

# VIRGINIA ACTS OF ASSEMBLY -- 1997 SESSION

## CHAPTER 751

*An Act to amend and reenact §§ 37.1-128.02, 37.1-128.1, and 37.1-132 of the Code of Virginia, relating to compensation for guardians ad litem.*

[H 2027]

Approved March 22, 1997

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 37.1-128.02, 37.1-128.1, and 37.1-132 of the Code of Virginia are amended and reenacted as follows:**

§ 37.1-128.02. Proceedings in circuit courts to determine legal competency.

A. On petition of any person to the circuit court of a county or 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 facility or nursing home, convalescent home, state hospital for the mentally ill or other similar institution and such person because of mental illness or mental retardation is incapable of taking care of his person or handling and managing his estate, the petitioner shall give reasonable notice to such alleged incompetent person of the hearing and of his right to be present, and at least five days' notice by first-class mail to the proposed committee and at least three of the following persons in the following order of priority: a spouse, an adult son or daughter, a parent, an adult brother or sister, or other known relative. The court shall hold a hearing to determine if a committee should be appointed. If three of the above persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order. The petition shall state the names and addresses of all persons within the above classes entitled to notice of the proceedings and, where no member from any of those classes can be identified and reasonably located, the names and addresses of other known relatives. The petition shall also state the native language of the alleged incompetent person and identify any necessary alternative mode of communication of the notice. The notice shall be reasonably calculated to inform the alleged incompetent person of the time and place of the hearing, of his rights during the hearing as set forth in § 37.1-133.1, and of the legal rights which could be restricted as a result of the hearing. A copy of the petition, of any order directing that a comprehensive evaluation be conducted, and of the order appointing a guardian ad litem shall be attached to the notice. Prior to the hearing, the court may order the community services board or the community mental health clinic for the county or city in which the alleged incompetent person resides or, if applicable, the state facility or private hospital in which the alleged incompetent person is located, to prepare a comprehensive evaluation of the current condition of the alleged incompetent. Such evaluation may be based upon medical, psychiatric, psychological and social information taken for the purposes of this evaluation. Information compiled within the previous eighteen months, which assesses the alleged incompetent's physical, intellectual and functional abilities may also be considered. The local department of public welfare or social services for the county or city in which the alleged incompetent resides may be ordered to assist in preparing that portion of the comprehensive evaluation in which it has knowledge concerning the alleged incompetent. The reasonable costs of the evaluation may be taxed as part of the costs of the proceedings in the discretion of the court. In the absence of such a comprehensive evaluation, the court shall consider such other evidence as it may deem proper as to the abilities of the alleged incompetent person.

If, after considering such other evidence as is presented in the hearing, the court or jury, if one is requested, determines on the basis of clear and convincing evidence that the person is incompetent, the court shall appoint a committee for him. The court shall specify whether the person is incompetent because of mental illness or mental retardation.

No finding of incompetency shall be made unless the court finds that the person's inability to care for himself or handle and manage his affairs is total and that a finding of incapacity pursuant to § 37.1-128.1 or § 37.1-132 would not be appropriate.

B. The committee shall give such bond, either secured or unsecured, as may be required by the court and shall comply with all applicable provisions of Title 26.

On the hearing of every petition for appointment of a committee, a guardian ad litem shall be appointed to represent the interests of the person for whom a committee is requested, and he 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, in its discretion, waive all fees and court costs in connection with such proceedings. *If the adult subject of the petition is determined to be indigent, any such fees and costs shall be borne by the Commonwealth.* The alleged incompetent 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.

C. The person may present a petition for an appeal to the Supreme Court if he is adjudicated

incompetent because of mental illness or mental retardation. 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 adjudicated incompetent person.

§ 37.1-128.1. Appointment of guardian for person determined incapacitated because of mental illness or mental retardation.

