



COMMONWEALTH of VIRGINIA

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November 1, 2022

To: The Honorable John S. Edwards, Co-chair, Senate Committee on the Judiciary
The Honorable R. Creigh Deeds, Co-chair, Senate Committee on the Judiciary
The Honorable Robert B. Bell, Chair, House Committee for Courts of Justice
Fr: Nelson Smith, Commissioner, Department of Behavioral Health and Developmental Services (DBHDS)

Chapter 630 of the 2022 Acts of Assembly directs the Department of Behavioral Health and Developmental Services (DBHDS), in conjunction with several other state agencies and stakeholders, to identify possible strategies for making it easier for parents to care for their adult children with intellectual and developmental disabilities within the context of the Commonwealth's guardianship process. The language states:

That the Department of Behavioral Health and Developmental Services shall convene a work group to consider issues related to (i) the care of adults with permanent disabilities that render them incapable of making informed decisions about their own care and (ii) potential changes to guardianship requirements to make it easier for parents to care for their adult children with such disabilities. The work group shall include representatives from the Joint Legislative Audit and Review Commission, the Department for Aging and Rehabilitative Services, the Department of Social Services, the Department of Medical Assistance Services, the Office of the Executive Secretary of the Supreme Court of Virginia, the Virginia Poverty Law Center, the Virginia Disability Law Center, the Virginia Academy of Elder Law Attorneys, the Virginia Board for People with Disabilities, and The Arc of Virginia. The work group shall make recommendations for legislative changes to address these issues by November 1, 2022, to the Chairmen of the Senate Committee on the Judiciary and the House Committee for Courts of Justice.

In accordance with this item, please find enclosed the report of the Guardianship Workgroup. Staff are available should you wish to discuss this request.

CC: The Honorable John Littel, Secretary of Health and Human Resources



Virginia Department of
Behavioral Health &
Developmental Services

**Report on Chapter 630 (SB302)
of the 2022 Acts of Assembly
Guardianship Workgroup Report**

To the Chairmen of the Senate Committee on the Judiciary and the House
Committee for Courts of Justice

Tuesday, November 1, 2022

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Executive Summary

The Department of Behavioral Health and Developmental Services (DBHDS) convened a workgroup to identify challenges faced by parents in becoming guardians for their adult children with intellectual and developmental disabilities (IDD). The report uses the term “guardian” to represent both guardianship and conservatorship unless otherwise indicated. The use of a single term to imply both processes was convenient as adults under guardianship who have sufficient income and/or assets typically also have a conservator.¹

The consensus of the workgroup was that there are two primary barriers that parents face when planning for the long-term support and guidance of their adult children with IDD. First, parents seeking to become guardians for their adult children with IDDs may be hindered by the cost of legal counsel needed for obtaining guardianship in cases where there are no less restrictive options for support. Second, some parents may also take on the responsibility of petitioning for and obtaining guardianship and its associated financial burden unnecessarily due to a lack of awareness of or access to less restrictive alternatives to guardianship.

In response to these identified barriers the workgroup recommends the following:

1. Virginia Code requirements for parents seeking to obtain guardianship of their children should not be changed. After extensive discussion and analysis, the workgroup concluded that requirements for obtaining guardianship as currently defined in the Code of Virginia are necessary safeguards for the civil rights of individuals with IDD regardless of their relationship to the individual petitioning for guardianship.
2. The Code should be amended to include petitioner’s cost of counsel in court costs covered by the Commonwealth when the respondent is found to be indigent, and the petitioner is the parent of the respondent. Costs of counsel incurred by respondents seeking to remove guardianships they are under, as well as those of petitioners seeking to remove guardianships when they are next-of-kin of the individual under guardianship, should also be covered by the Commonwealth when the respondent is found to be indigent. Currently, the respondent is responsible for covering all “reasonable costs and fees” of the petitioner so long as the court finds that the petitioner is acting in good faith². However, in cases where the petitioner is the parent of the respondent, the respondent is typically indigent. When the court finds that the respondent is indigent the Commonwealth pays for the court fees, guardian ad litem fees, and the cost of the respondent’s council, however the Commonwealth does not cover the cost of the petitioner’s counsel³. Costs of council for respondents or petitioners seeking to remove guardianships are also not covered by the Commonwealth regardless of their ability to pay. Such costs may pose a barrier to removing guardianships when they are not necessary.
3. Stakeholder awareness of less restrictive alternatives to guardianship should be enhanced through continued investment in the expansion of educational programming and resources. While DBHDS and organizations such as the Arc of Virginia and the disAbility Law Center of Virginia already provide education regarding less restrictive

¹ JLARC, “Improving Virginia’s Guardian and Conservator System”. The Joint Legislative Audit and Review Commission. (October 18, 2021). p. i

² Code of Virginia § 64.2-2008

³ Code of Virginia § 64.2-2008

alternatives to guardianship, continuing to expand the availability of educational materials and training is critical to ensuring that all stakeholders understand all options for support.

4. Awareness of and access to less restrictive alternatives should also be improved through the creation of a standardized template for capacity evaluations. Such a template should include the legal definition of capacity for the practitioner's reference while conducting evaluations, and options for identifying areas of capacity and limited capacity and the opportunity to recommend less restrictive alternatives to full guardianship including supported decision-making agreements. Currently, there is no standardized template for capacity evaluations. Improving the evaluation process will help to ensure that individuals with intellectual and developmental disabilities are supported by the least restrictive means possible. It will likely also reduce the number of parents who need to go through the time intensive and financially burdensome process of obtaining guardianship of their adult child.
5. The workgroup recommends that language accessible durable power of attorney forms be created. Currently, there is no standard durable power of attorney form in the Commonwealth. The creation of a language accessible durable power of attorney form would support the need identified by the workgroup to make less restrictive alternatives to guardianship more accessible.

