



# **INSTRUCTIONS TO CONSERVATORS OF INCAPACITATED PERSONS**

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**CONSERVATORS OF INCAPACITATED PERSONS**

**TABLE OF CONTENTS**

**PAGE i**

I. DUTIES AND POWERS OF A CONSERVATOR ..... 1

    A. Duties (Va. Code § 37.2-1022)..... 1

    B. Powers (Va. Code § 37.2-1023) ..... 1

    C. Authority To Sell (Va. Code § 37.2-1023)..... 2

II. IDENTIFY CONSERVATORSHIP ASSETS..... 3

III. WHOM TO NOTIFY OF YOUR APPOINTMENT ..... 3

IV. PUT ASSETS INTO CONSERVATORSHIP NAME ..... 4

V. CONSERVATORSHIP CHECKING ACCOUNT ..... 4

VI. INVENTORY OF ASSETS..... 5

VII. ACCOUNTINGS..... 5

VIII. DISBURSEMENTS..... 8

IX. INVESTMENTS BY CONSERVATORS..... 8

X. ESTATE PLANNING ..... 9

XI. COMPENSATION FOR CONSERVATORS..... 9

XII. SURETY BOND COVERAGE..... 10

XIII. FAILURE TO PROPERLY FILE INVENTORY OR ACCOUNTINGS ..... 11

XIV. TERMINATION OF CONSERVATORSHIP..... 11

A Conservator of an adult declared incapacitated by an Order of the Circuit Court has a duty to administer the assets of the incapacitated person in accordance with the laws of the Commonwealth of Virginia. Most, but not all, of the sections of the Virginia Code dealing with conservatorship matters can be found in Title 37.2. Title 26 is also pertinent as it contains the laws regarding a Conservator's reporting, bond, and other fiduciary duties and requirements.

The following is a very general outline of matters which you, as a Conservator of an incapacitated person, will need to be aware of in order to properly administer the incapacitated person's estate.

## **I. DUTIES AND POWERS OF A CONSERVATOR**

### **A. Duties ([Va. Code § 37.2-1022](#))**

1. At all times, the conservator shall exercise reasonable care, diligence and prudence, and shall act in the best interest of the incapacitated person. To the extent known, a Conservator shall consider the expressed desires and personal values of the incapacitated person.
2. A Conservator shall take care of and preserve the estate of the incapacitated person (both personal property and real property) and manage it to the best advantage. Income from the estate shall be applied to the payment of debts of the incapacitated person, including payment of reasonable compensation to the Conservator and to any guardian, and to the maintenance of the person and his legal dependents.
3. A Conservator shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage the estate and his financial affairs.
4. A Conservator stands in a fiduciary relationship to the incapacitated person and may be held personally liable for a breach of any fiduciary duty.
5. A Conservator shall comply with and be subject to the requirements imposed upon fiduciaries under Title 26, specifically, including the duty to account set forth in [Va. Code § 26-17.4](#).

### **B. Powers ([Va. Code § 37.2-1023](#))**

Pursuant to [Va. Code § 37.2-1023](#) a Conservator has the following powers and all those set forth in [Va. Code § 64.1-57](#):

1. To ratify or reject a contract entered into by the incapacitated person;
2. To pay any sum distributable for the benefit of the incapacitated person or for the benefit of a legal dependent by paying the sum directly to the distributee, to the

provider of goods and services or to any individual or facility that has assumed the responsibility for the care and custody of the incapacitated person; or to a distributee's custodian or to the guardian of the incapacitated person, or in the case of a dependent, to the dependent's guardian or conservator.

3. To maintain life, health, casualty and liability insurance for the benefit of the incapacitated or any legal dependent;
4. To manage the estate following the termination of the conservatorship until its delivery to the incapacitated person or successors in interest.
5. To execute and deliver all instruments and to take all other actions that will serve the best interests of the incapacitated person;
6. To initiate a legal proceeding to (i) revoke a power-of-attorney under [Va. Code § 11-9.1](#) or (ii) to make an augmented estate election under [Va. Code § 64.1-13](#);
7. To borrow money upon such terms and conditions as the Conservator shall deem advisable; to mortgage or pledge portions of the incapacitated person's estate to secure such loans and as maker or endorser, to renew existing loans.

**C. Authority To Sell ([Va. Code § 37.2-1023](#))**

Unless the Court imposes restrictions, usually at the time of appointment of the Conservator, the Conservator has unlimited authority to sell all assets, including the power to sell real estate.

