

Summary: Improving Virginia’s Adult Guardian and Conservator System

WHAT WE FOUND

Approximately 12,000 Virginia adults are under guardianship, relying on a court-appointed third party to manage their affairs

Adults under guardianship and conservatorship are among the most vulnerable Virginians; they typically have long-term, complex physical and/or mental conditions such as dementia, traumatic injury, or autism. Approximately 12,000 adults in Virginia were under guardianship in FY20.

When adults are placed under guardianship or conservatorship by a circuit court, the court legally removes some or all of their rights and grants another individual—a family member, friend, professional guardian, or private attorney—control over their affairs. Guardians make potentially life-altering decisions, such as where the adult lives, the medical or mental health care that they receive, and who the adult can have contact with. Conservators make decisions regarding the management of the adult’s financial affairs.

Few adults under guardianship have their rights restored, but circuit courts should regularly consider changes to guardianship arrangements

Most guardianship arrangements are permanent. The conditions of most adults under guardianship are unlikely to improve, and they are likely to need a guardian to make important housing, medical, and financial decisions for the rest of their lives. Adults can be under guardianship for a long time—in FY20, nearly half of the state’s approximately 12,000 adults under guardianship were under age 45.

Some adults under guardianship may not need a guardian permanently, but Virginia courts restore the rights of few adults under guardianship. From October 2018 to March 2021, about 30 adults had their rights restored. Unlike some other states, Virginia state law does not require periodic court reviews of guardianship arrangements. The absence of a periodic review may have led to adults remaining under guardianship even though they could have had their rights restored.

WHY WE DID THIS STUDY

In 2020, the Joint Legislative Audit and Review Commission (JLARC) asked staff to conduct a review of Virginia’s guardianship and conservatorship system. The study resolution directed the examination of the court process to appoint guardians and conservators, oversight of guardians and conservators, the process for restoring rights to adults under guardianship or conservatorship, and Virginia’s laws to prevent the abuse or neglect of vulnerable adults.

ABOUT GUARDIANSHIP AND CONSERVATORSHIP

Guardianship and conservatorship support incapacitated adults by providing them a representative who legally makes decisions on their behalf. Guardianship is a legal process where a court-appointed individual supervises the personal affairs of an adult who is incapacitated because of a disability or illness. In conservatorship, a court-appointed individual manages the financial affairs of an incapacitated adult.

The term “guardianship” as used in this report encompasses both guardianship and conservatorship. Adults under guardianship who have sufficient income and/or assets typically also have a conservator. The term “conservator” is used when discussing responsibilities that are specific to a conservator, such as financial management.

Circuit courts need better information to make the best decisions in guardianship cases

Investigations and recommendations by guardians ad litem (GALs) are the primary source of information judges use to decide whether to place an adult under guardianship and who the guardian should be. However, GALs are not required to report some pertinent information on the suitability of prospective guardians, such as the number of incapacitated adults prospective guardians serve or the distance the guardian would need to travel to visit the adult.

GALs are also not required to explain to the circuit court judge why arrangements other than a full permanent guardianship are not appropriate to meet the adult's needs. Alternative arrangements should be fully considered, especially since guardianship removes all or most of the adult's rights, and rights are rarely restored.

Guardians have too much discretion to restrict contact with adults under their guardianship

Contact with family, friends, and others can help prevent the abuse, neglect, and exploitation of incapacitated adults because visitors can observe the condition, care, and living arrangements of a person under guardianship. In contrast to Virginia, other states have stronger laws establishing conditions and processes for when a guardian can restrict contact with adults they serve. For example, guardians in Virginia are not required to provide the affected parties with a rationale for their decision to restrict contact or inform them of how they can challenge the restriction through the circuit court. Additionally, the Code of Virginia merely requires that the conditions for restricting contact with the adult be "reasonable" according to the guardian, which is an overly broad standard that affords the guardian too much discretion. This vague standard, combined with guardians' ability to restrict contact with adults under guardianship without providing justification or informing parties of their ability to challenge the restriction, enables guardians to unjustifiably restrict contact between an adult and their family members or other individuals who may be able to contribute to the adult's care and well-being.

