

Restoration Cases: The Role of the Guardian Representative

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§ 64.2-2012. Petition for restoration, modification, or termination; effects

A. Upon petition by the incapacitated person, the guardian or conservator, or any other person or upon motion of the court, the court may (i) declare the incapacitated person restored to capacity; (ii) modify the type of appointment or the areas of protection, management, or assistance previously granted or require a new bond; (iii) terminate the guardianship or conservatorship; (iv) order removal of the guardian or conservator as provided in §64.2-1410; or (v) order other appropriate relief. The fee for filing the petition shall be as provided in subdivision A 42 of §17.1-275.

B. In the case of a petition for modification to expand the scope of a guardianship or conservatorship, the incapacitated person shall be entitled to a jury, upon request. Notice of the hearing and a copy of the petition shall be personally served on the incapacitated person and mailed to other persons entitled to notice pursuant to § 64.2-2004. The court shall appoint a guardian ad litem for the incapacitated person and may appoint one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the incapacitated person, as alleged in the petition, to conduct an evaluation. Upon the filing of any other such petition or upon the motion of the court, and after reasonable notice to the incapacitated person, any guardian or conservator, any attorney of record, any person entitled to notice of the filing of an original petition as provided in §64.2-2004, and any other person or entity as the court may require, the court shall hold a hearing.

C. An order appointing a guardian or conservator may be revoked, modified, or terminated upon a finding that it is in the best interests of the incapacitated person and that:

- 1. The incapacitated person is no longer in need of the assistance or protection of a guardian or conservator;**
- 2. The extent of protection, management, or assistance previously granted is either excessive or insufficient considering the current need of the incapacitated person;**
- 3. The incapacitated person's understanding or capacity to manage his estate and financial affairs or to provide for his health, care, or safety has so changed as to warrant such action; or**

4. Circumstances are such that the guardianship or conservatorship is no longer necessary or is insufficient.

D. The court shall declare the person restored to capacity and discharge the guardian or conservator if, on the basis of evidence offered at the hearing, the court finds by a preponderance of the evidence that the incapacitated person has substantially regained his ability to (i) care for his person in the case of a guardianship or (ii) manage and handle his estate in the case of a conservatorship.

In the case of a petition for modification of a guardianship or conservatorship, the court shall order (a) limiting or reducing the powers of the guardian or conservator if the court finds by a preponderance of the evidence that it is in the best interests of the incapacitated person to do so, or (b) increasing or expanding the powers of the guardian or conservator if the court finds by clear and convincing evidence that it is in the best interests of the incapacitated person to do so.

The court may order a new bond or other appropriate relief upon finding by a preponderance of the evidence that the guardian or conservator is not acting in the best interests of the incapacitated person or of the estate.

E. The powers of a guardian or conservator shall terminate upon the death, resignation, or removal of the guardian or conservator or upon the termination of the guardianship or conservatorship.

A guardianship or conservatorship shall terminate upon the death of the incapacitated person or, if ordered by the court, following a hearing on the petition of any interested person.

F. The court may allow reasonable compensation from the estate of the incapacitated person to any guardian ad litem, attorney, or evaluator appointed pursuant to this section. Any compensation allowed shall be taxed as costs of the proceeding.

Virginia Code Sec. 64.2-2012 Petition for restoration, modification, or termination; effects (Virginia Statutes (2022 Edition))

Restoring someone to capacity is about EVIDENCE! The court is looking for facts to justify resorting an individual to capacity. As an attorney, this is the type of information I will need from an incapacitated person's legal guardian and/or conservator. When restoring an individual that is under a guardianship, I typically ask about the person's day to day activities and what they can perform on their own. Is the legally incapacitated person able to manage his/her activities of daily living (ADLs)? Can the person shower on their own? Can the person get themselves dressed or eat or use the toilet on their own? The lawyer will be relying on the guardian to provide this information.

Likewise, for conservatorships, the lawyer will need information (or facts) which support the court allowing an incapacitated person to take over their own affairs. Depending on the facts and circumstances, this can be more difficult to show to a court. An incapacitated person may be able

to complete their ADLs but is not mentally capable of handling their own affairs/finances. Questions which I typically ask are: is the incapacitated person responsible enough to handle his/her own money? Would the incapacitated person be capable of timely paying his/her own monthly expenses? Would the incapacitated person be put at risk if they are allowed to manage their own finances (think drug/alcohol abuse cases)? Restoring a person subject to a conservatorship carries with it a bit more of a higher bar (generally).

What a guardian should be prepared to do in court. Answer: testify. The court in any restoration case will want to hear from the appointed guardian and/or conservator. It is also important that the person to be restored attend the hearing. Remember, a restoration hearing is very fact driven and therefore, live testimony is extremely important. The guardian and/or conservator should be prepared to go into all the facts which they believe support the petition for restoration. The lawyer's role is to help facilitate the testimony and ensure the facts (or evidence) are meeting the legal requirements for restoration. The court may also have questions which will need to be addressed. Some cases are more difficult than others which further highlights the need for testimony from the guardian/conservator and the incapacitated (soon to be restored) adult.

Other considerations. If possible, it is always greatly helpful to have a medical professional do an assessment of the incapacitated adult. If the medical assessment shows that incapacitated person is medically capable of being restored, it is very good evidence to support a petition and the court will rely on it. Medical professionals can be licensed medical doctors, licensed clinical social workers, psychologists, etc. Any medical report which furthers the case for restoration is helpful and the court will want to know about it.

Once an individual who was previously found to be incapacitated is restored, the guardian and/or conservator may still have obligations. The most common is the obligation of a conservator to file a final accounting with the commissioner of accounts in the jurisdiction where they were previously appointed. This is commonly required by the court. The conservator will also need to turn over control of any assets it may hold for the restored individual to that individual. Upon the approval of the final accounting for the conservatorship, the fiduciary bond is released. The court order restoring an individual to capacity will list any further obligations a guardian/conservator may have after the hearing.

QUESTIONS?