A. On petition of any person to the circuit court of a county or 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 facility or nursing home, convalescent home, state hospital for the mentally ill or other similar institution and such person, by reason of mental illness or mental retardation, has become incapable, either wholly or partially, of taking care of himself or his estate, the petitioner shall give reasonable notice to such mentally ill or mentally retarded incapacitated person of the hearing and of his right to be present, and at least five days' notice by first-class mail to the proposed guardian and at least three of the following persons in the following order of priority: a spouse, an adult son or daughter, a parent, an adult brother or sister, or other known relative. The court shall hold a hearing to determine whether a guardian should be appointed. If three of the above persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order. The petition shall state the names and addresses of all persons within the above classes entitled to notice of the proceedings and, where no member from any of those classes can be identified and reasonably located, the names and addresses of other known relatives. The petition shall also state the native language of the alleged incapacitated person and identify any necessary alternative mode of communication of the notice. The notice shall be reasonably calculated to inform the alleged incapacitated person of the time and place of the hearing, of his rights during the hearing as set forth in § 37.1-133.1, and of the legal rights which could be restricted as a result of the hearing. A copy of the petition, of any order directing that a comprehensive evaluation be conducted, and of the order appointing a guardian ad litem shall be attached to the notice. Prior to the hearing, the court may order the community services board or the community mental health clinic for the county or city in which the alleged incapacitated person resides, or, if applicable, the state facility or private hospital in which the alleged incapacitated person is located, to prepare a comprehensive evaluation of the current condition of the person. Such evaluation may be based on medical, psychiatric, psychological and social information taken for the purposes of this evaluation. Information compiled within the previous eighteen months, which assesses the person's physical, intellectual and functional abilities may also be considered. The local department of public welfare or social services for the county or city in which the alleged incapacitated individual resides may be ordered to assist in preparing that portion of the comprehensive evaluation in which it has knowledge concerning the alleged incapacitated person. The reasonable costs of the evaluation may be taxed as part of the costs of the proceedings in the discretion of the court. In the absence of such a comprehensive evaluation, the court shall consider such other evidence as it may deem proper as to the abilities of the alleged incapacitated person.

If, after considering such evidence as is 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. In selecting a guardian, the court shall give due regard to the preferences of the incapacitated person. 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 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.

B. The guardian shall have the same powers, duties, and liabilities which pertain to committees and trustees appointed under § 37.1-128.02 or § 37.1-134, but such powers, duties, and liabilities shall be limited to matters within the areas where incapacity is determined. The guardian shall give such bond, either secured or unsecured, as may be required by the court and shall comply with all applicable provisions of Title 26.

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 guardian is requested, and he 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. *If the adult subject of the petition is determined to be indigent, any such fees and costs shall be borne by the Commonwealth.* The alleged incapacitated person shall be present at the hearing if so requested by the person or by the guardian ad litem representing the person.

If no person is 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.

C. 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.

D. The person may present a petition for an appeal to the Supreme Court if he 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.

## § 37.1-132. 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 facility or nursing home, convalescent home, state hospital for the mentally ill or other similar institution, that such person, by reason of impaired health or physical disability, has become mentally or physically incapable of taking care of himself or his estate, the petitioner shall give 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 is known, the proposed guardian and at least three of the following persons in the following order of priority: a spouse, an adult son or daughter, a parent, an adult brother or sister, or other known relative. The court shall hold a hearing to determine whether a guardian shall be appointed. If three of the above persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order. The petition shall state the names and addresses of all persons within the above classes entitled to notice of the proceedings and, where no member from any of those classes can be identified and reasonably located, the names and addresses of other known relatives. The petition shall also state the native language of the alleged incapacitated person and identify any necessary alternative mode of communication of the notice. The notice shall be reasonably calculated to inform the alleged incapacitated person of the time and place of the hearing, of his rights during the hearing as set forth in § 37.1-133.1, and of the legal rights which could be restricted as a result of the hearing. A copy of the petition, of any order directing that a comprehensive evaluation be conducted, and of the order appointing the guardian ad litem shall be attached to the notice. 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 is 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.

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. *If the adult subject of the petition is determined to be indigent, any such fees and costs shall be borne by the Commonwealth.* 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 is 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 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.