Preface

Chapter 630 of the 2022 Acts of Assembly directs the Department of Behavioral Health and Developmental Services (DBHDS), in conjunction with several other state agencies and stakeholders, to identify possible strategies for making it easier for parents to care for their adult children with intellectual and developmental disabilities within the context of the Commonwealth's guardianship process. The language states:

That the Department of Behavioral Health and Developmental Services shall convene a work group to consider issues related to (i) the care of adults with permanent disabilities that render them incapable of making informed decisions about their own care and (ii) potential changes to guardianship requirements to make it easier for parents to care for their adult children with such disabilities. The work group shall include representatives from the Joint Legislative Audit and Review Commission, the Department for Aging and Rehabilitative Services, the Department of Social Services, the Department of Medical Assistance Services, the Office of the Executive Secretary of the Supreme Court of Virginia, the Virginia Poverty Law Center, the Virginia Disability Law Center, the Virginia Academy of Elder Law Attorneys, the Virginia Board for People with Disabilities, and The Arc of Virginia. The work group shall make recommendations for legislative changes to address these issues by November 1, 2022, to the Chairmen of the Senate Committee on the Judiciary and the House Committee for Courts of Justice.

Introduction

The Department of Behavioral Health and Developmental Services convened a work group to identify challenges faced by parents seeking guardianship for adult children with intellectual and developmental disabilities (IDD). The Workgroup met four times between May and August 2022. A complete list of workgroup participants can be found in Appendix A. The term “guardian” in this report encompasses both guardianship and conservatorship. Adults under guardianship who have sufficient income and/or assets typically also have a conservator⁴.

The workgroup was tasked with identifying “potential changes to guardianship requirements to make it easier for parents to care for their adult children with such disabilities”. While this language is general in its direction to review guardianship requirements for parents, the original language of SB302 was focused on the requirements for parents to obtain guardianship of their adult children. The introduced language of the bill proposed permitting parents to obtain guardianship of their adult children without filing a petition for guardianship if a licensed physician deemed the individual to be permanently incapacitated. Discussion in committee and public comment also focused on the requirements for parents to obtain guardianship of their adult children as the bill moved through the legislative process. The language changing the process by which parents could obtain guardianship of their adult children was removed in the senate substitute that added the language creating the workgroup. Given such contextual information the workgroup concluded that its focus should be requirements for parents seeking to obtain guardianship of their children.

Workgroup Findings

Based on their collective experience working with parents seeking to obtain guardianship of their incapacitated adult children the work group identified two main challenges within the guardianship appointment process: the cost of legal counsel for petitioners and a lack of education for stakeholders on alternatives to guardianship. Additionally, the work group reviewed information related to DBHDS’s current role in the development of educational programs related to the use of supported decision-making in Virginia, as well as the scope of Virginia’s guardianship system⁵.

Cost of Legal Counsel

If acting in good faith, the petitioner typically does not bear the cost-of-service fees or court costs including the cost of guardians ad litem and counsel for the respondent, however they do often bear the cost of their own counsel. The fees for the guardian ad litem and counsel for the respondent are set by the court and included in the costs of the proceeding⁶. If the court finds that the petition was brought in good faith the court will order that the petitioner is reimbursed from the estate of the respondent for “all reasonable costs and fees” regardless of whether or not a guardian is appointed⁷. In such cases “reasonable costs and fees” include the cost of the

⁴ JLARC, 2021, p. i

⁵ See Appendix B for Definitions

⁶ Code of Virginia § 64.2-2003; § 64.2-2006

⁷ Code of Virginia § 64.2-2008

petitioner's counsel in addition to the fees for the guardian ad litem, counsel for the respondent and other court costs. However, if the respondent is determined to be indigent, the court costs, including the cost of the guardian ad litem and counsel for the respondent, are paid for by the Commonwealth, but the cost of the petitioner's counsel is not covered⁸.

In cases where parents are petitioning for guardianship of their adult children, the respondent is typically indigent. Therefore, most parents petitioning for guardianship of their adult children are responsible for all costs of retaining counsel for themselves regardless of their ability to pay. There is no data publicly available regarding the current average cost of counsel for petitioners, as such counsel is retained privately by the individual seeking to obtain guardianship or conservatorship. The cost of counsel to the petitioner can vary significantly by geographic region and the complexity of the individual case.

Lack of Education on Alternatives to Guardianship

Based on their collective experience working with these populations, the workgroup concluded that a lack of awareness among parents and other stakeholders of less restrictive alternatives to guardianship has led to unnecessary guardianships and associated financial burdens. This lack of awareness has also led to individuals with ID/D being denied the ability to make some or all of their own decisions and access support in arrangements that are less restrictive than guardianship. Such less restrictive alternatives to full guardianship include the use of limited guardianship, supported decision making agreements, authorized signers on financial accounts, joint accounts, trusts, powers of attorney, representative payees, and advance directives⁹¹⁰. Stakeholders for whom increased education and training on less restrictive alternatives are needed include but are not limited to parents, individuals with intellectual and developmental disabilities, guardians ad litem, attorneys representing petitioners, judges, capacity evaluators, K-12 educators, and financial managers. Communication barriers can also limit parents' ability to seek legal counsel and access educational materials on the guardianship process and alternatives to guardianship. Individuals who are most impacted include those with low English proficiency, low literacy, or who are deaf or hard of hearing.

DBHDS's Current Role in Supported Decision-Making in Virginia

Virginia studied supported decision-making in 2014, 2019, and again in 2020. Supported decision-making is employed by most people in everyday situations and is not a legally binding process, rather it serves as a less restrictive alternative that can reduce the over utilization of substituted decision making and improve the overall quality of an individual's life. Supported Decision-Making Agreements (SDMAs) provide a way for individuals to document when they want support with making decisions, how they want to receive that support, and who they want to support them.

