



Improving Virginia's Adult Guardian and Conservator System

Study mandate

- Review Virginia's court-appointed guardian and conservator system
 - examine opportunities to strengthen laws
 - review the adequacy of oversight of the guardian and conservator system
 - identify appropriate training, qualification, and oversight requirements for court-appointed guardians
 - consider a complaint process for receipt and investigation of complaints regarding the actions of guardians

Research activities

Interviews

- state and local staff
- court process stakeholders
- advocates and subject-matter experts

Data and document analysis

- court case, adult protective services, and guardianship data
- court case files

Surveys of

- local departments of social services staff
- public guardianship provider organization staff
- commissioners of accounts

In brief

Judges may lack adequate information when considering whether to appoint a guardian or conservator; judges and guardians ad litem would benefit from more training.

The state's public guardianship program has strong oversight and effective visitation, training, and caseload requirements.

In contrast, private guardians are not subject to standards and are subject to ineffective reporting and monitoring.

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

Quality of guardianship services can be improved through strengthened requirements and oversight of private guardians and expansion of the public guardianship program.

In this presentation

Background

Court process for appointing a guardian or conservator

Training, requirements, and oversight for private guardians

Virginia's public guardianship program

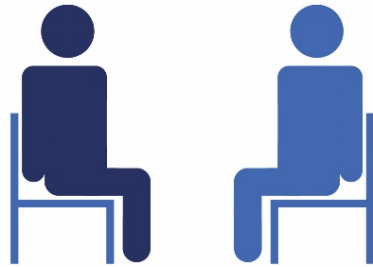
Training, requirements, and oversight for conservators

Guardians and conservators are appointed for incapacitated adults at a circuit court hearing

- An incapacitated adult is a person found to be incapable of receiving and evaluating information effectively to meet essential needs or manage affairs
- Circuit court judge reviews evidence presented at a hearing to determine the adult's need for guardianship and the suitability of the proposed guardian(s)
- Adults placed under guardianship are among the most vulnerable Virginians

Adult's being considered for guardianship have the right to request a trial by jury.

Guardians and conservators have several important duties and responsibilities



Guardian responsibilities

- Making key life decisions for the adult
- Encouraging adult's participation in major decisions
- Visiting adult as needed
- Making funeral arrangements



Conservator responsibilities

- Monitoring/managing adult's assets, routine payments, and financial goals
- Encouraging adult's participation in financial decisions
- Managing estate after death before estate transfers to successors

About 12,000 Virginia adults are under guardianship, and number is likely to grow

- About half of adults under guardianship are relatively young, between 18 and 44 years old
- The number of adults newly placed under guardianship has remained stable in the last five years (~1,400 to 1,700 statewide)
- Guardianship tends to be a lifelong arrangement
- Number of adults under guardianship likely to increase over time