1. Be sure to review the Order appointing you as Conservator to see which, if any, requirements need to be met before you begin procedures to sell any real property.
2. Prior to selling any real estate, the Court may require the Conservator to:
  - a. Increase the amount of the Conservator's bond,
  - b. Secure an appraisal of the real estate of interest,
  - c. Give notice to interested parties,
  - d. Consult with the Commissioner of Accounts, and if one has been appointed, the guardian, and
  - e. Require the use of a common source information company, as defined in [Va. Code § 54.1-2130](#), when listing the property.
3. Where these requirements are imposed, the Conservator must report his compliance in writing to the Commissioner of Accounts before any sale can take place.

**II. IDENTIFY CONSERVATORSHIP ASSETS**

1. If the incapacitated person is unable to tell you where and what his assets are, you may find looking in these places helpful:
  - Checkbook registers – usually deposits will reflect the source, i.e., social security, annuities, stock dividends.
  - Old tax returns -will show names of banks and account numbers from 1099's, and other investment information.
2. Determine how each asset is titled - solely owned; joint with someone and if so, with whom, and were the funds all contributed by the ward or what percentage was contributed by the ward; pay on death-account.
3. Vehicles - those titled in the incapacitated person's name solely should be considered as an asset of the conservatorship.
4. Furniture- if the incapacitated person's home is shared by a spouse or family member, the furniture is not usually considered as a conservatorship asset under your control.
5. Jewelry- if the incapacitated person is wearing it, do not consider it as being under your control as a conservator asset. If there is other valuable jewelry that would be in jeopardy if you don't take control of it, inventory it and put it in a safe place.

**III. WHOM TO NOTIFY OF YOUR APPOINTMENT**

- Send a copy of your letters of appointment as Conservator to every bank, brokerage firm, agency from which annuities are sent, and any other appropriate entity with a letter stating who you are, your address, and requesting future payments be sent to the incapacitated person in care of you as conservator.
- Take your letters of qualification as Conservator to the bank in which you will open any conservatorship accounts. Be sure that you use a bank that returns original cancelled checks or photocopies of cancelled checks to you for the conservatorship checking account.
- If the incapacitated person owns a car or a house, notify the insurance companies to assure future billings will be sent to you.
  - o If the house is vacant, be sure to advise the insurance company of this as they may require an additional premium in order to insure vacant homes.

- o If the incapacitated person can no longer drive a car you may need to decide whether to cancel the insurance or change its coverage in some fashion.

**IV. PUT ASSETS INTO CONSERVATORSHIP NAME**

- Titles to every account or asset of the incapacitated person should be changed from their name to "your name, Conservator for incapacitated person's name."
- Do not use your own Social Security number on conservatorship assets. You should use the incapacitated person's Social Security number.
- Assets held jointly with the incapacitated spouse should be split 50/50, and the incapacitated person's 50% should be put into the Conservatorship. Likewise 50% of the income earned from joint assets earned after the date of qualification should be deposited into the conservatorship.
- Pay on death (P.O.D.) accounts/assets and transfer on death (T.O.D.) accounts/assets should be left in the incapacitated person's name until such time as you need to use those assets for the incapacitated person's benefit. Then withdraw funds as needed and put the withdrawals into the estate checking account. Notify the holder of the asset so you will receive all statements and 1099's. Your intent should always be to maintain the character of the asset as designed by the incapacitated person so that his wishes will be honored at his death.
- Other jointly owned assets should be reported in the percentage that was contributed by the incapacitated person.
- Stocks or investments that have not reached maturity can be left as titled as long as the co-owner agrees to cooperate with you as Conservator and permit you to hold the original documents.

**V. CONSERVATORSHIP CHECKING ACCOUNT**

- Choose a Virginia Bank to open the conservatorship checking account. Use only a bank account that returns the original or photocopies of checks. If you will be keeping more than \$1,000 in the checking account, it is suggested you use an interest bearing account.
- It is recommended that you deposit all income for the incapacitated person into the conservatorship checking account and that you make all disbursements from this account. You may invest assets elsewhere, but the record keeping for you will be greatly simplified if all transactions pass through this one account.

- o This does not mean you should not invest in certificates of deposits or buy Treasury Bills, etc. Just deposit the proceeds from matured, redeemed, or sold assets into the checking account and then purchase new assets with a check from the checking account.
- As you are required to exhibit to the Commissioner of Accounts cancelled checks, or signed receipts for every disbursement you make as Conservator, should your bank fail to send you a statement or the cancelled check, anytime during the year, call them as soon as you are aware of the situation. Delaying your request for missing statements or cancelled checks may result in service charges by your bank.