Chapter 232 of the 2021 Acts of Assembly (House Bill 2230) directs the DBHDS to create a SDMA template for individuals with intellectual and developmental disabilities to use, develop and provide education regarding the development and use of SDMAs, develop information and protocols related to preventing, identifying, and addressing abuse and exploitation of individuals using SDMAs, and to collect data regarding the use of SDMAs in Virginia. As provided for in

⁸ Code of Virginia § 64.2-2008

⁹ Virginia Wings. "Options in Virginia to Help Another Person Make Decisions: Choices Less Restrictive than Guardianship and Conservatorship". Virginia Working Interdisciplinary Network of Guardianship Stakeholders. (June 2021).

¹⁰ See Appendix C Virginia's Continuum of Decision Making Supports

the 2021 Special Session I Chapter 552 budget, DBHDS created a Supported Decision-Making Community Resource Consultant Lead (SDM CRC Lead) position within the Office of Provider Development. The position was filled in December 2021.

Since then, the SDM CRC Lead organized a workgroup made up of stakeholders throughout Virginia. The workgroup met 9 times over the course of 7 months to identify the goals of SDMA in Virginia, possible barriers and how to address them, devise an educational and training campaign, and ultimately create the Virginia SDMA template and supplemental documents that are currently available for use by Virginians with intellectual and developmental disabilities. The SDM CRC Lead continues to provide ongoing education, training, and outreach to all target populations identified in Chapter 232 of the 2021 Acts of Assembly (individuals with intellectual and developmental disabilities and their family members, individuals interested in serving as supporters, and members of the medical, legal, and financial professions and other individuals who provide services to individuals with intellectual and developmental disabilities).

Scope of Virginia’s Guardianship System

Aggregated data on the number of parents annually petitioning for and obtaining guardianship of their adult children currently does not exist. The closest category of classification that exists within data that has been aggregated is “family or friend”. Determining how many petitions were made by parents and how many parents were appointed as guardians would require reviewing each petition submitted and order of appointment issued statewide within the desired time period of analysis.

For the purposes of this report, data on the number of petitions and appointments of guardians who are “family or friend” can give a broad approximation of the population who may be impacted by the barriers identified and recommendations proposed. The 2021 Joint Legislative and Audit Review Commission (JLARC) report on Improving Virginia’s Adult Guardian and Conservator System included an analysis of data from the Office of the Executive Secretary Case Management System from FY2016 to March of FY2021¹¹. JLARC found that out of a total of 9,078 petitions filed, 66 percent were filed by “family or friend” of the respondent. Of the 9,078 petitions filed, 82 percent resulted in the appointment of a full guardian¹². Annual totals for petitions and appointments of guardians were stable from FY2016 through the start of the COVID-19 pandemic in March 2020 with a high of 2,061 petitions and 1,661 appointments in 2018 and a low of 1,819 petitions and 1,453 appointments in 2017¹³.

Using data from the Department for Aging and Rehabilitative Services (DARS), JLARC estimated that in FY20 there were approximately 12,000 individuals under guardianship in the Commonwealth. Of these individuals 8,830 (73%) had a guardian to adult ratio of one to one¹⁴. Although not a direct measure of the number of guardians who are family or friends of the individual under their care, one to one ratios are most likely to occur in guardianships within this category.

¹¹ See Figures 1 & 2

¹² JLARC, 2021, p. 5

¹³ JLARC, 2021, p. 6

¹⁴ JLARC, 2021, p. 10

Figure 1.

Majority of petitioners are family members (FY16 to FY21)¹⁵

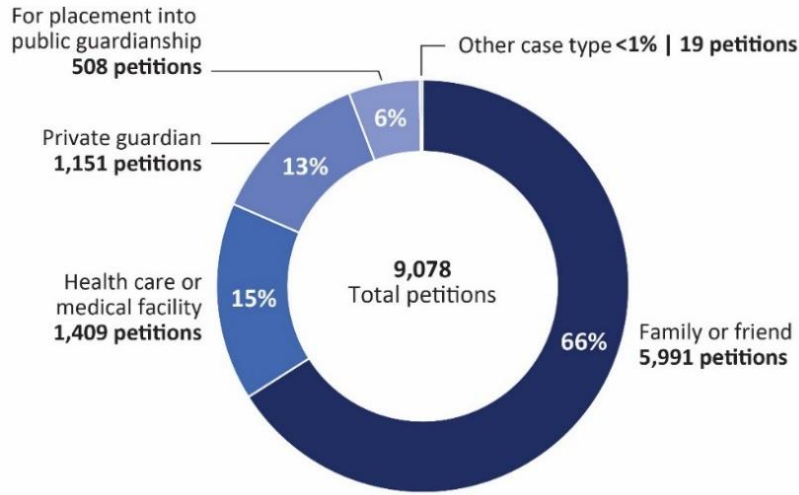
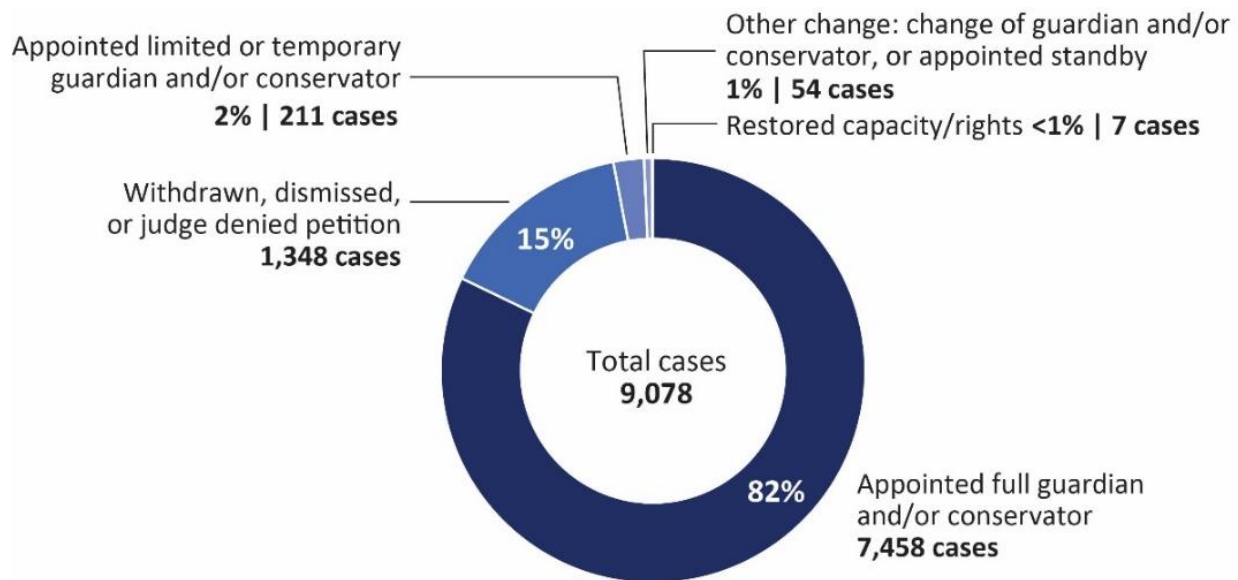


