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When Legal Incapacity Becomes a Lack of Personhood: Why a Ward's Ability to Sue in Their Own Name Should be a Fundamental Aspect of Virginia Guardianship

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WHEN LEGAL INCAPACITY BECOMES A LACK OF PERSONHOOD: WHY A WARD'S ABILITY TO SUE IN THEIR OWN NAME SHOULD BE A FUNDAMENTAL ASPECT OF VIRGINIA GUARDIANSHIP

ABSTRACT

It is a fundamental failing of any legal system when it is unable to protect the most vulnerable within its population. Whether we are comfortable admitting it or not, guardian abuse of incapacitated wards has been well-documented across all fifty states. Virginia is no exception, and this lack of oversight leaves one of our most vulnerable populations without recourse. This Note argues that by simply granting a ward the ability to bring suit in their own name, Virginia may strike a significant blow to the dysfunction that systematically infects the guardianship process. This Note highlights Virginia statute and case law to draw attention to ineffective guardianship regulations that put incapacitated persons at risk. This Note will analyze Virginia statute and how the overall lack of agency for wards leaves a gaping hole for guardianship abuse to fester. This Note will also examine two recent cases, *Lopez-Rosario v. Habib* and *Cook v. Radford Community Center*, that continued to restrict a ward's ability to bring suit in their own name. Finally, this Note will address how the legal system has failed incapacitated wards by trying their hands behind their backs—if a ward cannot bring suit in their own name, then there is little recourse for abuse suffered at the hands of a guardian. To conclude, this Note will discuss potential steps forward, and methods that Virginia courts and legislature can take to ensure that a vulnerable population does not continue to slip through the cracks of the legal system.

INTRODUCTION

In an ideal legal system, an adult who is unable to make legal decisions, be they personal, medical, or financial, would be appointed an individual who could assist in this decision making. These decisions would be made in a manner consistent with the adult's best interest. In most cases, this assistance would come in the form of a guardian. A guardian might ensure that a person has enough food to eat, receives required medication, or is able to see loved ones. However, we do not live in a perfect legal system. Despite the best of intentions, oftentimes these relationships, intended to be a lifeline to the vulnerable person, instead turn abusive and parasitic. While the intentions behind guardianship and ward relationships are undoubtedly good, the system itself leaves a lot to be desired when it comes to preserving the legal integrity and autonomy of incapacitated persons.

This Note argues that for an incapacitated person to be treated justly under the full extent of the law, the individual must be allowed to bring suit in their own name when part of a ward and guardian relationship. While expanding safeguards for incapacitated persons under a guardianship will undoubtedly be beneficial, these steps alone are not sufficient to fully protect incapacitated persons. This Note begins by addressing the background of the guardian and ward relationship in Virginia before moving on to the specific issue of wards being unable to sue in their own name. Finally, this Note addresses the problems that arise from this lack of agency for the ward and will conclude by addressing potential solutions that could be undertaken in the meantime.

I. BACKGROUND

Courts have long played a pivotal role in defining the relationships between individuals.[1] The right of parents to make decisions

1. For examples of the right for parents to make decisions for their children being protected under the 14th Amendment see Meyer v. Nebraska, 262 U.S. 390, 401–03 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925).

for their children has an extensive foundation in legal history.[2] In Virginia, this same right exists regardless of whether there is a biological relationship between parent and child, most noticeably in the form of guardianship.[3] Furthermore, guardians may also be assigned to an adult found to be incapacitated by the courts.[4] Virginia defines an incapacitated person as,

> [A]n 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.[5]

When a person is legally incapacitated, a court may appoint a guardian to assist the person with their financial or other life affairs.[6] The incapacitated person is then said to become the "ward" of the guardian.[7] A ward may be defined as either a minor or an incapacitated adult under the protection of a legal guardian.[8]

Typically, courts provide support to minors or incapacitated adults by appointing either a guardian or conservator.[9] Although the two share similarities, they serve vastly different roles.[10] For example, while a conservator may be appointed to handle most of the ward's financial affairs, such as bills or assets, a guardian serves a much broader purpose.[11] While each state takes a different approach, Virginia refers to a guardian as follows:

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2. *See Meyer*, 262 U.S. 401–03; *Pierce*, 268 U.S. 534–36.
3. *See* VA. CODE ANN. § 62.4-2000 (2020).
4. *See id.*
5. *Id.*
6. Aaron Larson, *What is a Guardianship*, EXPERT LAW (Apr. 19, 2018), https://www.expertlaw.com/library/estate_planning/guardianship.html [https://perma.cc/35YB-HMYN].
7. *Id.*
8. *Id.*
9. *Id.*
10. *See id.*
11. *See id.*

> *"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."[12]

Accordingly, guardianships may be a full or "plenary" guardianship, or a limited or temporary guardianship.[13] Limited guardians differ from plenary guardians in that such a guardian only has control over the specific aspects of a ward's life as specified when the guardian is appointed.[14] This Note will primarily address the concept of a plenary guardian, as this guardian is the version that has full control over their ward's affairs.[15] Unless otherwise specified, "guardian" will refer to a plenary guardian exercising full control over a ward's affairs.

Finally, it is important to distinguish a full guardian from a guardian ad litem (hereinafter interchangeable with GAL). A GAL is "an attorney appointed by the court to represent the interests of the respondent" during a hearing to determine legal capacity.[16] Though other states' laws vary, Virginia requires that all GALs be local licensed attorneys.[17] A GAL's primary responsibility is to represent a respondent within the court system before the respondent has access to a full guardian.[18] As a result, the main task of a GAL is evaluating petitions for guardianship that have been submitted to the court: namely, whether a respondent will require a full guardianship.[19] Other duties may include visiting and explaining legal rights to the respondent, recommending that legal counsel be appointed if necessary, investigating any petitions for guardianship, as well as determining whether further evidence is required or whether a less restrictive means might be available when determining if a full

12. VA. CODE ANN. § 64.2-2000 (2020) (emphasis added).
13. *Id.*
14. *Id.*
15. *Cf. id.*
16. *Id.*
17. *Id.* Compare with states such as North Carolina or Washington, which do not require guardians ad litem to be licensed attorneys so long as they have been approved by the state. *See* N.C. GEN. STAT. § 7B-600 (2021); WASH. REV. CODE ANN. § 26.12.175 (LexisNexis).
18. *See* VA. CODE ANN. § 64.2-2000 (2020).
19. *Id.*

guardianship is necessary.[20] Ultimately, GALs must file a report regarding capacity pursuant to Section 64.2-2003.[21]

Unlike GALs, full guardians have a much broader scope of responsibilities.[22] The responsibilities are laid out in statutes and revolve around tasks performed on behalf of a legally incapacitated person.[23] These tasks may include managing personal affairs; making health, safety, or educational decisions; or even choosing the residence where the incapacitated person will reside.[24] Overall, the primary difference between a guardian and a GAL is that a guardian typically has full access and input into an incapacitated person's affairs, while a GAL is primarily responsible for a respondent's legal advocacy when determining the necessity of a guardianship.[25]

II. Examination of Statute and Case Law

Section 64.2 states that a ward cannot file suit in their own name.[26] While this language has been updated over time, the issue of a ward's agency has long been a contested concept in the legal field.[27] Section 64.2-2025 states the following:

> Subject to any conditions or limitations set forth in the order appointing the fiduciary, the fiduciary shall prosecute or defend *all actions* or suits to which the incapacitated person is a party at the time of qualification of the fiduciary and all such actions or suits subsequently instituted after 10 days' notice of the pendency of the action or suit. Such notice shall be given by the clerk of the court in which the action or suit is pending.[28]

Interestingly, if we then examine Section 64.2-2012 of the same code, the following is stated:

> . . . *Upon petition by the incapacitated person*, the guardian or conservator, or any other person or upon motion of the court, the court may (I) declare the incapacitated person restored to capacity; (ii) modify the type of appointment or the areas of protection, management, or assistance previously granted or require a new

20. Va. Code Ann. § 64.2-2003(b) (2020).
21. Va. Code Ann. § 64.2-2000 (2020).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Va. Code Ann. § 64.2-2025 (2020).
27. For two historical Virginia examples of issues between incapacitated persons and their guardians, see Cole's Comm. v. Cole's Adm'r, 69 Va. 365, 367–73 (1877) and Hinton v. Bland's Adm'r, 81 Va. 588, 590–99 (1886).
28. Va. Code Ann. § 64.2-2025 (2020) (emphasis added).