Adults under guardianship range in condition and across demographics

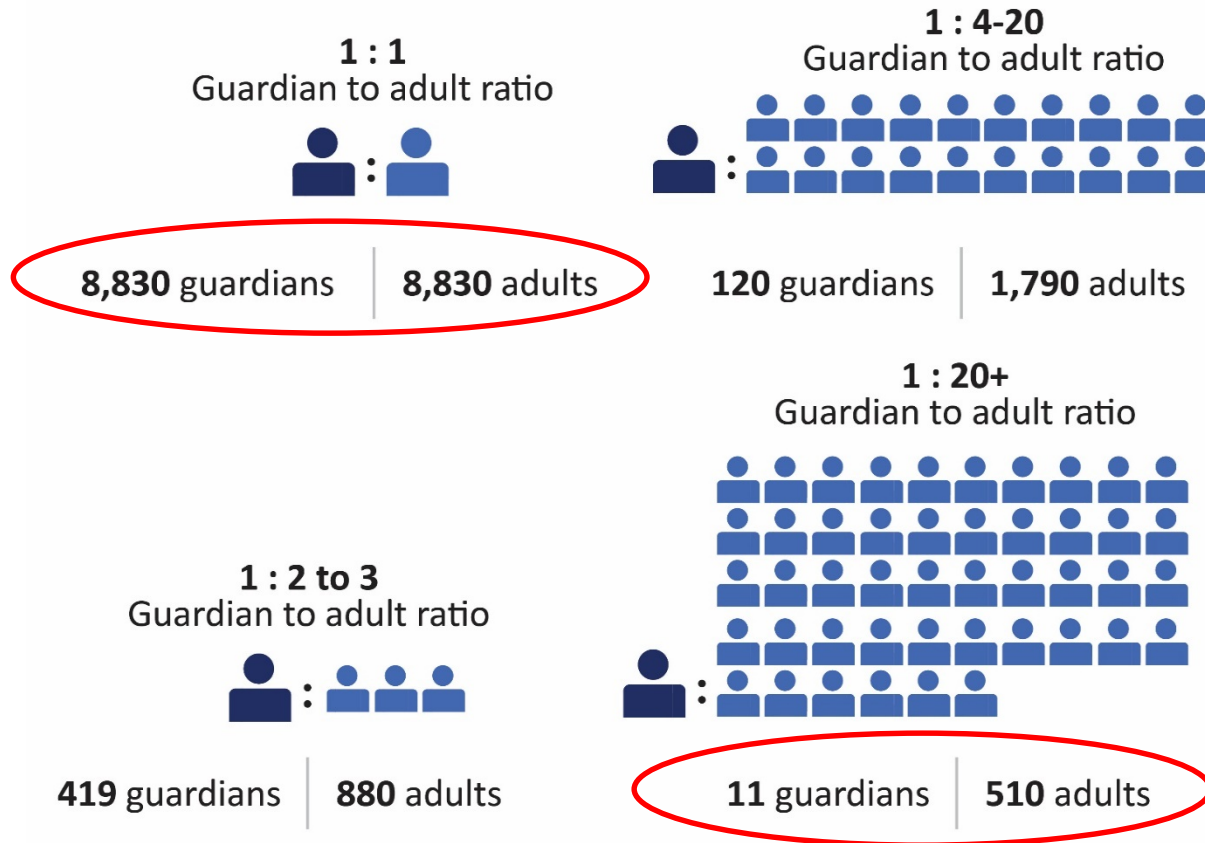
- Dementia, traumatic injury, developmental or intellectual disability, or serious mental health issues
- 50% are 18 to 44 years old; 10% are 85 or older
- 72% are white, 18% Black, 4% Asian, 4% Hispanic
- Number of adults under guardianship generally aligns with adult population in a locality
 - ~1,750 in Fairfax County, 3 or fewer in a dozen localities
 - Slightly higher proportionally in small and rural localities

Race data is available for only 45 percent of adults under guardianship.

Adults can be served through the public guardianship program or by a private guardian

- Public guardianship (~1,000 adults)
 - incapacitated adults with limited ability to pay and no family or friends willing to be guardian
 - 13 organizations contract with state to serve as guardian
 - funded by general funds (~\$4.5 million in FY21)
- Private guardianship (~11,000 adults)
 - any incapacitated adult
 - a family member, friend, attorney, professional guardian, or organization serve as guardian
 - paid for from the estate of the adult, if there is one

Most guardians serve one adult; 11 guardians with large caseloads serve 510 adults (FY20)



Local agencies oversee guardians and conservators; court has authority to make changes

- Local departments of social services (LDSS) receive and review annual reports from guardians on adult's condition and needs
 - Department files a copy of the report with the circuit court
- Local commissioners of accounts receive and review reports from conservators on spending of adult's assets
 - Commissioner files a copy of reports with the circuit court
- Only the court has the ability to make changes to a guardianship or conservatorship arrangement

