

24104700D

SENATE BILL NO. 293

Offered January 10, 2024

Prefiled January 9, 2024

A *BILL to amend and reenact §§ 64.2-2019 and 64.2-2021 of the Code of Virginia, relating to guardianship and conservatorship; duties and powers of guardian and conservator; self-dealing prohibited.*

Patron—Roem

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2019 and 64.2-2021 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2019. Duties and powers of guardian.

A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of the incapacitated person.

A1. A guardian shall avoid all conflicts of interest and self-dealing, including all appearances of conflicts of interest and self-dealing, when addressing the needs of the incapacitated person to whom the guardian owes a fiduciary duty. For the purposes of this subsection (i) a conflict of interest arises when the guardian has a personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the incapacitated person, and (ii) self-dealing arises when the guardian seeks to take advantage of his position as guardian and acts for his own interests rather than for the interests of the incapacitated person.

Any sale or transaction that constitutes self-dealing shall be voidable by the court. A guardian may seek court authorization of a sale or transaction by filing a petition with the court.

For the purposes of this subsection, a sale or transaction entered into (i) prior to the appointment of such guardian or (ii) after a court authorizes such sale or transaction shall not constitute self-dealing.

B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance directive or durable power of attorney previously executed by the incapacitated person. A guardian may seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an advance directive, but the modification shall not in any way affect the incapacitated person's directives concerning the provision or refusal of specific medical treatments or procedures.

C. A guardian shall maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities and as needed to comply with the duties imposed upon him pursuant to the order of appointment and this section and any other provision of law. The guardian shall visit the incapacitated person as often as necessary and at least three times per year, with at least one visit occurring every 120 days. Except as otherwise provided in subsection C1, of the three required visits, at least two visits shall be conducted by the guardian. The guardian shall conduct at least one of such visits in person; the second such visit may be conducted by the guardian via virtual conference or video call between the guardian and incapacitated person, provided that the technological means by which such conference or call can take place are readily available.

The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. If a person other than the guardian conducts any such visit, he shall provide a written report to the guardian regarding any visit conducted by such person.

A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

C1. If for reasons outside the guardian's control the guardian cannot make an in-person visit to an

INTRODUCED

SB293

59 incapacitated person, then such visit may be conducted in person by an individual designated by the
60 guardian pursuant to subsection C. If either the guardian or such individual designated by the guardian
61 is unable to conduct an in-person visit, then such visit may be conducted virtually through electronic
62 means such as a virtual conference or video call, or, if such technological means are not readily
63 available, by telephone.

64 C2. In the event of a state of emergency or public health crisis in which a facility in which the
65 incapacitated person resides is not allowing in-person visitation, visitation requirements required pursuant
66 to subsection C may be met via a virtual conference or video call between the guardian and
67 incapacitated person, to the extent feasible for the facility to provide the technological means by which
68 such conference or call can take place. A telephone call shall meet the requirements of this subsection
69 only if such technological means are not readily available.

70 D. A guardian shall be required to seek prior court authorization to change the incapacitated person's
71 residence to another state, to terminate or consent to a termination of the person's parental rights, or to
72 initiate a change in the person's marital status.

73 E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in
74 decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A
75 guardian, in making decisions, shall consider the expressed desires and personal values of the
76 incapacitated person to the extent known and shall otherwise act in the incapacitated person's best
77 interest and exercise reasonable care, diligence, and prudence. A guardian shall not restrict an
78 incapacitated person's ability to communicate with, visit, or interact with other persons with whom the
79 incapacitated person has an established relationship, unless such restriction is reasonable to prevent
80 physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after
81 consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be
82 imposed pursuant to § 64.2-2019.1.

83 F. A guardian shall have authority to make arrangements for the funeral and disposition of remains,
84 including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains,
85 or some combination thereof, if the guardian is not aware of any person that has been otherwise
86 designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to
87 make arrangements for the funeral and disposition of remains after the death of an incapacitated person
88 if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to
89 determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make
90 the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next
91 of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral
92 service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune
93 from civil liability for any act, decision, or omission resulting from acceptance of any dead body for
94 burial, cremation, or other disposition when the provisions of this section are met, unless such acts,
95 decisions, or omissions resulted from bad faith or malicious intent.

96 **§ 64.2-2021. General duties and liabilities of conservator.**

97 A. At all times the conservator shall exercise reasonable care, diligence, and prudence and shall act
98 in the best interest of the incapacitated person. To the extent known to him, a conservator shall consider
99 the expressed desires and personal values of the incapacitated person.

100 B. Subject to any conditions or limitations set forth in the conservatorship order, the conservator
101 shall take care of and preserve the estate of the incapacitated person and manage it to the best
102 advantage. The conservator shall apply the income from the estate, or so much as may be necessary, to
103 the payment of the debts of the incapacitated person, including payment of reasonable compensation to
104 himself and to any guardian appointed, and to the maintenance of the person and of his legal
105 dependents, if any, and, to the extent that the income is not sufficient, he shall so apply the corpus of
106 the estate.

107 C. A conservator shall, to the extent feasible, encourage the incapacitated person to participate in
108 decisions, to act on his own behalf, and to develop or regain the capacity to manage the estate and his
109 financial affairs. A conservator also shall consider the size of the estate, the probable duration of the
110 conservatorship, the incapacitated person's accustomed manner of living, other resources known to the
111 conservator to be available, and the recommendations of the guardian.

112 D. A conservator stands in a fiduciary relationship to the incapacitated person for whom he was
113 appointed conservator and may be held personally liable for a breach of any fiduciary duty. Unless
114 otherwise provided in the contract, a conservator is personally liable on a contract entered into in a
115 fiduciary capacity in the course of administration of the estate, unless he reveals the representative
116 capacity and identifies the estate in the contract. Claims based upon contracts entered into by a
117 conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, or torts
118 committed in the course of administration of the estate may be asserted against the estate by proceeding
119 against the conservator in a fiduciary capacity, whether or not the conservator is personally liable
120 therefor. A successor conservator is not personally liable for the contracts or actions of a predecessor.

121 *D1. A conservator shall avoid all conflicts of interest and self-dealing, including all appearances of*
122 *conflicts of interest and self-dealing, when addressing the needs of the incapacitated person to whom the*
123 *conservator owes a fiduciary duty. For the purposes of this subsection (i) a conflict of interest arises*
124 *when the conservator has a personal or agency interest that can be perceived as self-serving or adverse*
125 *to the position or best interest of the incapacitated person, and (ii) self-dealing arises when the*
126 *conservator seeks to take advantage of his position as guardian and acts for his own interests rather*
127 *than for the interests of the incapacitated person.*

128 *Any sale or transaction that constitutes self-dealing shall be voidable by the court. A conservator*
129 *may seek court authorization of a sale or transaction by filing a petition with the court.*

130 *For the purposes of this subsection, a sale or transaction entered into (i) prior to the appointment of*
131 *such conservator or (ii) after a court authorizes such sale or transaction shall not constitute*
132 *self-dealing.*

133 *E. A conservator shall comply with and be subject to the requirements imposed upon fiduciaries*
134 *generally under Part A (§ 64.2-1200 et seq.) of this subtitle, specifically including the duty to account*
135 *set forth in § 64.2-1305.*