Figure 2.

Most cases result in a full guardian and conservator appointment¹⁶



¹⁵ SOURCE: JLARC staff analysis of Office of the Executive Secretary Case Management System FY16 to March of FY21. Excludes Alexandria and Fairfax court data.

NOTE: Petitions for placement into public guardianship include those initiated by local departments of social services, Community Services Boards (CSB), Behavioral Health Authorities (BHAs), or health care providers; as well as petitions by public guardianship provider organizations to transfer guardianship of an adult they serve from their private program into the public program or to seek restoration of an adult's rights. Public guardianship provider organizations themselves do not petition the court to initially find an adult incapacitated and to be placed under guardianship. An adult's family or a care provider such as a hospital may use a private guardian (typically an attorney) to serve as the petitioner and ultimately serve as the guardian.

¹⁶ SOURCE: JLARC staff analysis of Office of the Executive Secretary Case Management System FY16 to March of FY21. Excludes Alexandria and Fairfax court data.

Virginia’s Current Guardianship and Conservatorship Process

Filing of the Petition for Guardianship or Conservatorship – Anyone may file a petition with a Virginia circuit court stating that a Virginia resident needs a guardian or conservator to manage some or all of their affairs. A local or state governmental agency may also file¹⁷.

The process for petitioning for guardianship or conservatorship is the same irrespective of the relationship between the petitioner and the respondent, with the exception that a parent may file a petition up to six months prior to the respondent’s 18th birthday¹⁸.

An evaluation report 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” must be provided by the petitioner prior to the hearing on the petition¹⁹.

A notice of hearing, a copy of the petition, and a copy of the order appointing a guardian ad litem (discussed below) must be served to the respondent by the guardian ad litem. A copy of the notice and petition must be mailed at least 10 days before the hearing by the petitioner to all adult individuals and entities whose names and addresses appear in the petition²⁰.

Appointment of the Guardian ad Litem – When a petition for guardianship or conservatorship is filed the court must appoint guardian ad litem to represent the interests of the respondent²¹. The guardian ad litem must advise the respondent of their rights, recommend legal counsel for the respondent if the guardian ad litem believes it necessary, notify the court if the respondent requests counsel, and investigate the petition and evidence, requesting additional evaluation if necessary. The guardian ad litem must file a report with the court that includes, among other requirements, their determination of whether a guardian or conservator is needed, the extent of the duties and powers of the guardian or conservator, and the propriety and suitability of the individual selected as guardian or conservator. The report must also contain explanations for any decision not to recommend the appointment of counsel for the respondent, determination that a less restrictive alternative to guardianship or conservatorship is not advisable, or determination that the appointment of a limited guardian or conservator is not appropriate.

Hearing on Petition to Appoint – The court must conduct a hearing within 120 days from the filing of the petition²². The court shall consider the limitations of the respondent, the development of the respondent’s maximum self-reliance and independence, the availability of less restrictive alternatives, including advance directives, supported decision-making agreements, and durable powers of attorney, the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse, the actions needed to be taken by the guardian or conservator, the suitability of the proposed guardian or conservator, and the best interests of the respondent.

NOTE: Fairfax and Alexandria circuit courts’ record keeping systems are separate from the Office of the Executive Secretary’s Case Management System. Fairfax and Alexandria data does not indicate the specific outcome of a guardianship trial. Therefore, these localities are not included in the analysis of court case outcomes.

¹⁷ Code of Virginia § 64.2-2001, 64.2002

¹⁸ Code of Virginia § 64.2-2001

¹⁹ Code of Virginia §64.2-2005

²⁰ Code of Virginia § 64.2-2004

²¹ Code of Virginia §64.2-2003

²² Code of Virginia § 64.2-2007

Order of Appointment – If the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court will enter an order of appointment that, among other requirements, must state the nature and extent of the person’s incapacity, the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself and manage property to the extent he is capable, specify whether the appointment is limited to a specified length of time, and specify legal disabilities if any of the respondent²³.