Conservators may receive compensation from the adult for their service

- Commissioners of accounts review and approve conservator compensation
- Manual for Commissioner of Accounts guidelines;
 - 5% of adult's non-investment income annually, and
 - 1% annually on the first \$500,000 of assets; 0.75% on next \$500,000; 0.5% on assets over \$1 million
- Can receive compensation from social security income if they are also federally designated “representative payee”

Extent of mistreatment of adults under guardianship in Virginia is unknown

- Adult protective services (APS) data and criminal court data indicate 20 guardians in Virginia mistreated the adults they were serving (FY19 to FY21)
 - Nineteen of the allegations were for neglect; one was for financial exploitation
 - Guardians in all 20 cases were family members or friends of the adult under guardianship
- Not all mistreatment of adults under guardianship is captured in APS or criminal court data

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Court process for appointing a guardian or conservator has several steps



Finding

Additional information should be required to be reported by guardians ad litem to ensure consistency and quality in the information presented to the court.

Guardian ad litem report is the primary source of information for the court

- State law requires the guardian ad litem (GAL) to investigate a case and report to the court whether
 - a guardian is needed
 - the proposed guardian is suitable
 - legal counsel should be appointed for the adult
- Judges use information in the report when deciding a guardianship appointment

GALs are not required to support recommendations and determinations

- GALs recommend whether an adult needs a defense attorney but are not required to support a recommendation that a defense attorney is not needed
- GALs consider whether alternatives to guardianship are appropriate but are not required to support a determination that alternatives are not appropriate
- Adult's access to a defense attorney and thorough consideration of alternatives to guardianship are critical for protecting the adult's rights

GALs should be required to further evaluate the suitability of the potential guardian

- GALs are required to report on the “propriety and suitability” of a potential guardian, but the current requirements are insufficient
- Not required to report:
 - number of adults already served
 - whether staff is used to help fulfill guardianship duties
 - distance needed to travel to visit the adult
 - whether the prospective guardian has a full-time job
 - whether the prospective guardian has any substantiated adult protective services complaints

Recommendations

General Assembly may wish to consider requiring the guardian ad litem report to include:

- support for why i) an adult under consideration for guardianship does not need defense counsel and ii) an alternative to guardianship is not appropriate.
- additional information about the suitability of the proposed guardian including workload and whether that person is the subject of any substantiated adult protective service complaints.

Finding

Additional training is needed for judges and GALs to ensure a comprehensive and consistent court process that best protects the rights and interests of adults under consideration for guardianship.

Judges and GALs make critical decisions and recommendations but are insufficiently trained

- Circuit court judges receive limited training about guardianship cases
- Reference book given to judges has little additional guidance for guardianship cases
- GAL training is helpful, but more training is needed for contested guardianship cases

Recommendations

The Virginia Judicial Education Committee should offer training for judges on adult guardianship cases.

The Virginia Benchbook Committee should provide additional material related to guardianship hearings in the reference book provided to judges.

The Office of the Executive Secretary of the Supreme Court of Virginia (OES) should work with a third party to develop a GAL training course on contested guardianship cases.

Petitioners repeatedly use the same GAL, which has appearance of a conflict of interest

- Medical and long-term care facilities petition to place adults under guardianship to facilitate discharge
 - Adults are usually indigent, not paying for care
 - Prolonged stays limit available bed space
- Some entities often request, and receive, the same attorney to serve as GAL
 - GAL could have incentive to reach conclusions that support petitioner's desire to place an adult under guardianship

Courts use the same GALs in guardianship cases because they are uncomfortable rotating GALs

- Courts explain using same GALs because those attorneys have knowledge, experience, and meet deadlines
- OES maintains a list of qualified GALs that courts can use to select GALs at random, but court stakeholders indicate the list
 - is not up-to-date
 - includes no context about a GAL's experience or expertise
- OES could take steps to enhance the information on the list, communicate to courts its usefulness

Recommendations

- The Office of the Executive Secretary should:
 - communicate to all circuit court judges the availability, accuracy, and timeliness of the list of qualified guardians ad litem, and
 - include on the list of qualified guardians ad litem each attorney's years of experience and areas of expertise to better enable courts to use it when selecting a GAL.