## **VI. INVENTORY OF ASSETS**

- [Virginia Code Section 26-12](#) requires every Conservator to file an inventory of the assets of the incapacitated person's estate within four months from the date of qualification.
- The Clerk will have given you an Inventory form at the time of your qualification that includes detailed instructions for completing the form.
- Use exact figures on your Inventory valuations. Do not round figures. Use the beginning values, not the value as of the day you complete the Inventory.
- Inventories must be printed legibly in black or blue ink or typewritten, and signed by each qualified Conservator.
- You must submit the fully executed Inventory form, in duplicate, with the appropriate filing fee to the Commissioner of Accounts office. The Clerk will have given you a filing fee schedule at the time you qualified.
- Inventories may be filed by mail or in person at the Commissioner of Accounts Office if you make an appointment ahead of time. An appointment can sometimes be made with as little as one day's notice.
- Each Conservator must supply the Commissioner of Accounts with his telephone numbers, and complete, current street address. If you use a Post Office Box for mail, a street address must still be provided. It is the responsibility of each Conservator to keep the Commissioner of Accounts apprized of a current street address.

## **VII. ACCOUNTINGS**

- [Virginia Code §§ 26-17.3](#) and [26-17.4](#) requires every Conservator to file an account of the assets of the incapacitated person's estate.

- The Clerk will have given you an Account form that must be used and instructions on completing the form at the time of qualification.
- The First Account should cover a four-month period, beginning on the date of the Conservator's qualification. This account must be filed with the Commissioner of Accounts within **six months** from the date of qualification. For example, if the Conservator qualified on January 10, 2008, the First Account would cover the period January 10, 2008 through May 10, 2008, and it would be due on July 10, 2008.
- Second and subsequent accounts are to cover 12 months beginning with the ending date of the prior account, and are due within 16 months from the ending date of your prior account. For example, if the First Account ended May 10, 2008, then the Second Account would end May 10, 2009, and would be due by September 10, 2009. However, you may end your account on any day of the month, so that instead of ending it May 10, you can end it May 31.
- A Final Account by a Conservator is filed upon the death of the incapacitated person or upon entry of a Court Order restoring the incapacitated person's competency.
- Every accounting must be filed in duplicate and must be accompanied by the following:
  - o Original and one copy of the account signed by each Conservator that qualified.
  - o A check payable to the Commissioner of Accounts in the appropriate amount for the filing fee. The Clerk will have given you the filing fee schedule at the time you qualified.
  - o Vouchers, i.e. original cancelled checks, debit memos or signed receipts for each disbursement shown on the account. These will be returned to you. If you use a bank that does not return cancelled checks, then you must have a signed receipt from the payee or a photocopy of the check prepared by the bank. Vouchers must be organized in the same order as they appear on the accounting. Vouchers do not need to be filed in duplicate.
  - o A copy of the signed settlement sheet on any sale of real estate and "broker's statement to support any sale of stocks or other securities.
  - o Verification of each asset that remains on hand as of the end of the account period must be provided.

- For cash accounts, a statement from the financial institution, covering the ending date of the accounting and reconciled to agree with your accounting, must be provided.
- For a certificate of deposit, if there is no statement available, the original certificate must be provided, or a letter from the issuer verifying the existence of the certificate as of the ending date of the account and stating the balance of the certificate may be provided.
- Brokerage account statements should be supplied to verify stocks, bonds, and other securities or funds held. If you hold securities in certificate form, you must exhibit the original certificates to the Commissioner of Accounts or provide a statement from a bank officer certifying the original certificates of each security listed were exhibited to the bank officer on or after the ending date of the accounting.
- Titles for cars, boats, etc., should be exhibited. Jewelry and furnishings, if carried as assets under the Conservator's control, can be supported by a statement from a disinterested third party certifying the existence and the location of said assets. The statement by the third party should include his printed name, address and daytime phone number.
- Original notes must be exhibited unless an agency is handling the collection of the notes. In those instances a statement from the collecting agency certifying the identity of the holder and the principal balance as of the ending date of the account will be accepted.
- Copies of K-1 forms from the tax returns may be used to verify any partnership interests.
- Where the market value of the asset is not equal to the carrying value, show the market value in parentheses within the asset description.
- A final account must show ZERO assets on hand. No assets may be held in escrow by the Conservator for any reason whatsoever.
  - o Any assets remaining at the termination of a conservatorship for an incapacitated person should be delivered to the qualified fiduciary of his estate (if the incapacitated person died) or to the person himself (if he were declared competent by Court Order).
  - o All original vouchers will be returned to the Conservator or his representative after the completion of the Commissioner's audit.

