

**“The Graying of America Increases the Need for  
Appointment of Guardians and Conservators”**

by

Glen M. Robertson, Esq.

Social scientists have been tracking the “graying” of America for quite some time since the leading edge of the post-World War II baby boom generation reached middle age approximately fifteen years ago. As the members of that generation have reached middle age, their parents have reached their senior years, causing both generations to confront the difficult issue of disabled or incompetent parents, family, or friends. For both generations, it is important to know what options are available to address this growing situation and there several.

Some measures can be taken before the onset of disability or incompetence. For example, every competent person should execute a durable general financial power of attorney, known as a “durable POA”. The durable POA enables the person creating it to appoint someone they trust to act as their attorney-in-fact in order to transact as much (or as little) of the grantor’s business as the grantor desires to include within it. The durable POA is extremely flexible and can limit authority to the performance of one particular act on behalf of the grantor, such as the sale of a piece of real estate or management of a particular account or, if the grantor desires, the durable POA can be drafted so broadly as to permit the attorney-in-fact to act on behalf of the grantor in all things and in all ways that the grantor would otherwise act for himself or herself. The flexibility of the durable POA and its proactive nature make it a desirable tool in addressing concerns about a person whose ability to conduct their own affairs is deteriorating while that person is still competent to be fully involved in the planning process.

It is important to keep in mind that, since a durable POA - - - particularly one without limitation - - - grants an attorney-in-fact so much power, it should only be given to someone

whom the grantor trusts, literally, with everything they own. Even then, it is an unfortunate fact of life that even the people we trust the most can let us down. In order to help protect the grantor of a durable POA, Virginia law grants any “interested” party the right to request an accounting from the attorney-in-fact to insure that the attorney-in-fact is performing his duties in the best interest of the grantor rather than acting out of self-interest.

In addition to a durable POA, everyone should execute a durable medical power of attorney, known as a “medical POA,” authorizing a trusted family member or friend to make medical decisions on behalf of the grantor in the event that the grantor is rendered unable to make such decisions. In the absence of a medical POA, a person unable to authorize their own medical treatment will leave a situation where family members must come to a consensus about such treatment. While this sounds fairly simple, experience has shown us that it is not. Family members often disagree about what medical treatment is appropriate and this disagreement heightens the family’s emotional toll in such a situation and may result in medical treatment which is not in keeping with what the now disabled person would have preferred be done or, just as importantly, not done on their behalf. In order to relieve family members of this potential conflict and to insure that your own choices concerning medical treatment are followed, you should discuss your desires and options with a qualified attorney as well as the person who is to be entrusted with the medical POA prior to execution of it.

Unfortunately, many people fail to execute durable POAs and medical POAs. Even some who do execute these documents sometimes end up in situations which might require the appointment of a guardian and/or conservator. For example, if the attorney-in-fact becomes incompetent or disabled (a not altogether unlikely occurrence if the attorney-in-fact is a spouse or sibling of similar age), or if the durable POA or medical POA is not broad enough to handle all situations, or in the event that the incompetent grantor of the durable POA or medical POA needs to have their legal rights taken away in order to protect them from unscrupulous people.

This last scenario is heartbreakingly commonplace among the developmentally disabled and senior citizens who are no longer able to realize that a family member or friend is now taking advantage of them. When such a situation arises and an incompetent's legal rights need to be taken from them for their protection, the only way this may be done is to petition a court where the incompetent lives and to demonstrate to that court by clear and convincing evidence that the person is legally incompetent.

The process of appointing a guardian and/or conservator for an incompetent person begins with the determination of whether a guardian (a person who will be responsible for the personal affairs of the incompetent, including making decisions regarding support, care, health and safety) and/or a conservator (a person to be responsible for managing the estate and financial affairs of the incompetent person) needs to be appointed and, if so, who should be appointed to serve these roles. The same person is typically appointed both guardian and conservator if both are requested of the court, but these responsibilities can be split if that is deemed advisable. Additionally, the court may appoint co-guardians and/or co-conservators where that appears to be the most appropriate decision.

As a practical matter, this guardianship/conservatorship process is much easier and much quicker if all family members and the incompetent person are consulted and understand the process and agree on the appointment of the guardian and/or conservator. Regrettably, it is not uncommon for some of the parties involved, including the incompetent, to disagree with the need for a guardian. It is in these circumstances where the process becomes much like any other adversarial proceeding in the courts and, like other adversarial proceedings, the process may take several months before the court can hear the case and the cost of the process can become quite substantial as each party hires attorneys and expert witnesses to present their case.