Finding

The lack of a periodic court hearing to review guardianship cases may mean that adults' rights and well-being are not being fully protected.

Court's decision to appoint a guardian merits further review

- A guardian appointment is typically permanent and removes most or all of an adult's rights, however
 - adults' conditions can improve over time
 - guardians may not always effectively perform their duties
 - adults under guardianship may have little ability to advocate for themselves
- About 30 adults had their rights restored during the past 2.5 years (~0.25% of adults under guardianship) ^a
- Courts in at least four other states require a periodic review of guardianship cases

^a From October 2018 to March 2021

Periodic review hearings would not be necessary in all cases

- Court could waive the need for a periodic review hearing when deemed unnecessary, based on
 - the adult's condition and potential for improvement
 - whether there were concerns with or disputes about the initial guardian appointment
- Holding a review hearing for some guardianship cases would modestly affect court workload (~0.5% increase)

Recommendation

The General Assembly may wish to consider requiring circuit courts to hold a periodic review hearing for guardianship and conservatorship cases, unless the court determines that further review hearings are unnecessary or impracticable.

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Finding

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

Private guardians are not required to regularly visit adults they serve

- Code gives private guardians broad discretion for how often they visit an adult: stating “as often as necessary”
 - Some visit frequently, others visit rarely or not at all
- Lack of visits means the guardian is likely unable to
 - observe and assess adult’s physical condition and living situation,
 - learn adult’s needs and preferences, or
 - observe changes in condition over time
- Regular visits can be difficult for guardians with large caseloads but are important to ensure adequate service

Recommendation

The General Assembly may wish to consider amending the existing visitation requirement in Code to require guardians to visit adults in person at least once every three months to observe and assess the adult's (i) living environment; (ii) overall condition and well-being; (iii) whether needs are being met; (iv) progress toward goals; (v) participation in educational or vocational programs, and (vi) contact and involvement with family and friends.

Private guardians are not required to receive training

- Training is important for private guardians to understand
 - their roles and responsibilities
 - importance of including the adult in decision-making
 - how to approach critical decisions like medical planning and selecting an appropriate living arrangement
- Training is beneficial for the guardian, as well as any staff performing duties on their behalf
- State does not offer training to private guardians

Recommendation

The General Assembly may wish to consider requiring any individual who is appointed to be a private guardian—and staff who perform duties on their behalf—to become trained within four months of their appointment.

Finding

The annual report that is completed by guardians and submitted to local departments of social services is insufficient to monitor the service provided by guardians or the well-being of the adult they serve.

The annual guardianship report is ineffective for monitoring private guardians; should be redesigned

- Annual guardianship report is
 - completed by the guardian, submitted to LDSS, forwarded by LDSS to the circuit court
 - the primary source of information related to adult's condition and well-being
- Report form lacks useful questions and is not well structured
 - Does not ask about factors such as adult protective services involvement or progress made towards goals
 - Reliance on open-ended responses to questions enables vague and inconsistent reporting

Recommendation

The General Assembly may wish to consider requiring that the annual guardianship report be redesigned to include additional information needed to fully understand the condition, treatment, and well-being of adults under their guardianship.

Finding

Independent monitoring visits to adults under private guardianship would help ensure they are receiving adequate service.

Monitoring visits to adults would further improve oversight of private guardians

- Monitoring visits are made by someone other than the guardian to check the adult's condition and circumstances
- Several other states and one Virginia locality use these types of visits
 - can identify problems that would otherwise be undetected
 - potential for a visit could incentivize guardian to perform
- Visits are conducted for public guardians but not private
- Visits from LDSS staff could be conducted for a sample of adults under private guardianship
 - must balance usefulness and resource restraints

Recommendation

The Department for Aging and Rehabilitative Services (DARS), in consultation with the Virginia Department of Social Services and local departments of social services, should develop a proposal for conducting monitoring visits for a sample of private guardianship cases each year.