> bond; (iii) terminate the guardianship or conservatorship; (iv) order removal of the guardian or conservator as provided in § 64.2-1410; or (v) order other appropriate relief.[29]

Before continuing, it is necessary to distinguish these two sections of the Code. The language of 64.2-2012, that "the court . . . may declare the incapacitated person restored to capacity" at "petition by the incapacitated person" appears to directly conflict with 64.2-2025.[30] As previously noted, 64.2-2025 states that a ward cannot file suit in their own name.[31] Not only does the guardian control when a ward can sue, they also have the exclusive right to control all actions and suits to which the incapacitated person is a party.[32] Neither statute offers an explanation for this seemingly contradictory language.[33] However, the case law is slightly more forthcoming on the issue.[34]

In cases such as *Cook v. Radford Community Center*, Virginia courts have held that any suit incorrectly brought in the name of the ward, rather than the guardian, will be immediately dismissed.[35] Sixteen years after *Cook*, *Lopez-Rosario v. Habib* upheld this finding that an incapacitated person cannot bring suit in their own name regardless of the circumstances.[36] However, the court has held that incorrect language in filing is not a fatal error, and can be remedied by amendment.[37] Finally, both *Cook* and *Lopez-Rosario* established that Section 64.2-2025 of the Virginia Code determined that the parents of the ward had both the "authority and obligation"[38] to prosecute on plaintiff's behalf.[39] Therefore, even if the parents acquiesced to allow the ward to bring suit in their own name, the ward could not do so.[40]

Ultimately, despite conflict among the language in the statute, the controlling law in Virginia appears to be that a ward cannot file suit in their own name.[41] This presents a clear problem. If one statute clearly states that an incapacitated party may bring suit in their own

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29. VA. CODE ANN. § 64.2-2012 (2020) (emphasis added).
30. *Id.* (emphasis added)
31. *Compare* VA. CODE ANN. § 64.2-2012 (2020), *with* VA. CODE ANN. § 64.2-2025 (2020).
32. VA. CODE ANN. § 64.2-2025 (2020).
33. *Compare* VA. CODE ANN. § 64.2-2012 (2020), *with* VA. CODE ANN. § 64.2-2025 (2020).
34. *See* Cook v. Radford Cmty. Hosp., Inc., 536 S.E.2d 906, 907 (Va. 2000).
35. *Id.*
36. Lopez-Rosario v. Habib, 785 S.E.2d 214, 216–17 (Va. 2016).
37. *Cook*, 536 S.E.2d at 910.
38. *Lopez-Rosario*, 785 S.E.2d at 217.
39. *Id.*; *see also Cook*, 536 S.E.2d at 910.
40. *Lopez-Rosario*, 785 S.E.2d at 216–17.
41. *See* VA. CODE ANN. § 64.2-2025 (2020); *see also Cook*, 536 S.E.2d at 910; *Lopez-Rosario*, 785 S.E.2d at 217.

name yet another states the opposite,[42] the result appears to be a substantial issue of due process for any affected incapacitated person.

A. Potential Exceptions to Va. Code Ann. § 64.2-2025

Courts have suggested potential exceptions to the language of 64.2-2025.[43] For example, *Cook* established that "if a fiduciary has been appointed for a ward," then "the fiduciary [must] prosecute any suit to which the ward is a party."[44] Furthermore, "*in the absence of an exception*" a ward does not have the legal ability to bring suit in their own name.[45] The court in *Cook*, which referenced the now-repealed Section 37.1-141 of the Code, neglected to specify what any of these exceptions might be.[46] However, *Lopez-Rosario* appeared to shed some light on this when it followed *Cook* in 2016.[47] *Lopez-Rosario* stated that a guardianship may be "limited in nature" in such a way as to prevent the guardian from having full "authority over legal decisions."[48] In turn, this would alleviate the restriction created by a guardian that forbids wards from bringing suit.[49]

At first glance, this exception appears to present a possible solution to the issue at hand. If a ward needs to bring suit, then they may do so under a limited guardianship.[50] However, this "solution" fails to address the powerlessness that wards under a full guardianship face.[51] Wards do not get to choose what type of guardianship to be placed under, be it limited or full.[52] Therefore, any steps taken to grant wards more legal power must be taken with a full guardianship in mind. A full guardianship means full control over the ward's life, and full access to control it as the guardian sees fit.[53] As one may expect, this power discrepancy between a ward and an incapacitated person, while not always problematic, can lead to serious issues when conflict does arise.[54] We need only refer to a report by the U.S. Government Accountability Office to see that many wards

