

# VIRGINIA ACTS OF ASSEMBLY -- 2021 SPECIAL SESSION I

## CHAPTER 232

*An Act to amend and reenact §§ 64.2-2000, 64.2-2003, and 64.2-2007 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 37.2 a section numbered 37.2-314.3, relating to supported decision-making agreements. Report.*

[H 2230]

Approved March 18, 2021

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

**1. That §§ 64.2-2000, 64.2-2003, and 64.2-2007 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 3 of Title 37.2 a section numbered 37.2-314.3 as follows:**

**§ 37.2-314.3. Powers and duties of the Department related to supported decision-making agreements; report.**

*A. As used in this section:*

*"Principal" means an adult with an intellectual or developmental disability who seeks to enter or has entered into a supported decision-making agreement with a supporter.*

*"Supported decision-making agreement" means an agreement between a principal and a supporter that sets out the specific terms of support to be provided by the supporter, including (i) helping the principal monitor and manage his medical, financial, and other affairs; (ii) assisting the principal in accessing, obtaining, and understanding information relevant to decisions regarding his affairs; (iii) assisting the principal in understanding information, options, responsibilities, and consequences of decisions; and (iv) ascertaining the wishes and decisions of the principal regarding his affairs, assisting in communicating such wishes and decisions to other persons, and advocating to ensure the wishes and decisions of the principal are implemented.*

*"Supporter" means a person who has entered into a supported decision-making agreement with a principal.*

*B. The Department shall develop and implement a program to educate individuals with intellectual and developmental disabilities, their families, and others regarding the availability of supported decision-making agreements, the process by which an individual with an intellectual or developmental disability may enter into a supported decision-making agreement with a supporter, and the rights and responsibilities of principals and supporters who are parties to a supported decision-making agreement. Such program shall include (i) specific training opportunities for individuals with intellectual and developmental disabilities and who seek to enter into supported decision-making agreements, individuals interested in serving as supporters pursuant to supported decision-making agreements, family members of principals and individuals with intellectual and developmental disabilities who seek to enter into supported decision-making agreements, and members of the medical, legal, and financial professions and other individuals who provide services to individuals with intellectual and developmental disabilities who may enter into supported decision-making agreements and (ii) development of model supported decision-making agreements for individuals who seek to enter into supported decision-making agreements. Such program shall also include development of information about and protocols for preventing, identifying, and addressing abuse and exploitation of individuals with intellectual and developmental disabilities who enter into supported decision-making agreements.*

*C. The Department shall collect data regarding the utilization of supported decision-making agreements in the Commonwealth to guide the development of policies and programs to enhance the use of supported decision-making agreements and shall report such information together with recommendations to enhance the utilization of supported decision-making agreements annually to the Governor and the General Assembly by November 1.*

**§ 64.2-2000. Definitions.**

*As used in this chapter, unless the context requires a different meaning:*

*"Advance directive" shall have the same meaning as provided in § 54.1-2982.*

*"Annual report" means the report required to be filed by a guardian pursuant to § 64.2-2020.*

*"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." "Conservator" includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide conservatorial services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been*

designated by the Department for Aging and Rehabilitative Services as a public conservator, it may also serve as a conservator for other individuals.

"Estate" includes both real and personal property.

"Facility" means a state or licensed hospital, training center, psychiatric hospital, or other type of residential or outpatient mental health or mental retardation facility. When modified by the word "state," "facility" means a state hospital or training center operated by the Department of Behavioral Health and Developmental Services, including the buildings and land associated with it.

"Guardian" means a person appointed by the court who has the powers and duties set out in § 64.2-2019, or § 63.2-1609 if applicable, and 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, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public guardian pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide guardian services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Department for Aging and Rehabilitative Services as a public guardian, it may also serve as a guardian for other individuals.

"Guardian ad litem" means an attorney appointed by the court to represent the interests of the respondent and whose duties include evaluation of the petition for guardianship or conservatorship and filing a report with the court pursuant to § 64.2-2003.

"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 provide for his support or for the support of his 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 definition. 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.