Findings

Guardians have overly broad latitude to restrict family or friends from visiting adults under guardianship.

Family and friends may not be aware of the reason for the restriction or the process to challenge the restriction in court.

Contact with family and friends contributes to well-being of adults under guardianship

- Social isolation has negative consequences for the health and well-being of incapacitated adults
- Contact with family, friends, and others can help prevent and identify abuse, neglect, and exploitation
 - Visitors can observe condition and living arrangements
 - Guardian may better serve an adult when they know that person will receive visitors
- Guardian may have to restrict certain individuals from contacting/visiting an adult to protect their well-being

State law on restricting contact or visitation is too broad

- Code of Virginia says only that a guardian cannot “unreasonably” restrict contact or visitation with adult
- Code does not require guardian to explain to affected persons why they are restricted from contact or visitation
- Code does not require guardian to notify affected individuals that they can challenge the restriction in court or about the process for doing so

Recommendations

The General Assembly may wish to consider permitting guardians to restrict contact with adults only when necessary to prevent physical, emotional, or mental harm or to protect finances.

The General Assembly may wish to consider requiring guardians who restrict an individual from visiting or contacting an adult to notify the individual in writing about (i) the terms of the restriction, (ii) the reasons for the restriction, and (iii) how the restricted individual can challenge the restriction through the court.