Qualification – After the Judge signs the Court Order of Appointment, the petitioner must formally qualify before the Clerk of the Circuit Court where the Order of Appointment was entered. The Clerk shall then promptly forward a copy of the order appointing a guardian to the local department of social services in the jurisdiction where the respondent then resides and to the Department of Medical Assistance Services²⁴.

Recommendations

1. Code requirements for parents seeking to obtain guardianship of their children should not be changed

Background: Currently, the statutorily defined process for parents to obtain guardianship of their adult children is the same as any other individual petitioning for guardianship, with the exception that parents may petition for guardianship up to six months before their child’s 18th birthday²⁵. While some protections may appear from the perspective of petitioners to be barriers, they are in fact essential to the preservation of fundamental constitutional rights of individuals with disabilities. There was a strong consensus within the workgroup that the current Code requirements for obtaining guardianship are necessary safeguards to protect the civil rights of individuals with intellectual and developmental disabilities, regardless of their relationship to the individual petitioning for guardianship.

Recommendation: The workgroup does not recommend any further procedural exceptions be made within the Code for parents seeking to obtain guardianship of their adult children.

Fiscal Impact: None

2. Change Code language to expand the Commonwealth’s coverage of legal costs associated with guardianship filing

Background: The current provisions in Code to provide financial relief are not sufficient to address parents’ cost of legal counsel. Current code language allows the petitioner to be reimbursed from the estate of the respondent for the petitioner’s cost of legal counsel. However, this is not useful in cases where the respondent is a coming-of-age minor who has no estate or whose estate is the same as his or her parents, who are the petitioners. It should also be noted that costs of council for respondents or petitioners seeking to remove guardianships are not currently

²³ Code of Virginia § 64.2-2009

²⁴ Code of Virginia § 64.2-2011

²⁵ Code of Virginia § 64.2-2001

covered by the Commonwealth. Such costs may pose a barrier to removing guardianships when they are not necessary.

Recommendation: The workgroup recommends that the General Assembly amend the Code to include the petitioner’s cost of legal counsel when the petitioner is the parent of the respondent, and the respondent is found to be indigent. It is recommended that the Commonwealth also cover legal costs incurred by respondents seeking to remove guardianships they are under, as well as those of petitioners seeking to remove guardianships when they are the next-of-kin to the individual under guardianship, and the respondent is found to be indigent.

Fiscal Impact: Further practical and procedural analysis as well as financial analysis will be needed before this recommendation may be implemented²⁶. One such consideration that requires further analysis is whether the Commonwealth’s recommended expanded coverage of legal costs should mirror the current process for coverage of respondents’ costs of counsel or if another procedure should be developed. Resources would also be required for sourcing and analyzing existing and new data to estimate how many guardianship cases fit eligibility criteria of this recommendation to calculate the fiscal impact.

Although it has not been obtained at the writing of this report, data likely exists for the number of guardianship cases in which the respondent was found to be indigent. Data does not currently exist on the average cost of legal counsel for petitioners who are parents seeking to obtain guardianship of their children. Such costs will vary widely by geographic location and complexity of the case. Additional analysis would be needed to determine if legal fees paid by the Commonwealth for respondents’ counsel may be used to estimate the potential cost of petitioners’ counsel. While there is data on the number of cases in which capacity rights were restored (seven between FY 2016 and FY 2021), a source of consolidated statewide data on the number of cases in which capacity restoration was sought has not been identified at the writing of this report. It should also be considered that the financial barrier that legal costs pose to individuals seeking capacity restoration may also be suppressing this number. Finally, as stated previously, there is currently no consolidated statewide data for the number of parents who petition for guardianship of their children each year. The closest category for identifying the relationship between the petitioner and the respondent for which statewide data is available is “family or friend”²⁷.

3. Expand availability of educational materials on less restrictive alternatives to guardianship

Guardianship for individuals with intellectual and developmental disabilities is frequently viewed as the primary tool for long-term care planning instead of less restrictive alternatives, such as supported decision-making²⁸. Guardianship, while needed by some individuals, is the most restrictive option available, and therefore, it is appropriate that there are safeguards in place for individuals with disabilities when guardianship is being considered. While DBHDS, as well as organizations such as the Arc of Virginia and the disAbility Law Center of Virginia, already provide education regarding alternatives to guardianship, continuing to expand the availability of educational materials and provide training is critical to ensuring that all stakeholders, including parents, individuals with intellectual and developmental disabilities, guardians ad litem,

²⁷ JLARC, 2021

²⁸ Kohn, Blumenthal, and Campbell. “Supported Decision-Making: A Viable Alternative to Guardianship?” Penn State Law Review. (Apr 2013).

attorneys representing petitioners, judges, medical evaluators, educators, and financial managers have a clear understanding of less restrictive alternatives. Additionally, information about how to contact or refer individuals to these professionals for more information will be important for all stakeholders.

3A. Equitable Access

Background: To ensure fully informed choice, steps should be taken to ensure equitable access to educational materials, especially for individuals most likely to face communication barriers such as those with low English proficiency, low literacy, or who are deaf or hard of hearing.

Recommendation: Educational material should be made widely available in multiple formats. The material should be available online through a website that is compliant with the Americans with Disabilities Act (ADA) and compatible with screen readers. Written information should be formatted in a manner that is easily readable and in plain language. Additionally, all information, both online and printed, should be available in multiple languages to include English and Spanish, at a minimum.