- o Accountings must be printed legibly in black or blue ink or typewritten.
- o Accountings may be filed by mail or in person at the Commissioner of Accounts office if you call for an appointment ahead of time. An appointment can sometimes be made with as little as one day's notice.
- o Each Conservator must supply the Commissioner of Accounts with his telephone numbers, and complete, current street address. If you use a Post Office Box for mail, a street address must still be provided. It is the responsibility of each Conservator to keep the Commissioner apprised of his current street address.

**VIII. DISBURSEMENTS**

- A Conservator may use principal and income for the benefit of the incapacitated person. [Virginia Code § 37.2-1022](#) also permits a Conservator to contribute funds towards the support and maintenance of the incapacitated person's spouse and/or family.
- Since you must provide a cancelled check or receipt for each disbursement, it is suggested you make all disbursements from the conservatorship checking account so you will have a complete record of all such transactions.
- Costs of maintaining an incapacitated person's real property are properly paid from the conservatorship funds.
- If you must use cash to pay for something, obtain a signed receipt for it. You may find it convenient to pay occasional, small expenses yourself and then write a conservatorship check to yourself for reimbursement periodically.

**IX. INVESTMENTS BY CONSERVATORS**

- A Conservator is charged with the investment of funds under his control, and he must make such investments within four months from the time he collects such funds. ([Va. Code § 26-39](#))
- [Virginia Code § 26-40.01](#) provides a listing of securities in which a Conservator may invest. Some examples of approved investments are bonds, notes and other evidences of indebtedness of Virginia, a Virginia county, a Virginia city, or the United States as well as savings accounts, time deposits or certificates of deposit in banks, savings banks, trust company, savings and loan association, or credit unions authorized to do business in Virginia that are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund.

- For investments not approved by [Va. Code § 26-40.01](#), investments must be made in good faith, using intelligent and prudent reasoning, in order to be acceptable.
- It is recommended that a Conservator use Virginia banks for estate accounts. This is suggested in case the Conservator cannot complete the administration of the estate due to his own death, removal, or other reason. A substituted Conservator would be less inconvenienced in recovering the assets in Virginia than in some other state or the District of Columbia, resulting in less disruption to the administration of the incapacitated person's estate.
- [Virginia Code § 26-5](#) sets out the liability of fiduciaries regarding loss of assets.
- A Conservator may not invest conservatorship monies in unsecured notes or buy real estate or lend money to himself.
- Be sure to title all investments properly, i.e. "**Your name**, Conservator for **Incapacitated Person's Name**."
  - o Do not make any conservatorship asset joint with you or anyone else. The conservatorship funds belong only to the incapacitated person, and must be listed with the Conservator's name and title. Commingling funds results in confusion, especially when one party dies.

## X. ESTATE PLANNING

- [Virginia Code § 37.2-1024](#) permits the Court to authorize a Conservator, upon Petition to the Court, to make gifts and to disclaim property on behalf of the incapacitated person.
  - o The Conservator may make a gift, not to exceed \$100 to each donee in a calendar year and not to exceed a total of \$500 per calendar year, without petitioning the Court, if the Conservator determines that the incapacitated person had a three year history of making similar gifts.
- [Virginia Code § 54.1-2820](#) permits a Conservator to arrange for the funeral/burial of the incapacitated person while the incapacitated person is still alive. There are, however, many regulations a Conservator must meet. Before you enter a preneed funeral/burial plan, be sure the funeral home's contract meets the requirements of Virginia law.

## XI. COMPENSATION FOR CONSERVATORS

[Virginia Code § 26-30](#) allows a "reasonable compensation" to a Conservator for services rendered in the administration of a conservatorship. There is no specific definition of

"reasonable compensation", but, absent unusual circumstances, the Commissioner would expect to allow a fee based upon the following guidelines:

1. Income- 5% of all income receipts (interest, dividends, rents, etc.) realized during each accounting period, excluding capital gains.
2. Principal -A fee based upon the market value of the assets brought forward from the Inventory or prior account in accordance with the following schedule:

First	\$1,000,000	1%
Next	\$500,000	1/2 %
Balance over	\$1,500,000	1/4 %

3. Special Rules
  - a. Where the conservator hires an attorney or accountant to perform the duties of the Conservator, those fees shall be deducted from the compensation due the conservator. **NOTE:** This does not apply to fees paid to attorneys or accountants for tax work or litigation or other legal services necessary for the orderly administration of the conservatorship.
  - b. The Commissioner may reduce the allowable fee in exceptional circumstances. The Commissioner may also increase the allowable fee in exceptional circumstances, upon the request of the Conservator. Factors to be considered would be the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, and the results obtained.