Virginia's public guardianship program is effective, but demand for public guardians exceeds available slots

Most adults under guardianship are served by private guardians, but indigent adults who do not have someone who is willing to serve as their guardian may be served by guardians who work for 13 organizations that provide state-funded "public" guardianship services. Virginia's public guardianship program serves approximately 1,000 indigent adults under guardianship and is managed and overseen by the Department for Aging and Rehabilitative Services (DARS).

Virginia's public guardianship program requirements closely align with national standards for an effective guardianship program. One national expert said that Virginia

has a “model system,” and other states—including Nebraska and Oregon—have modeled their public guardianship programs on Virginia’s. DARS provides comprehensive and effective oversight of the public guardianship program. Staff conduct a multi-day, on-site review of each provider organization every 12 to 18 months.

Demand exceeds available slots in the public guardianship program. Nearly 700 individuals are currently on waitlists for public guardianship services, and the waitlists will likely grow. More than half of the public slots are dedicated to individuals with intellectual and developmental disabilities or serious mental health issues. People who fall into these categories tend to be relatively young when a guardian is appointed and are likely to remain in public guardianship for a long period; therefore, the number of public slots that open up over time is unlikely to keep pace with additional demand.

Expansion of the public guardianship program would require additional state funding. Expanding the program by an additional 700 slots to eliminate the current program waitlist would require approximately \$2.7 million annually based on the current average funding for a public guardianship slot (a 60 percent increase to current program funding of \$4.5 million).

Most adults under guardianship are served by private guardians, who are not subject to any standards

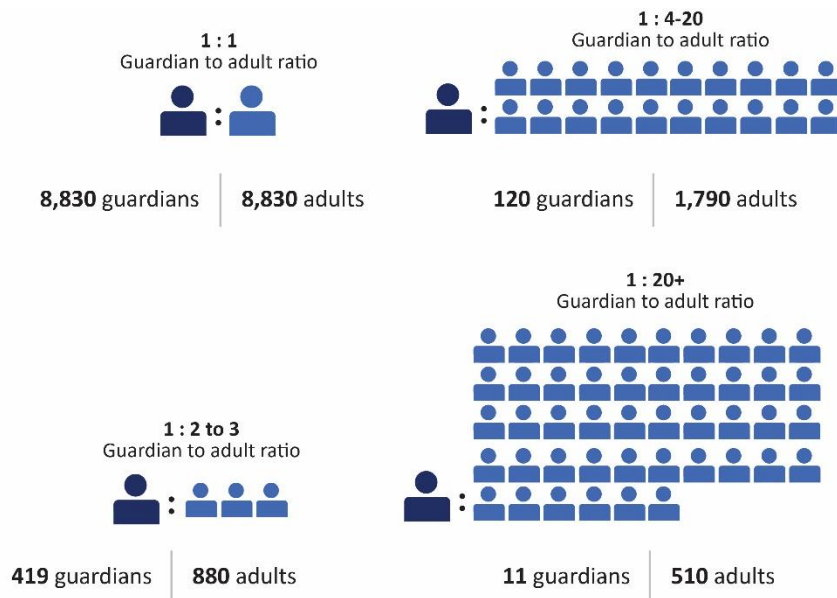
Most private guardians are a family member or friend of the individual under guardianship and only serve as guardian to one adult. However, adults who do not have a family member or friend able to serve as their guardian may be served by an attorney or a professional guardian.

Private guardians are not subject to any standards. In contrast to the public program, private guardians do not have a caseload standard, visitation requirements, or training requirements. In FY20, 510 adults under guardianship were served by 11 private guardians who had caseloads of more than 20, with a median of 33 adults per guardian and one guardian with a caseload of 110. Adults are not under guardianship by choice, and most cannot choose whether a public or private guardian serves them, so there should be similar assurances of quality service in both the public and private systems.