Fiscal Impact: Funding from the General Assembly would be needed to update state agency websites to meet ADA standards and to translate materials into multiple languages. Ongoing funds would be needed to ensure that the websites are updated, as ADA standards change, and that new materials are translated as they are created. The agency responsible for overseeing this and the specific state website that is impacted is at the discretion of the General Assembly. The average cost of these updates ranges from \$3,000-\$5,000²⁹. And operations and maintenance can cost anything from \$500-\$1,000 per month depending on the size and scope of the website³⁰. The number of websites needing these updates can be multiplied by the cost to determine fiscal impact. If it is uncertain which websites need to be updated there are ADA compliance audits which start around \$1,500, however these audits do not make any of the changes and instead only determine what changes are needed³¹.

3B. Parents and Family Members

Background: The workgroup specifically focused on the educational needs of parents and family members of individuals with intellectual and developmental disabilities. Data from 2021 shows that in Virginia, the majority (66%) of guardianship petitions are brought forward by a family member, and most result in the court appointing the family member as the legal guardian³². Additionally, nearly one-third of guardianships appointed in FY2020 (30.9%) were for individuals between the ages of 18 to 29, indicating that a significant proportion of guardianships begin during young adulthood³³. While DBHDS is currently providing education on supported decision-making and Virginia's efforts to expand the use of supported decision-making agreements, more effort needs to be made by other state entities that are part of the guardianship process.

²⁹ Bachmeier, Kristen. (May 2019). "How Much Does ADA Website Compliance Cost?" Atilus. <https://atilus.com/ada-website-compliance-cost/#:~:text=Again%2C%20the%20cost%20to%20make,how%20many%20pages%20there%20are>.

³⁰ Bachmeier, 2019

³¹ Bachmeier, 2019

³² JLARC, 2021, p. 5

³³ Department for Aging and Rehabilitative Services PeerPlace Guardianship Data, FY2020

Recommendation: The workgroup recommends providing education for parents at the time a guardianship is established regarding what future planning should occur and when a new guardian should be appointed. This information could reduce the number of individuals deemed legally incapacitated with no legal guardian, due to their guardian being deceased with no backup plan established. Additionally, developing and implementing education and training for parents about options for supporting their children when they are no longer able to, could provide an alternative path for parents to utilize besides guardianship.

Fiscal Impact: The agencies responsible for overseeing this are at the discretion of the General Assembly. Fiscal analysis will be needed to determine the cost if any of developing and distributing such materials.

Depending on the amount of educational materials and scope of training the cost can vary for this item. If management and distribution of these training and educational materials could be managed with current staffing, initial funding of approximately \$5,000 could be identified to begin the process of developing and distributing training/educational materials. Fiscal impact could then be reassessed after initial implementation. This allocation would be consistent with what is allocated for supplies in program budgets within DBHDS Central Office. If most materials can be accessed through an online platform, then this could reduce the on-going costs of production and distribution. It would also be recommended to look at what other states might be doing already towards this initiative and utilize existing resources.

3C. Capacity Evaluators

Background: Currently, petitioners are required to provide the court with a report evaluating the condition of the respondent 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”³⁴. Guardians are also required to investigate the petition and evidence and request additional evaluations if necessary³⁵. There was concern amongst members that there is a gap between the legal definition of capacity and how capacity is interpreted and assessed by medical practitioners, and that such individuals may not fully understand how their evaluations are interpreted by the court. Additionally, doctors conducting capacity evaluations must understand less restrictive alternatives to guardianship, such as supported decision-making, and how these options can increase a person’s capacity. Case studies provide a variety of examples of the wide spectrum of support needs by those with intellectual and developmental disabilities, as well as alternative options for receiving support with making decisions, beyond full guardianship.

Recommendation: The workgroup recommends incorporating case studies in educational programming and materials provided to medical professionals conducting capacity evaluations. Evaluators can reference these examples to aid in their determination of whether or not someone has the capacity and what level of support is needed.³⁶

³⁴ Code of Virginia §64.2-2005

³⁵ Code of Virginia §64.2-2003

³⁶This recommendation aligns with the directives of Chapter 232 of the 2021 Acts of Assembly (House Bill 2230), to develop and provide education regarding the use of Supported Decision Making Agreements to individuals with intellectual and

Fiscal Impact: Partnerships between state agencies and advocacy groups such as DBHDS, DARS, The disAbility Law Center of Virginia (dLCV), and The Arc of Virginia could assist with compiling a wide array of case studies. Additionally, partnerships with groups such as VCU's Partnership for People with Disabilities, could assist with disseminating information and providing education, as they have existing educational programs designed for medical providers. Fiscal analysis will be needed to determine the cost if any of developing and distributing such materials.

3D. Judges

Background: Education to judges regarding alternatives to guardianship and recommendations from the Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) 2020 Guardianship Monitoring pilot program in Arlington was provided at the 2022 Judicial Conference of Virginia^{37 38}. The agenda for judicial conferences is determined by the Judicial Education Committee of the Judicial Conference of Virginia. Judicial education recommendations may be made to the Educational Services Department in the Office of the Executive Secretary to be presented to the Judicial Education Committee. In determining whether a particular topic should be included in future judicial conference programs, the committee is likely to consider whether the same topic has been presented recently.

Recommendation: The workgroup recommends that judges continue to receive education and training on how the current legal definition of capacity can be interpreted while taking into consideration supported decision making as a least restrictive alternative to guardianship and conservatorship.

Fiscal Impact: With the continued support and education from WINGS, in collaboration with DBHDS, additional trainings and education focused on judges would have a minimal fiscal impact.

3E. Local Departments of Social Services

Background: Local departments of social services (LDSS) serve as a source for referrals for petitions for guardianship for individuals with intellectual and developmental disabilities who are aging out of foster care but continue to need support in some manner. However, it is unclear as to whether or not other alternatives are explored prior to the petition for guardianship for this population.