## **XII. SURETY BOND COVERAGE**

The Court must determine the penalty of the personal bond and whether surety on the personal bond is required. ([Va. Code § 26-4](#))

Surety is when an insurance company is paid a premium to insure that a fiduciary will properly discharge his duties as a fiduciary. The surety bond is set at an amount sufficient to cover the assets in the hands of the fiduciary as of a specified date, plus 12 months worth of anticipated income.

1. The Commissioner of Accounts must report to the Court if the surety bond is insufficient. This is done after the filing of the Inventory and each Interim Accounting by a letter to the fiduciary setting forth the amount of increase necessary to cover the existing assets and anticipated income. A copy of the letter is sent to the Clerk of the Court and to the insurance company.
2. Reduction of the amount of the surety bond can be requested by a fiduciary when an inventory or accounting is filed which shows assets on hand, plus anticipated income, are less than the current surety bond coverage.

**XIII. FAILURE TO PROPERLY FILE INVENTORY OR ACCOUNTINGS**

1. Should a Conservator fail to file the required report within the time required by law or within an approved extension period, the following actions may result:
  - o A summons will be issued by the Commissioner of Accounts and served on the Conservator by the Sheriff. The summons gives the Conservator 30 days from the date of service to file the required report with the Commissioner of Accounts.
  - o If the summons deadline is not met, the Commissioner of Accounts will make his report to the Court and request the Judge to issue a Rule to Show Cause against the Conservator. Said Rule will be served by the Sheriff and the Conservator will be required to appear in Court to explain to the Judge why he has not filed the required report and why he should not be removed as the Conservator.
2. [Virginia Code § 26-19](#) provides that conservators who fail to settle their accounts as required by [Va. Code § 26-17.3](#) shall forfeit their commissions unless allowed by the Commissioner of Accounts for good cause shown.
3. Fees for the issuance of the summons and Rule, as well as any Court appearances by the Commissioner of Accounts, are charged against the Conservator personally.
4. [Virginia Code § 26-18](#) requires the Commissioner of Accounts to send a copy of his report to the Court to the Virginia State Bar for any fiduciary who is an attorney.

**XIV. TERMINATION OF CONSERVATORSHIP**

1. When the incapacitated person dies or is declared competent by the Order of the Circuit Court the conservatorship will end.

- a. Your powers as Conservator cease the day the incapacitated person dies. If the value of the personal estate in your capacity as Conservator exceeds \$5,000, you should write no conservatorship checks until an Administrator or Executor is qualified on the incapacitated person's estate. Then write a check to that fiduciary and transfer all remaining assets to him. As Administrator or Executor, he will pay all unpaid debts, including the filing fee for your final conservatorship account and your fee for conservatorship compensation.
  - 1) If the value of the personal estate in your capacity as Conservator is \$5,000 or less and no one has qualified as fiduciary of the incapacitated person's estate and it appears that no one will qualify, the Conservator may pay the balance of the incapacitated person's estate to the incapacitated person's surviving spouse, or if there is no surviving spouse, to the distributees of the incapacitated person or other persons entitled thereto, including any person or entity entitled to payment for funeral or burial services. The distribution shall be noted in your final Conservator's account.
- b. If the incapacitated person dies prior to restoration of competency, you must surrender the real estate to the incapacitated person's heirs or devisees.
- c. If the termination of the conservatorship is due to regained competency, your powers as Conservator cease upon entry of the Court Order reinstating the incapacitated person's competency.
- d. File your final account after you have transferred all remaining conservatorship assets, with the filing fee and with all supporting vouchers. Be sure to obtain a signed receipt from the fiduciary (ies) or formerly incapacitated person to whom you transfer the assets. Itemize each asset delivered.
  - 1) You are not relieved as Conservator until the Commissioner of Accounts approves your final account.
  - 2) Send a copy of your final account to the insurance company that is providing the surety on your bond so that they will cease billing you.