

GUARDIANSHIPS AND CONSERVATORSHIPS

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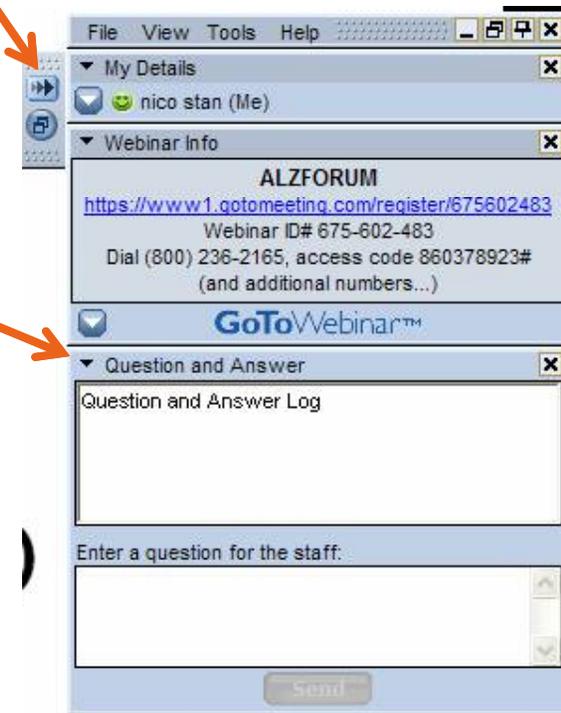
HOW-TO and QUESTIONS

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SUBSTITUTE DECISION MAKER

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TWO VEHICLES TO CREATE A SUBSTITUTE DECISION MAKER



**POWER OF
ATTORNEY**

GUARDIANSHIP

POA

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"A power of attorney is a written instrument by which one person appoints another as his agent or attorney-in fact and confers upon him authority to perform certain specified acts. A power of attorney creates an agency and this establishes the fiduciary relationship which exists between a principal and agent."

14B Michie's Jurisprudence, *Powers* § 2

POA'S ATTRIBUTES

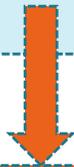
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- **Duration**
- **Durability**
- **Compensation of agent**
- **Protection of principal's assets**
- **Revocation**
- **Oversight**
- **Absence of obligation to act**
- **Absence of obligation to accept**
- **Scope of authority**

POA and GUARDIANSHIP

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A POWER OF ATTORNEY assumes that the principal is capable of managing his or her own affairs to the extent of appointing an agent.



NO COURT ACTION

A GUARDIANSHIP can only be implemented if the person involved lacks capacity.



ALL COURT ACTION

GUARDIAN - CONSERVATOR



The 1998 revisions to the guardianship provisions of the Code of Virginia created a new term: the conservatorship.

The **Guardian** is the person responsible for the medical decisions and housing arrangements for the incapacitated person. §§ 37.2-1000; 37.2-1020. This was previously known as the guardian of the person.

The **Conservator** is responsible for managing the money and other resources for the ward, §§ 37.2-1000, 37.2-1022, and was formerly known as the guardian of the estate.

For purposes of this summary, the term "Guardian" will be used for the combined offices of guardian and conservator, which mirrors the common usage of the term, particularly among the medical community.

ATTRIBUTES

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1. "Any person may file a petition for the appointment of a guardian, a conservator or both." § 37.2-1002(A).
2. The petition may be filed where the allegedly incapacitated person resides; where he or she is hospitalized or residing in a nursing home or similar facility; or where he or she resided immediately prior to becoming a patient or resident of a facility. § 37.2-1001(A).
3. A non-resident may have a conservator appointed regarding that person's property located in Virginia. § 37.2-1001(A).
4. 'As opposed to the pre-1998 law, judges are encouraged to tailor guardianships and conservatorships to the individual and to the circumstances.
5. **Every petition for appointment of a guardian or conservator, no matter how limited in scope or duration, must be supported by an evaluation report prepared by a licensed physician, psychologist, or other licensed professional with appropriate skills and experience. § 37.2-1005.**

THE GUARDIAN IS...

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- ❑ ...expected to promptly undertake to assess the medical needs of the ward and to make appropriate decisions for his or her care.
- ❑ ...obligated to investigate the housing needs of the ward, and to address those needs in an appropriate fashion.
- ❑ ...obligated to move without delay to secure whatever benefits are available, whether by application for Medicaid long term care benefits for nursing home care or auxiliary grants for assisted living, etc.
- ❑ ...also responsible for the medical care decisions for the ward. Whatever the right choice might be in the particular circumstance, the guardian must also convince the care provider that the guardian is the decision maker, not the patient and not the family members who may have been involved in the care to that point. The guardian may be forced to educate the doctor as to the significance of his or her appointment, as physicians in particular sometimes don't get it when it comes to the fact of the substitution of the guardian as the decision maker.

THE CONSERVATOR IS...

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- ❑ **...obligated to immediately take control over bank accounts, real estate, cars, brokerage accounts, income of all kinds including public benefits payments such as Social Security, and whatever else needs to be safeguarded.**
- ❑ The first task is to identify what the ward owns. Redirecting mail to the conservator is a necessary step that usually reveals assets and income. Once a bank or brokerage is identified, the next hurdle is establishing the right and obligation of the conservator to take control on behalf of the ward.

The appointment of a guardian or a conservator comes with the obligation to do something, and quickly, if only to size up the situation and determine if the status quo should be maintained. Whatever discretion to act may be in the holder of the power, the fiduciary obligations of the guardian and conservator compel appropriate, and frequently immediate, action on behalf of the ward.

Costs and Benefits of the Use of POAs, Guardianships and Conservatorships

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Out-of-pocket expenses

Scope of authority

Control by the grantor of the power vs. participation by the ward

Oversight of the agent vs. oversight of the guardian and conservator

Duration and durability

Compensation of the agent; the guardian; and the conservator.

Q&A

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