Recommendation: The workgroup recommends that training for staff at LDSS be developed regarding best practices for providing continued support for individuals with intellectual and developmental disabilities aging out of foster care in the least restrictive arrangement possible. The Virginia Department of Social Services (VDSS) in collaboration with DBHDS may be a source of information and training for local departments.

developmental disabilities, their family members, and members of any profession that provide services to individuals with intellectual and developmental disabilities, including those in the fields law.

³⁷ "Monitoring Pilot Program" Impact Report". Working Interdisciplinary Networks of Guardianship Stakeholders. (September 2021).

³⁸ "Oft Overlooked & Important Considerations in the Lifespan of an Incapacitated Adult Case". Department of Educational Services, Office of the Executive Secretary, Supreme Court of Virginia. (2022).

Fiscal Impact: The development of partnerships between LDSS, VDSS, and DBHDS could reduce the fiscal impact of researching and developing educational and training materials. However, VDSS would need to assess the costs involved in developing and conducting the training for LDSS staff. Funds from the General Assembly would be required to cover costs that cannot be absorbed by VDSS with current staff.

4. Enhance efficacy of capacity evaluations by creating a standardized template

Background: As stated previously, the Code of Virginia mandates that a report evaluating the condition of the respondent be filed with the court, and that such a report be prepared by “one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of physical or mental conditions of the respondent as alleged in the petition”³⁹. Requirements for what must be contained in the report submitted by the evaluator are broad⁴⁰.

The Code does not provide specific guidance for the method of evaluation or assessment that should be used or require the evaluator to include a description of their methods in the report. It should also be noted that even though such evaluations are typically used in guardianship hearings to determine an individual’s capacity, the term capacity is not used or defined in the Code section defining the requirements of the evaluation report.

The workgroup is concerned that this lack of standardization in evaluation reporting has resulted in ambiguity and inconsistencies in guardianship hearings. Improving the evaluation process will help to ensure that individuals with intellectual and developmental disabilities are supported by the least restrictive means possible. It will likely also reduce the number of parents who need to go through the time-intensive and financially burdensome process of obtaining guardianship of their adult child.

Recommendation: The workgroup recommends that the current process for evaluating capacity be reformed to reduce subjectivity and enhance the accuracy of the assessment. Awareness of and access to less restrictive alternatives could be enhanced by creating a standardized template for capacity evaluation. The legal definition of capacity should be visible on the form for the practitioner’s reference while conducting evaluations. In addition, the form should contain options for identifying areas of capacity and limited capacity and the opportunity to recommend less restrictive alternatives to full guardianship including supported decision-making agreements. Such a template may be piloted for statewide usage in future years.

Fiscal Impact: The agencies responsible for overseeing this are at the discretion of the General Assembly. Further fiscal analysis would be needed to determine the cost of developing and distributing such documents.

5. Create language accessible durable power of attorney forms

Background: The Commonwealth currently does not have any standard documents or forms for Durable (general) Power of Attorney. The lack of such standardized forms has led financial institutions and other entities to require individuals to complete their own versions of such forms.

³⁹ Code of Virginia §64.2-2005

⁴⁰ See Appendix D Requirements for Reports Evaluating the Condition of the Respondent

The duplicative nature of this system can be burdensome for individuals with intellectual and developmental disabilities and their supporters.

Recommendation: The workgroup recommends the development of easy to understand Durable (general) Power of Attorney documents and forms. Documents should be written using plain language while also ensuring that the documents hold legal authority. Plain language documents are important for ensuring accessibility for individuals with low English literacy. Such populations may include individuals for whom English is not a primary language and individuals with intellectual and developmental disabilities as well as others. This recommendation responds to the need identified by the workgroup to make less restrictive alternatives to guardianship more accessible.

Fiscal Impact: The agencies responsible for overseeing this are at the discretion of the General Assembly. Further fiscal analysis would be needed to determine the cost of developing and distributing such documents. While Power of Attorney templates already exist online and are usually free, creating a standardized language accessible form will require further research. Accessible POA forms created in other states, by advocacy groups, etc. should be explored further and may reduce the cost of developing a new form.

Conclusion

The workgroup was directed to consider issues related to requirements for parents seeking to obtain guardianship of their adult children with intellectual and developmental disabilities. The workgroup identified legal costs incurred by parents when they petition for legal guardianship and lack of awareness of less restrictive alternatives to guardianship as primary barriers that parents face when planning long term support for their adult children. The workgroup recommends (i) preserving current legal requirements for parents seeking to obtain guardianship of their adult children (ii) amending code language to cover the costs of legal counsel both for parents petitioning to obtain guardianship of their adult children and individuals under guardianship and their next of kin seeking to remove guardianships, (iii) increasing investments in accessible educational programming on less restrictive alternatives, (iv) enhancing the efficacy of capacity evaluations, and (v) creating language accessible durable power of attorney forms.

While this workgroup was directed to specifically consider the challenges faced by parents, the workgroup also feels that consideration should be given to the value of family and friends who are not parents of the individual who serve as their guardian. These individuals accept the same level of responsibility and provide the same level of support as parents when they are appointed guardians. Family and friends also serve the same vital role as parents in reducing the need for public guardians. It must be recognized that in cases where parents are serving as guardians, they frequently cannot fill this role for the entirety of the individual's life, and oftentimes rely on family and friends to take their place. Such considerations should be taken into account when developing policy to assist individuals seeking guardianship of their relative or friend.

