

VIRGINIA ACTS OF ASSEMBLY -- 1998 SESSION

CHAPTER 582

An Act to amend and reenact §§ 24.2-230, 24.2-232, 24.2-410, 37.1-134.6, 37.1-134.14, 37.1-134.15, 37.1-134.18 and 37.1-137.2 of the Code of Virginia, relating to guardians and conservators; election laws; commissioners of accounts.

[S 14]

Approved April 15, 1998

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-230, 24.2-232, 24.2-410, 37.1-134.6, 37.1-134.14, 37.1-134.15, 37.1-134.18 and 37.1-137.2 of the Code of Virginia are amended and reenacted as follows:

§ 24.2-230. Applicability of article; certain exceptions.

This article shall apply to all elected or appointed Commonwealth, constitutional, and local officers, except officers for whose removal the Constitution of Virginia specifically provides.

However, an appointed officer shall be removed from office only by the person or authority who appointed him unless he is sentenced for a crime as provided for in § 24.2-231 or is determined to be "mentally incompetent" as provided for in § 24.2-232. This exception shall not apply to an officer who is (i) appointed to fill a vacancy in an elective office or (ii) appointed to an office for a term established by law and the appointing person or authority is not given the unqualified power of removal.

§ 24.2-232. Vacancy occurring when officer determined "mentally incompetent" (incapacitated).

A person who is determined to be incapacitated in a judicial proceeding as provided for in Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1 shall be deemed for purposes of Article II, Section 1 of the Constitution of Virginia and this title to be "mentally incompetent" as that term is used in those provisions. The office of any person who is so determined to be incapacitated in a judicial proceeding as provided for in Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1, shall become vacant and the vacancy filled in the manner provided by law. Notwithstanding the provisions of Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1, however, any officer shall have a jury trial unless it is waived by him or for him by his counsel of record.

§ 24.2-410. Clerks of circuit courts to furnish lists of incompetents.

The clerk of each circuit court shall furnish monthly to the State Board a complete list of all persons adjudicated *incapacitated pursuant to Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1, and therefore "mentally incompetent" for purposes of this title unless the court order specifically provides otherwise*, during the preceding month or a statement that no adjudications have occurred that month. The list shall contain each such person's name; address; county, city, or town of residence; social security number, if any; date and place of birth; and date of adjudication. The Board shall transmit the information from the list to the appropriate general registrars.

§ 37.1-134.6. Definitions.

As used in this chapter, unless a different meaning is clearly required by the context:

"Advance directive" shall have the same meaning as provided in the Health Care Decisions Act (§ 54.1-2981 et seq.).

"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."

"Estate" includes both real and personal property.

"Guardian" means a person appointed by the court 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, *and* therapeutic treatment, and if not inconsistent with an order of commitment, regarding the person's residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian."

"Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this subsection. *A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.*

"Limited conservator" means a person appointed by the court who has only those responsibilities for managing the estate and financial affairs of an incapacitated person as specified in the order of appointment.

"Limited guardian" means a person appointed by the court who has only those responsibilities for the personal affairs of an incapacitated person as specified in the order of appointment.

"Property" includes both real and personal property.

"Respondent" means an allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.

§ 37.1-134.14. Court order of appointment; limited guardianships and conservatorships.

The court's order appointing a guardian or conservator shall: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself or herself and manage property to the extent he or she is capable; (iii) specify whether the appointment of a guardian or conservator is limited to a specified length of time, as the court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity, *including but not limited to mental competency for purposes of Article II, Section 1 of the Constitution of Virginia or Title 24.2*; (v) include any limitations deemed appropriate following consideration of the factors specified in § 37.1-134.13; and (vi) set the bond of the guardian, and the bond and surety, if any, of the conservator.

The court may appoint a limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for his care, for the limited purpose of medical decision-making, decisions about place of residency, or other specific decisions regarding his personal affairs.

A guardian need not be appointed for a person who has appointed an agent under an advance directive executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title 54.1, unless the court determines that the agent is not acting in accordance with the wishes of the principal or there is a need for decision-making outside the purview of the advance directive.

The court may appoint a limited conservator for an incapacitated person who is capable of managing some of his property and financial affairs, for limited purposes specified in the order.

A conservator need not be appointed for a person (i) who has appointed an agent under a durable power of attorney, unless the court determines pursuant to § 37.1-134.22 that the agent is not acting in the best interests of the principal or there is a need for decision-making outside the purview of the durable power of attorney, or (ii) whose only or major source of income is from the Social Security Administration or other government program and who has a representative payee.