42. *Compare* VA. CODE ANN. § 64.2-2012 (2020), *with* VA. CODE ANN. § 64.2-2025 (2020).
43. *Cook*, 536 S.E.2d at 910.
44. *Id.* (alteration added).
45. *Id.* (emphasis added).
46. *Id.*
47. *See Lopez-Rosario*, 785 S.E.2d at 214.
48. *Id.* at 216.
49. *See id.*
50. *Cf.* VA. CODE ANN. § 64.2-2025.
51. *Id.*
52. *Cf.* VA. CODE ANN. § 64.2-2000.
53. *Id.*
54. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS Appendix III: Additional Cases of Abuse, Neglect, and Financial Exploitation by Guardians (2010).

suffer at the hands of abusive guardians.[55] Per this report, in Missouri, a guardian stole over $640,000 from his elderly ward who suffered from Alzheimer's.[56] The guardian spent this money on fancy cars and "exotic dancers" while his ward lived in squalor.[57] Eventually, county workers found the ward living in a "filthy basement wearing an old knit shirt and a diaper."[58] In another instance in Kansas, more than twenty victims with mental incapacities were sexually and physically abused by their guardian at an unlicensed group home.[59] The guardians billed Medicare for this "therapy" while the residents lived in "dirty and bug infested" conditions.[60] In these types of situations, it is unlikely that such a guardian would simply give up control so the ward might bring suit independently. More worryingly, if a guardian acts against the ward's best interest by subjecting them to abuse, the guardian is highly unlikely to act directly against his own self-interest by allowing a ward to bring the abuse to light.[61] This is why the so-called "exception" of a limited guardianship does not matter. In cases of full guardianship, where a ward does not have any ability to bring suit, there are no protections in place to prevent these wards from suffering abuse.[62] A plenary guardian has full control over every aspect of a ward's life.[63] Ultimately, a ward has no ability to petition a court to assist in escaping a harmful situation.[64]

Therefore, while this exception to 64.2-2025 might appear helpful on its face,[65] in reality it has little relevance. The language only applies to a limited guardianship.[66] Full guardianships inherently prevent an incapacitated person from seeking legal recourse.[67] To prevent cases of fraud and abuse, a ward under a plenary guardianship must be granted the opportunity to bring suit independent of a guardian.

III. APPOINTING A GUARDIAN

Appointing a guardian ought to be straightforward. However, despite statutes explaining the process, the language contained in

55. *Id.*
56. *Id.* at 17.
57. *Id.*
58. *Id.*
59. *Id.* at 15.
60. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 15 (internal quotations omitted).
61. *Cf. id.*
62. *Cf.* VA. CODE ANN. § 64.2-2000 (2020).
63. VA. CODE ANN. § 64.2-2000 (2020); VA. CODE ANN. § 64.2-2025 (2020).
64. VA. CODE ANN. § 64.2-2025 (2020).
65. *Id.*
66. *Cf. id.*
67. *Id.*

these statutes is not always clear.[68] The resulting ambiguity of some definitions can lead to disastrous consequences for wards under a guardianship.[69]

A. Defining an Interested Party

Under Virginia law, any interested party can file a claim that an incapacitated person needs a guardian.[70] While 64.2-2001 does not define an interested party as it relates to a guardian, courts have previously defined the term.[71]

By this reasoning, any relative or friend of the incapacitated person could claim the individual needs a guardian, even if untrue.[72] Indeed, there are numerous examples of hospitals using their legal teams to declare a patient incapacitated so the hospital may appoint a guardian and control the individual's medical treatment.[73] Overall, the potential for exploiting vulnerable individuals, even unintentionally, appears significant.[74]

B. Defining "Best Interest"

The courts are historically tight-lipped on safeguards for guardian appointments.[75] Under Virginia law, the respondent is the incapacitated person, and they have the right to a hearing and must be appointed a guardian ad litem.[76] At the hearing, the guardian ad litem will give an opinion on whether a guardian should be appointed based on the ward's "best interest."[77] However, it is unclear who

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68. *See* VA. CODE ANN. § 64.2-2001 (2020).

69. Bridget Balch, *He Asked for a Lawyer. The Person Charged with Protecting His Rights Said She Thought He Didn't Need One.*, RICHMOND TIMES-DISPATCH (Nov. 30, 2019), https://richmond.com/news/local/he-asked-for-a-lawyer-the-person-charged-with-protecting-his-rights-said-she-thought/article_21363dc4-715f-5be9-bb7d-13d0fea1e2fa.html [https://perma.cc/UL3D-M3TQ].