Unlike the public guardianship program, Virginia does not have a centralized process that adults under guardianship or their advocates can use to file a complaint about a private guardian. Family members of individuals under private guardianship and advocates for adults under guardianship routinely shared with JLARC staff that they have felt helpless and frustrated by the lack of a complaint process.

Virginia does not require independent visits by professionals of adults under private guardianship to assess their health and well-being, even though such visits are considered by national experts to be effective for overseeing guardians. Several other states use independent care visits to enhance their oversight of guardians.

Number of guardians and adults under guardianship by caseload size



SOURCE: JLARC analysis of DARS data, FY20.

Content and format of annual guardianship report are ineffective for overseeing private guardians

The annual guardianship report is the primary mechanism for overseeing private guardians. State law requires all guardians to submit an annual report to their local department of social services (LDSS), which subsequently provides the report to the circuit court. However, the broad content and open-ended structure of the annual report make it an ineffective tool for overseeing guardians. The report lacks questions that could be useful for monitoring the quality of care being provided to an adult under guardianship and identifying potential problems. The report’s questions are also open-ended, which results in vague responses that are not particularly helpful. Sixty-three percent of LDSS staff responding to a JLARC survey disagreed that the information from the annual reports is useful for overseeing guardians.

Court-appointed conservators can become responsible for complex financial decisions and need more training

Conservators are responsible for managing the finances of incapacitated adults who courts determine are unable to manage their own financial affairs. The finances that conservators may manage range from modest retirement accounts to large estates with multiple properties and investment accounts. Conservators are not required to have a financial background, and the state does not require or offer any training for conservators. Forty-three percent of local commissioners of accounts—who oversee conservators—said conservators supervised by their office do not receive adequate training and guidance, and 61 percent said the conservators supervised by their office

do not have adequate experience and knowledge to fulfill their fiduciary responsibilities.

Initial inventory of assets owned by adults is self-reported by conservators and not verified, creating risk of improper spending

Conservators submit an initial inventory report of an adult's assets to the local commissioner of accounts. Commissioners of accounts use these inventories as the basis for which to evaluate the propriety of future expenditures of the adult's assets that the conservator documents in annual reports. The initial inventory, however, is self-reported by the conservator and is not verified by a third party. This creates a risk that a conservator's improper expenditures of the adult's assets would be undetected.

WHAT WE RECOMMEND

Legislative action

- Require a periodic circuit court hearing to review guardianship and conservatorship appointments, unless the court determines that periodic reviews are unnecessary.
- Require that guardians ad litem explain in their report to the judge why an alternative arrangement to full guardianship is not appropriate for the adult and report to the judge additional information pertinent to the prospective guardian's suitability, such as the guardian's current caseload.
- Require private guardians and conservators to take state-provided training.
- Specify the circumstances that allow for restricting contact with adults under guardianship and create a formal, transparent process for guardians to implement a visitation restriction against one or more individuals.
- Set a visitation requirement for private guardians.
- Require the annual guardianship report to include more detailed and pertinent information.
- Give DARS new responsibilities related to private guardianship and direct DARS to develop a proposal for conducting independent care visits for a subset of private guardianships to ensure adults are receiving quality care.
- Appropriate funds to eliminate the public guardianship program's waitlist.
- Require conservators to notify family members and other interested parties that they may request a copy of the initial inventory of an adult's assets to review it for completeness and accuracy.
- Require the court order appointing a conservator to include a statement of the adult's financial resources for commissioners of accounts to compare to the conservator's initial inventory of assets.

Executive action

- Develop a process for guardians ad litem to request Adult Protective Services (APS) records.
- Develop and provide training for private guardians.
- Develop a centralized process for receiving complaints against private guardians and referring filers of complaints to state and local agencies that can address the complaint.
- Issue a request for information to determine organizations' interest in providing additional public guardianship services.
- Develop required online training for conservators.