Appendix A – Workgroup Participants

Department of Aging and Rehabilitative Services

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Joint Legislative Audit and Review Commission

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disAbility Law Center of Virginia

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Heidi Lawyer, Curriculum Support Specialist

The Arc of Virginia

Lucy Cantrell, Director of Information and Resources

Lucy Beadnell, Director of Advocacy for The Arc of NOVA

Virginia Academy of Elder Law Attorneys

Amy McCullough, Co-Chair of Public Policy Committee

Loretta Williams, Public Policy Committee Member

Virginia Association of Community Service Boards (VACSB)

Jennifer Faison, Executive Director

Virginia Association of Centers for Independent Living

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Virginia Network of Private Providers

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Virginia Poverty Law Center

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Appendix B – Virginia’s Current Guardianship and Conservatorship Process

Definitions

Definitions for the Guardianship and Conservatorship Process in Virginia are enumerated in Code of Virginia § 64.2-2000

Conservator: “means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." “

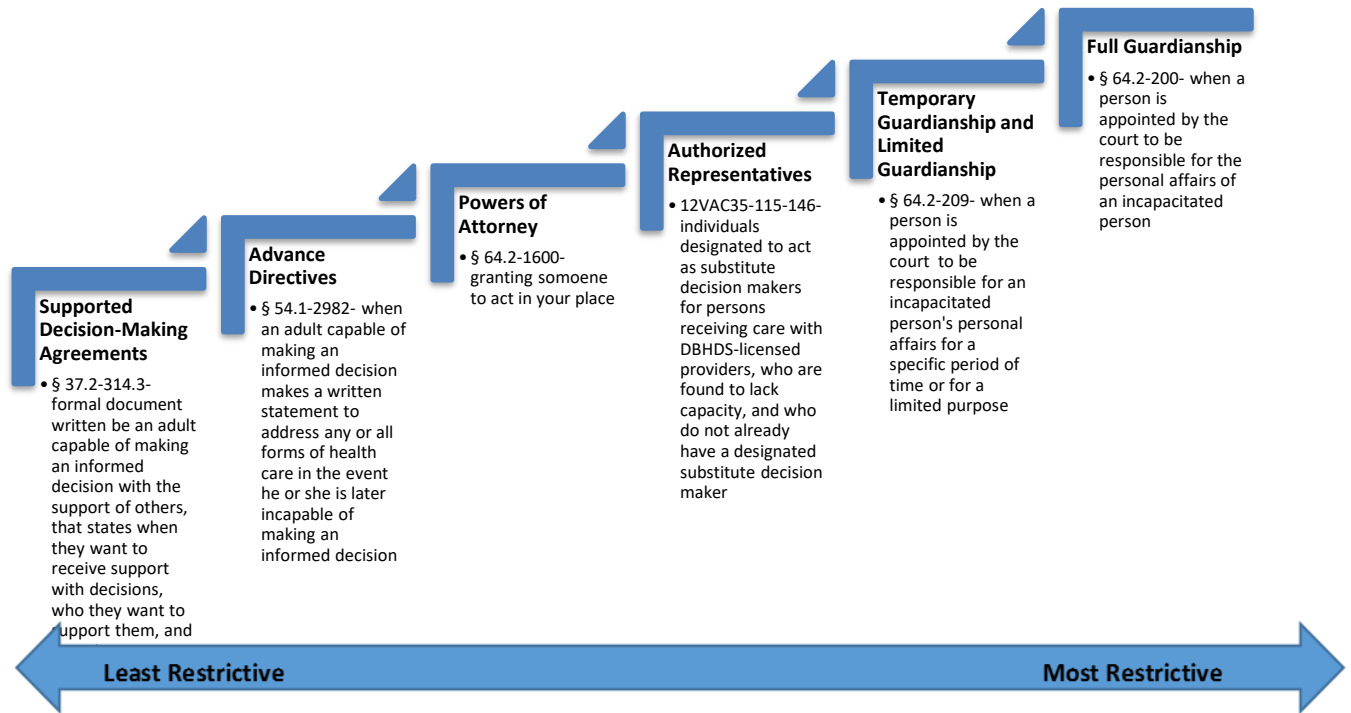
Guardian: “means a person appointed by the court who has the powers and duties set out in § 64.2-2019, or § 63.2-1609 if applicable, and who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian."

Guardian ad Litem: “An attorney appointed by the court to represent the interests of the respondent and whose duties include evaluation of the petition for guardianship or conservatorship and filing a report with the court pursuant to § [64.2-2003](#).”

Respondent: “The allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.”

The court may also appoint a limited guardian and/or conservator if it determines that a full guardianship or conservatorship is not needed. In such cases the limited guardian or conservator only has those responsibilities as specified in the order of appointment as detailed in § 64.2-2009.

Appendix C – Virginia’s Continuum of Decision-Making Supports⁴¹



⁴¹ Note: This chart was adapted from “Report on Senate Bill 585 Supported Decision Making Workgroup Report.” Department of Behavioral Health and Developmental Services. October 2020.

Appendix D – Requirements for Reports Evaluating the Condition of the Respondent

Virginia Code § 64.2-2005. Evaluation report.

A. A report evaluating the condition of the respondent shall be filed, under seal, with the court and provided to the guardian ad litem, the respondent, and all adult individuals and all entities to whom notice is required under subsection C of § [64.2-2004](#) within a reasonable time prior to the hearing on the petition. The report shall 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. If a report is not available, the court may proceed to hold the hearing without the report for good cause shown, absent any objection by the guardian ad litem, or may order a report and delay the hearing until the report is prepared, filed, and provided.

B. The report shall evaluate the condition of the respondent and shall contain, to the best information and belief of its signatory:

1. A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;
2. A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;
3. The date or dates of the examinations, evaluations, and assessments upon which the report is based; and
4. The signature of the person conducting the evaluation and the nature of the professional license held by that person.

C. In the absence of bad faith or malicious intent, a person performing the evaluation shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section.

D. A report prepared pursuant to this section shall be admissible as evidence in open court of the facts stated in the report and the results of the examination or evaluation referred to in the report, unless counsel for the respondent or the guardian ad litem objects.