There are several things which need to be done prior to the filing of any petition for guardianship/conservatorship in Virginia.

1. First, the person seeking the appointment of a guardian/conservator needs to discuss the incompetent person's medical condition with the incompetent's physician and obtain a written medical opinion that the person is incompetent. This medical evaluation is expressly called for by the Virginia code and the opinion is required to include a description of the nature, type and extent of the person's incapacity, a diagnosis or assessment of the person's mental and physical condition, including an evaluation of their ability to learn self-care skills, adaptive behavior and social skills and a prognosis for their improvement. If this report is not obtained, the court will likely order such an evaluation to be prepared before rendering a decision on the guardianship/conservatorship petition. While it is legally possible for the court to consider a petition without this medical opinion, practically speaking, courts are reluctant to do so.
2. Also, one must determine the appropriate scope of the guardianship/conservatorship. The person filing a petition needs to determine whether there are things the incompetent can still perform for themselves. If there are, the order appointing the guardian/conservator should reserve those specific rights to the incompetent so that the action taken is limited to that which is clearly necessary for the benefit of the incompetent.
3. Next, gather information about the incompetent person, such as their full name, social security number, height, weight, hair and eye color, means of communication including natural language, their monthly income, list of assets, list of debts, list of relatives and their addresses and where the incompetent will live if the petition is successful and what ongoing treatment plan is to be recommended to the court.

Once you have assembled all of this information and provided it to your attorney, the petition is ready for filing. The attorney filing the petition will ask the court to appoint a guardian *ad litem* at the same time as the petition is filed. The guardian *ad litem* is usually a local

attorney whose job is to be an impartial voice in the process who will report to the court his or her findings after meeting with the incompetent, the family and the physician rendering the evaluation report. The guardian *ad litem* is also charged with providing the incompetent with a copy of the petition and notice of hearing on the petition and explaining the incompetent's rights in the process. The petitioner must serve the petition and notice to the incompetent and mail a notice of the hearing to their family at least seven days prior to any hearing on the petition or the court will have no jurisdiction to consider the petition.

At the hearing on the petition, the judge will often, though not always, hear the case in his or her chambers as opposed to open court. An in chambers hearing is not required but many judges feel it appropriate due to the sensitive nature of the proceedings and to protect the privacy and dignity of the incompetent person. If the judge agrees to the appointment of a guardian/conservator, an order will be entered specifying the exact terms of the guardianship/conservatorship. The petitioner must then have the order recorded by the clerk and qualify as guardian/conservator before the probate clerk of that court.

As a part of the qualification process, the probate clerk will provide the newly appointed guardian/conservator with a list of duties, including the filing of an inventory (a list of the incompetent's assets and their values) and an accounting. The guardian/conservator files these documents with the Commissioner of Accounts for that jurisdiction. Finally, as the last step of qualification, the newly appointed guardian will be required to post a bond with a corporate surety. Both the bond's value and the cost of obtaining it are based on the value of the incompetent's assets.

While this article is intended to familiarize the reader with the basic process for appointment of a guardian/conservator, it is critical that you discuss the process with a qualified attorney prior to undertaking it. The attorney can help fully explain the process, prepare the necessary petitions and orders and help you fulfill your responsibilities as guardian and/or conservator. At Payne, Gates, Farthing & Radd, P.C., our experienced attorneys are qualified

to assist you in all aspects of the guardianship and conservatorship process. If you have a loved one or friend who needs or might need a guardian and/or conservator appointed for them, please contact us and we will meet with you to answer your questions and assist you in each step of the process.

July, 2005



**Glen M. Robertson's** practice is concentrated in the areas of civil litigation. He has a broad range of trial practice experience in commercial and corporate litigation. He has represented business and institutional clients of all sizes from large public corporations to sole proprietorships, as well as private individuals.

Contact Information:

**Wolcott Rivers Gates**

Attorneys at Law  
One Columbus Center, Suite 1100  
Virginia Beach, VA 23462-6765  
Phone: 757.497.6633  
Fax: 757.497.7267

email: [grobertson@wolriv.com](mailto:grobertson@wolriv.com)

[www.wolcottiversgates.com](http://www.wolcottiversgates.com)

This article does not constitute legal advice. Recipients should consult their legal advisors prior to acting on any information set forth in this article.

Circular 230 Disclosure: This communication is not a tax opinion, and does not constitute tax advice. Pursuant to Internal Revenue Service regulations, this communication is not intended or written to be used by a taxpayer for the purposes of avoiding tax penalties that may be imposed on the taxpayer.

© Wolcott Rivers Gates 2008