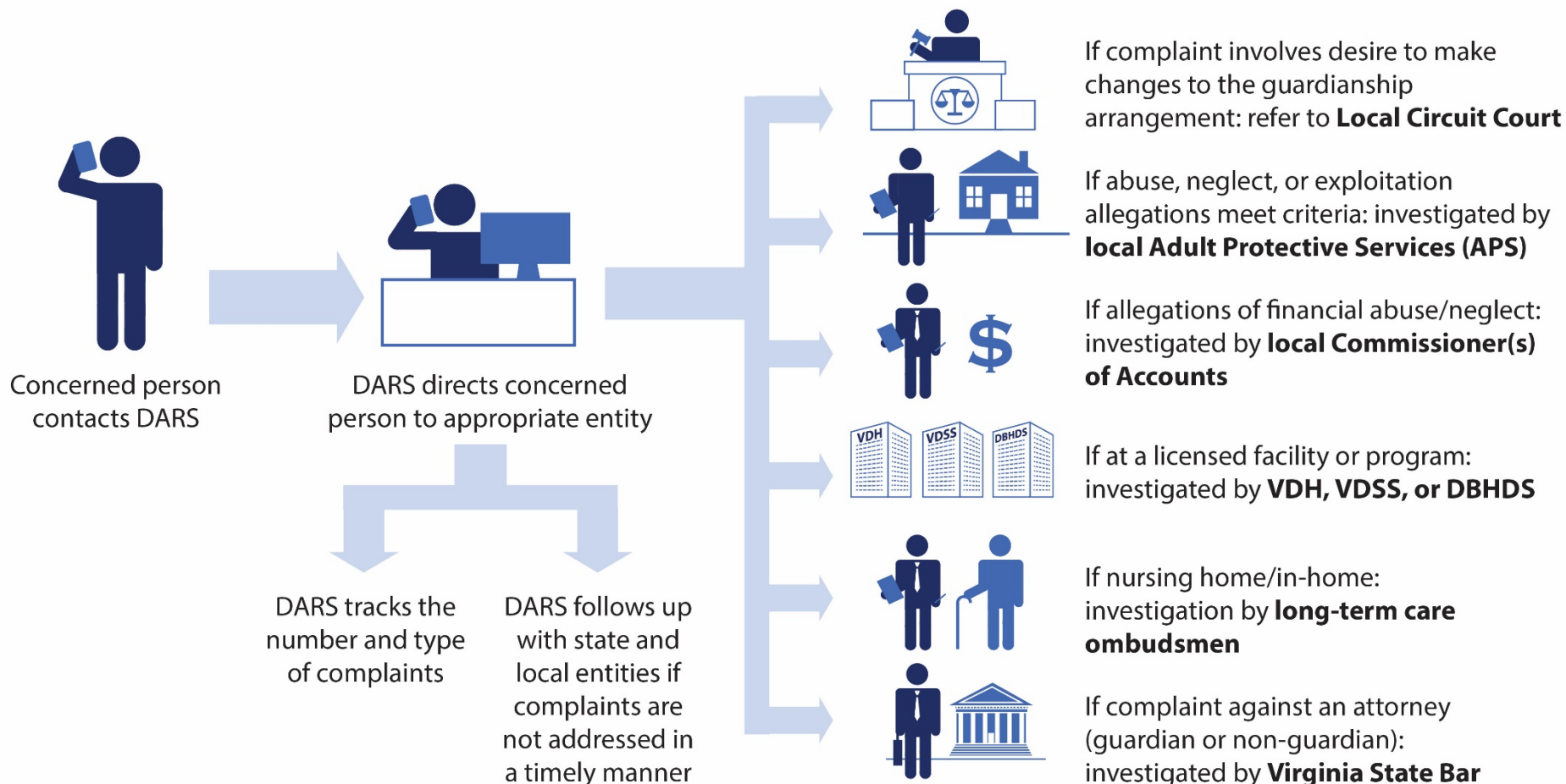
Finding

Virginia lacks an effective complaint process for adults under private guardianship and/or those wishing to advocate on their behalf.

There is no centralized resource for complaints or concerns related to private guardianship

- Several state agencies and programs can help resolve guardianship complaints or concerns, but public is not always aware of these resources or which to use
- A centralized complaint process administered by DARS could
 - direct people to the state or local entity best positioned to address their particular complaint
 - track the number and nature of complaints
 - follow-up with state or local entity handling the complaint to ensure it is addressed in a timely manner

Illustrative guardianship complaint process



Recommendation

The Department for Aging and Rehabilitative Services (DARS) should develop and administer a process for receiving complaints against private guardians and referring complainants to the appropriate court, state agency, or local agency.

Finding

There is no centralized state or local entity that has responsibility for several key roles related to private guardianship.

No single agency has responsibility for several necessary functions related to *private* guardians

- Combination of state and local agencies have some involvement with private guardians
 - Circuit court, commissioners of accounts, local departments of social services
- No state agency is responsible for
 - developing and administering training
 - collecting complaints against guardians
 - planning and training local staff to monitor guardians
- DARS has expertise with aging and disabled adults and effectively manages the public guardianship program
 - Would require additional staffing and funding

Recommendation

The General Assembly may wish to consider granting new responsibilities to the Department for Aging and Rehabilitative Services to strengthen the quality and accountability of the private guardianship system.

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Finding

Virginia's public guardianship program has effective requirements and oversight.

Public guardianship program is well structured and well managed

- Requirements align with national standards
 - Average ratio of 20 adults to one guardian
 - Minimum of one visit per month to the adult
- Training is effective; 86% of public guardians surveyed indicated the training helps them perform their job
- DARS provides comprehensive and effective oversight
 - On-site reviews of guardianship providers and adults
 - Information collection and reporting
- Program is well regarded by stakeholders and experts

Findings

Public guardianship program provider organizations have substantial waitlists.

Unmet demand for public guardianship services is not fully known.