"Individualized education plan" or "IEP" means a plan or program developed annually to ensure that a child who has a disability identified under the law and is attending an elementary or secondary educational institution receives specialized instruction and related services as provided by 20 U.S.C. § 1414.

"Individual receiving services" or "individual" means a current direct recipient of public or private mental health, developmental, or substance abuse treatment, rehabilitation, or habilitation services and includes the terms "consumer," "patient," "resident," "recipient," or "client."

"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.

"Mental illness" means a disorder of thought, mood, emotion, perception, or orientation that significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and requires care and treatment for the health, safety, or recovery of the individual or for the safety of others.

"Petition" means the document filed with a circuit court to initiate a proceeding to appoint a guardian or conservator.

"Power of attorney" has the same meaning ascribed to it in § 64.2-1600.

"Property" includes both real and personal property.

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

*"Supported decision-making agreement" has the same meaning ascribed to it in § 37.2-314.3.*

"Temporary conservator" means a person appointed by a court for a limited duration of time as specified in the order of appointment.

"Temporary guardian" means a person appointed by a court for a limited duration of time as specified in the order of appointment.

"Transition plan" means the plan that is required as part of the IEP used to help students and families prepare for the future after the student reaches the age of majority.

**§ 64.2-2003. Appointment of guardian ad litem.**

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 64.2-2006 and 64.2-2007 and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent, pursuant to § 64.2-2006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, considering whether a less restrictive alternative to guardianship or conservatorship is available, including the use of an advance directive, *supported decision-making agreement*, or durable power of attorney, and filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences. If the respondent is between 17 and a half and 21 years of age and has an Individualized Education Plan (IEP) and transition plan, the guardian ad litem shall review such IEP and transition plan and include the results of his review in the report required by clause (iv).

C. In the report required by clause (iv) of subsection B, the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or conservator is needed based on evaluations and reviews conducted pursuant to subsection B; (iii) the extent of the duties and powers of the guardian or conservator; (iv) the propriety and suitability of the person selected as guardian or conservator after consideration of the person's geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent.

D. A health care provider and local school division shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that the guardian ad litem determines necessary to perform his duties under this section.

**§ 64.2-2007. Hearing on petition to appoint.**

A. The respondent is entitled to a jury trial upon request, and may compel the attendance of witnesses, present evidence on his own behalf, and confront and cross-examine witnesses.

B. The court or the jury, if a jury is requested, shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones it for cause. The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

C. In determining the need for a guardian or a conservator and the powers and duties of any guardian or conservator, if needed, consideration shall be given to the following factors: (i) the limitations of the respondent; (ii) the development of the respondent's maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including advance directives, *supported decision-making agreements*, and durable powers of attorney; (iv) the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; (v) the actions needed to be taken by the guardian or conservator; (vi) the suitability of the proposed guardian or conservator; and (vii) the best interests of the respondent.

D. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person, who may be the spouse of the respondent, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent. If a guardian or conservator is appointed, the court shall inform him of his duties and powers pursuant to Article 2 (§ 64.2-2019 et seq.) and shall further inform the guardian or conservator that, to the extent feasible, the respondent should be encouraged to participate in decisions, act on his own behalf, and develop or maintain the capacity to manage his personal affairs if he retains any decision-making rights. Except for good cause shown, including a determination by the court that there is no acceptable alternative available to serve, the court shall not appoint as guardian or conservator for the respondent an attorney who has been engaged by the petitioner to represent the petitioner within three calendar years of the appointment. Such prohibition also applies to all other attorneys and employees of the law firm with which such attorney is associated. The court shall require the proposed guardian or conservator to certify at the time of appointment that he has disclosed to the court any such representation of the petitioner or association with a law firm that represented the petitioner within the three calendar years preceding the appointment. Compensation paid by a petitioner to an attorney or law firm for serving as a guardian or conservator shall not constitute representation of the petitioner by such attorney or law firm. In the case of a petitioner that is a medical care facility as defined in § 32.1-102.1,

the court may, for good cause shown, order that the reasonable costs for the guardian or conservator be paid by the petitioner during the time the respondent is under the care of such medical care facility.

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered. The order of appointment shall be made in a form that complies with the requirements set out in § 64.2-2009.