§ 37.1-134.15. Qualification of guardian or conservator; clerk to record order and issue certificate; reliance on certificate.

A guardian or conservator appointed in the court order shall qualify before the clerk upon the following:

1. Subscribing to an oath promising to faithfully perform the duties of the office in accordance with all provisions of this chapter;
2. Posting of bond, but no surety shall be required on the bond of the guardian, and the conservator's bond may be with or without surety, as ordered by the court; and
3. Acceptance in writing by the guardian or conservator of any educational materials provided by the court.

Upon qualification the clerk shall issue to the guardian or conservator a certificate, with a copy of the order appended thereto. The clerk shall record the order in the same manner as a power of attorney would be recorded *and shall, in addition to the requirements of § 37.1-134.18, provide a copy of the order to the commissioner of accounts*. It shall be the duty of a conservator having the power to sell real estate to record the order in the office of the clerk of any jurisdiction in which the respondent owns real property. If the order appoints a guardian, the clerk shall promptly forward a copy of the order to the local department of social services in the jurisdiction where the respondent *then* resides.

A conservator shall have all powers granted pursuant to § 37.1-137.3 as are necessary and proper for the performance of his duties in accordance with this chapter, subject to such limitations as are prescribed in the order. The powers granted to a guardian include only those powers enumerated in the court order.

Any individual or entity conducting business in good faith with a guardian or conservator who presents a currently effective certificate of qualification, may presume that the guardian or conservator is properly authorized to act as to any matter or transaction except to the extent of any limitations upon the fiduciary's powers contained in the court's order of appointment.

§ 37.1-134.18. Clerk to index findings of incapacity or restoration; notice to Commissioner, commissioner of accounts, Secretary of Board of Elections and CCRE.

A. A copy of the findings of the court, if the person is found to be incapacitated, or restored to capacity, shall be filed by the judge with the clerk of the court of the county or city in which deeds are admitted to record. The clerk shall properly index the same in the index to deed books by reference to the order book and page whereon such order is spread and shall immediately notify the Commissioner in accordance with § 37.1-147, *the commissioner of accounts in order to ensure compliance by a*

conservator with the duties imposed pursuant to §§ 37.1-137.2 through 37.1-137.5 and 37.1-144 and the Secretary of the State Board of Elections with such information as required by § 24.2-410. If a guardian is appointed or if a guardianship is terminated or otherwise modified, the clerk shall forward a copy of the court order to the local department of social services of the jurisdiction where the person then resides. If a guardianship is terminated or otherwise modified, the clerk shall forward a copy of the court order to the local department of social services to which the original order of appointment was forwarded and, if different, to the local department of social services in the jurisdiction where the person then resides.

B. The clerk shall certify and forward forthwith to the Central Criminal Records Exchange, on a form provided by the Exchange, a copy of any order adjudicating a person incapacitated under this article and any order of restoration of capacity under § 37.1-134.16. The copy of the form and the order shall be kept confidential in a separate file and used only for the purpose of conducting a firearms transaction record check authorized by § 18.2-308.2:2.

§ 37.1-137.2. Annual reports by guardians.

A. A guardian shall file an annual report in compliance with the filing deadlines in § 26-17.4 with the local department of social services for the jurisdiction in which he was appointed. *It shall be the duty of that local department to forward the report to the local department of the jurisdiction where the incapacitated person then resides.* The report shall be on a form prepared by the Office of the Executive Secretary of the Supreme Court and shall be accompanied by a filing fee of five dollars. The local department shall forward the fee to the state treasurer. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 26-17.4.

B. The report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person;
2. A description of the person's living arrangements during the reported period;
3. The medical, educational, vocational, and other professional services provided to the person and the guardian's opinion as to the adequacy of the person's care;
4. A statement of the frequency and nature of the guardian's visits with and activities on behalf of the person;
5. A statement of whether the guardian agrees with the current treatment or habilitation plan;
6. A recommendation as to the need for continued guardianship, any recommended changes in the scope of the guardianship, and any other information useful in the opinion of the guardian; and
7. The compensation requested and the reasonable and necessary expenses incurred by the guardian.

The guardian shall certify that the information contained in the report is true and correct to the best of his or her knowledge.

2. That an emergency exists and this act is in force from its passage.