Public guardianship program has insufficient capacity to meet demand for the program

- Program is full (1,049 slots) and has nearly 700 adults on waitlists; average wait ranges from 3 months at one organization to 4 years at another
- Those on the waitlists either have a private guardian who does not wish to permanently serve or are not served by a guardian at all
- DBHDS and some LDSS contract for private guardianship services because of lack of public slots
 - ~100 adults at a cost of ~\$0.5M annually

DBHDS: Department of Behavioral Health and Developmental Services

Public program should be expanded to eliminate the waitlists and demand should be fully assessed

- Most effective approach in the near term is to provide guardianship to those currently on waitlists
 - Create 700 slots at approximately \$2.7 million annually
- Further assessment is needed for:
 - total unmet demand for public guardianship
 - actual cost of providing guardianship services
- DARS should issue a request for information (RFI) for public guardianship services to assess organization's willingness and ability to serve

Public guardianship program has 1,049 slots and receives \$4.5M of general funds each year.

Recommendations

The General Assembly may wish to consider

- providing funding to pay for 700 new slots in the public guardianship program to address the current waitlists.
- providing one-time funding for DARS to hire a third party to study the need for any further expansion of the public program and to assess the cost of providing services.

The Department for Aging and Rehabilitative Services (DARS) should issue a request for information for public guardianship services to assess the availability of organizations to serve in this role.

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Conservators are responsible for managing finances of incapacitated adults

- Duties include:
 - paying bills
 - investment decisions
 - maintaining insurance
 - buying or selling assets, such as a home
- Conservators are overseen by local commissioner of accounts, submit reports
 - Initial inventory of adult's assets
 - Annual accounting of spending and changes to assets

Findings

Oversight of conservators is generally effective, but improvements could be made to ensure they are appropriately reporting and spending adults' assets.

Conservators often lack financial experience and would benefit from training.

Virginia law could better define the circumstances in which a conservator is using an adult's estate to their own financial benefit and prohibit such actions.

Further steps could be taken to help ensure the accuracy of conservator's initial inventory report

- Conservators create an initial inventory of the adult's assets and income, filed with commissioner of accounts
 - Unreported assets may not be detected, making the adult vulnerable to exploitation
 - Not practicable for commissioner to verify its accuracy
- Accuracy of the initial inventory could be improved by
 - court providing commissioner of accounts with known financial information reported at initial hearing
 - notifying adult's family and friends that they can request a copy of the inventory

Conservators can be responsible for complex financial management but receive no training

- Individuals are not required to have any financial experience or expertise to serve as a conservator
 - Family members or friends often serve as conservators
- Commissioners of accounts cited a lack of training for conservators as a key risk to adult's financial well-being
- State does not offer training to individuals who are appointed to be conservators

Recommendations

The General Assembly may wish to consider requiring

- that the court order appointing a conservator include a statement of the adult's financial resources identified as part of the court process.
- conservators to (i) notify family members and other interested parties that an initial inventory of assets will be submitted, and (ii) provide copies of the initial inventory to notified parties, if requested.

The General Assembly may wish to consider requiring conservators to complete state-provided training within four months of their court appointment.

Conservators can financially benefit at an adult's expense from “self-dealing”

- Self-dealing occurs when a conservator, their family, or their business financially benefits from adult's estate
 - Conservator hiring their spouse's estate sale business to sell the belongings of an adult they serve
 - Conservator using a partner in their law firm to conduct real estate transactions involving an adult's home
- At least seven states and Washington, D.C., have laws to define and prevent self-dealing by conservators
 - Code of Virginia does not currently address this issue

Recommendation

The General Assembly may wish to (i) define self-dealing, (ii) prohibit self-dealing by a guardian or conservator, and (iii) make voidable by the court any sale or transaction that constitutes self-dealing.

Key findings

Judges may lack adequate information when considering whether to appoint a guardian or conservator; judges and guardians ad litem would benefit from more training.

The state's public guardianship program has strong oversight and effective visitation, training, and caseload requirements.

In contrast, private guardians are not subject to standards and are subject to ineffective reporting and monitoring.

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

Quality of guardianship services can be improved through strengthened requirements and oversight of private guardians and expansion of the public guardianship program.

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