincing evidence shall be presented in the hearing to support each provision in the court's order of appointment, which order shall: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian so as to permit the incapacitated person to care for himself and manage his property to the extent that he is capable; (iii) specify whether the determination of incapacity is perpetual or limited to a specified length of time, as the court in its discretion may determine; and (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity.

The guardian appointed pursuant to this section shall, unless otherwise limited by the court, have the same rights and duties which pertain to committees, guardians and trustees appointed under §§ 37.1-128.02, 37.1-128.1 or § 37.1-134, shall give such bond, either secured or unsecured, as is required by the court and shall comply with all applicable provisions of Title 26 of the Code.

On the hearing of every petition for guardianship, a guardian ad litem shall be appointed to represent the interest of the person for whom a committee or guardian is requested and shall be paid such fee as is fixed by the court to be taxed as part of the costs of the proceeding. The court in which the petition is filed may, at its discretion, waive all fees and court costs in connection with such proceedings. The alleged incapacitated person shall be present at the hearing if the person so requests or if his presence is requested by the guardian ad litem representing the person.

If no person shall be appointed guardian within seven days from the determination of legal incapacity, either wholly or partially, the court, on motion of any interested party, may appoint a guardian, or it may appoint the sheriff pursuant to § 37.1-130.

A court determination of incapacity, either wholly or partially, pursuant to the provisions of this section shall not constitute an adjudication of legal incompetency as provided for in § 37.1-128.02 or § 37.1-134.

The person may present a petition for an appeal to the Supreme Court if he ~~be~~ *is* determined to be incapacitated, either wholly or partially. In the discretion of the court, a

petition for or the pendency of an appeal may suspend the judgment of the court, and the court may require that bond, either secured or unsecured, be given to protect the estate of the person determined to be incapacitated.

§ 37.1-134.2. Consent to medical treatment for and detention of certain persons.–A. On petition of any person to the circuit court or judge, as defined in § 37.1-1, herein referred to as the court, of the county or city in which resides or is located any adult person who is alleged, because of ~~advanced age,~~ impaired health, physical disability, mental illness, mental retardation, or any other mental or physical condition, to be incapable, either mentally or physically, of giving informed consent to treatment, by a licensed health care professional or in a licensed hospital, of physical injury or illness, or on petition to the court of any county or city in which is located the proposed place of treatment of the person, the court may authorize such treatment upon finding on the basis of clear and convincing evidence that the person is incompetent or incapable as so alleged and that the proposed treatment is medically necessary.

Prior to the court's authorization of such treatment:

1. The court shall find there is no legally authorized guardian or committee available to give consent.

2. The court shall appoint an attorney to represent the interests of the person. The court may authorize payment of such fee to the attorney as provided in § 37.1-89, which fee shall be paid by the person if not indigent, or if indigent, by the Commonwealth from the funds appropriated to reimburse expenses incurred in the involuntary mental commitment process.

3. Evidence shall be presented concerning the person's condition and proposed treatment, which evidence may, in the court's discretion, and in the absence of objection by the person, the attorney, or other interested person, be submitted by affidavit.

The court may not authorize nontherapeutic sterilization, abortion, or treatment for any mental, emotional, or psychological condition in accordance with this section.

B. Any order authorizing treatment pursuant to subsection A shall describe the treatment authorized and may authorize generally such related examinations, tests, and treatment as the treating physician may determine to be medically necessary. Such order shall require the treating physician to report to the court and the person's attorney any change in the person's condition resulting in restoration of the person's competence or capability to consent prior to completion of the authorized treatment and related services. Upon receipt of such report, the court may enter such order withdrawing or modifying its prior authorization as it deems appropriate. Any petition or order under this section may be orally presented or entered, provided a written order shall be subsequently executed.

C. Any order hereunder of a judge, or of a judge or magistrate under subsection F, may be appealed de novo within ten days to the circuit court for the jurisdiction where the order was entered, and any such order of a circuit court hereunder, either originally or on appeal, may be appealed within ten days to the Supreme Court.

D. Any licensed health professional or licensed hospital providing treatment, testing or detention pursuant to the court's or magistrate's authorization as provided in this section shall have no liability arising out of a claim to the extent it is based on lack of consent to such treatment, testing or detention. Any such professional or hospital providing treatment based on a person's consent to the treatment shall have no liability arising out of a claim to the extent it is based on lack of capability to consent if a court or a magistrate has denied a petition hereunder to authorize such treatment, and such denial was based on a finding that the person was competent to consent, and capable of consenting, to the proposed treatment.

E. Nothing in this section shall be deemed to affect any common law rule relating to consent for medical treatment or the right to use any other applicable statutory procedure relating to consent.

F. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding of probable cause to believe that an adult person within the court's or a

magistrate's jurisdiction is incapable, due to any physical or mental condition, of giving informed consent to treatment of a physical injury or illness, and that the medical standard of care calls for testing, observation or treatment of the injury or illness within the next twelve hours to prevent death, disability or a serious irreversible condition, the court or, if the court is unavailable, a magistrate may issue an order authorizing temporary detention of the person by a hospital emergency room and authorizing such testing, observation or treatment. The detention may not be for a period exceeding twelve hours unless extended by the court as part of an order authorizing treatment under subsection A. If the physician knows that such person, because of recognized religious practices, does not desire testing or treatment, he shall so advise the court or magistrate, who shall take into consideration the right of a person to rely on nonmedical remedial treatment in lieu of medical care. Persons with dysphasia or other communication disorders who are mentally competent and able to communicate shall not be considered incapable of giving informed consent. If before completion of authorized testing, observation or treatment, the physician determines that a person subject to an order under this subsection has become capable of giving consent, the physician shall rely on the person's decision of whether to consent to further observation, testing or treatment. If before issuance of an order under this subsection or during its period of effectiveness the physician learns of objection by a member of the person's immediate family to the testing, observation or treatment, he shall so notify the court or magistrate, who shall consider the objection in determining whether to issue, modify or terminate the order.

G. The provisions of § 37.1-89 relating to payment by the Commonwealth shall not apply to the cost of detention, testing or treatment under this section.

Official Use By Clerks

Passed By The Senate		Passed By The House of Delegates	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the Senate | Clerk of the House of Delegates

FORM ORDER

or Adjudication of Incapacity under Virginia Code Section 37.1-132.1 because of Advanced Age, Impaired Health, or Physical Disability of a Person, Mentally or Physically Incapable of Taking Care of Person or Property and Qualification of Guardian.

VIRGINIA:

IN THE CIRCUIT COURT OF THE _____ OF _____

RE: _____
Incapacitated

ORDER

Upon the petition of _____(wife, son, etc.) this day filed after due notice of the hearing and of his (her) right to be present, to _____, who was (was not) present, and after due notice by first class mail to _____, an immediate family member of the incapacitated, the Court appoints _____, a discreet and competent attorney at law, Guardian ad litem for _____, in this proceeding, who thereupon agreed, accepted the appointment and attended the hearing.

Upon clear and convincing evidence, the Court finds and determines, pursuant to Virginia Code Section 37.1-132,that _____, whose resides (is located) (was located prior to becoming a patient at _____ in the City (County) of _____, Virginia , within the jurisdiction of this court, is incapacitated. The Court further finds that (at this point counsel should state in the order: (1) the nature and extent of the person's incapacity; (2) whether the determination of incapacity is perpetual or limited to a specific length of time; (3) the specific legal disabilities, if any, of the person).

Accordingly, the Court appoints _____, Guardian of _____, incapacitated, with (at this point counsel should define the powers and duties of the guardian so as to permit the incapacitated person to care for himself and manage his property to the extent he is capable).

Thereupon, _____ appeared and together with _____, his surety, by _____ its duly authorized attorney in fact, which first justified upon the oath of its said attorney as to its sufficiency, entered into and acknowledged in open Court a bond as such Guardian in the penalty of $_____, payable and conditioned according to law.

A fee of $_____ and a fee of _____ is (are) allowed the attorney for petitioner and Guardian ad litem, respectively, for services rendered in this proceeding.

The clerk shall mail a certified copy of this Order to the Commissioner of Accounts of this Court.

ENTER:

_____
Judge

See B. Lamb, Virginia Probate Practice, §173 & 174 at 306-07 (1954).

1989 SESSION

LD5650118

SENATE BILL NO. 614

Offered January 20, 1989

A BILL to amend the Code of Virginia by adding in Article 1 of Chapter 4 of Title 37.1 a section numbered 37.1-134.3, relating to committees and guardians.

Patrons--Gartlan, Gray and Miller, E. F.; Delegates: Stambaugh, Robinson, Glasscock, Hall and Murphy

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Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 1 of Chapter 4 of Title 37.1 a section numbered 37.1-134.3 as follows:

§ 37.1-134.3. Reinstatement on docket.--Any matter adjudicated pursuant to §§ 37.1-128.02, 37.1-128.1 or 37.1-132, resulting in a determination of incompetency or incapacity, such incompetency or incapacity not having been restored pursuant to § 37.1-134.1, and in which the time for all appeals has expired, upon petition of any party to the original proceedings, shall be reinstated upon the docket.

Official Use By Clerks	
Passed By The Senate	**Passed By The House of Delegates**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
_____	_____
Clerk of the Senate	Clerk of the House of Delegates

MEMBERSHIP

TASK FORCE ON GUARDIANSHIP

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