70. VA. CODE ANN. § 64.2-2001 (2020); VA. CODE ANN. § 64.2-2002 (2020).

71. *See* Stephens v. Caruthers, 97 F. Supp. 2d 698, 707 (E.D. Va. 2000) (quoting Robertson's Ex'r v. Atl. Coast Realty Co., 106 S.E. 521, 524 (Va. 1921) ("A person is an interested party when that person 'is in some way . . . beneficially interested in the judgment or decree that is sought to be obtained.'")); *see also id.* at 707 (quoting Ratliff v. Jewell, 149 S.E. 409, 411 (Va. 1929) ("[A] person has a beneficial interest in litigation where . . . that person has 'an interest in the property concerned in the litigation that may be benefited or adversely affected by the result of the suit or a beneficial interest in the fund sought to be recovered.'")).

72. *See* VA. CODE ANN. § 64.2-2002 (2020).

73. Balch, *supra* note 69.

74. *Id.* (listing multiple cases of abuse at the hands of guardians and the healthcare system).

75. *See id.*

76. VA. CODE ANN. § 64.2-2003 (2020).

77. VA. CODE ANN. § 64.2-2021 (2020).

defines this interest or what this interest might be.[78] Indeed, the definition of best interest appears to vary depending on whether the ward is a child, incapacitated person, or some other type of ward.[79] For example, Section 20-124.3 of the Virginia Code states that when determining the best interest of a child for visitation or custody purposes, the court should consider, among other factors:

> 1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs[.]
> 2. The age and physical and mental condition of each parent[.]
> 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of the child[.]
> 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members; [and]
> 5. The role that each parent has played and will play in the future, in the upbringing and care of the child . . . .[80]

This list of factors is not exhaustive.[81] From this section alone, it is evident that the court defines the criteria for what constitutes a child's best interest.[82] Concerningly, this same level of definition does not appear to be the case with wards who are incapacitated persons.[83] For example, Section 64.2-2019(E) of the Code states the following:

> A guardian 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 personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's *best interest* and exercise reasonable care, diligence, and prudence. A guardian shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.[84]

78. *See id.*
79. *Compare* VA. CODE ANN. § 20-124.3 (2020), *with* VA. CODE ANN. 64.2-2019(E) (2020).
80. VA. CODE ANN. § 20-124.3 (2020).
81. *Id.*
82. *Id.*
83. VA. CODE ANN. § 64.2-2019(E) (2020).
84. VA. CODE ANN. § 64.2-2019 (2020) (emphasis added).

Because the court has not clearly defined what constitutes an incapacitated person's "best interest," it is difficult to determine what actions a guardian is permitted.[85] Furthermore, due to the general nature of the provision, what is in the best interest of one ward may not be in the best interest of another.[86] While this may not initially seem concerning, the danger for the ward increases when 64.2-2025 prevents the ward from bringing suit independently.[87] Overall, it seems clear that courts should address the language of "best interest"[88] for the guardian and ward relationship in order to ensure that the dynamic remains as safe and healthy as possible.

C. Guardians Ad Litem

While previously mentioned, it is important to emphasize the difference between a GAL and a regular guardian. A guardian, as defined by Virginia law, is a person responsible for making various decisions on behalf of an incapacitated person, who then becomes the guardian's ward.[89] This guardian need not have any legal training, as the statute simply states that a guardian must be "a person appointed by the court."[90] In contrast, a guardian ad litem is "an *attorney* appointed by the court to represent the interests of the respondent and whose duties include the evaluation of the petition for guardianship . . . and filing a report with the court pursuant to 64.2003."[91] The main difference between a guardian and a guardian ad litem is that the former can be any person, regardless of training, who can potentially be granted full control over an incapacitated person's life.[92] A guardian ad litem, on the other hand, is an attorney assigned by the court whose only job is to determine whether an interested party's petition for guardianship has merit.[93]

A GAL's duties are addressed specifically in Section 64.2-2003 of the Annotated Virginia Code.[94] The duties include:

> (i) [P]ersonally 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)

85. *Id.*
86. *Id.*
87. VA. CODE ANN. § 64.2-2025 (2020).
88. VA. CODE ANN. § 64.2-2019 (2020).
89. VA. CODE ANN. § 64.2-2000 (2020).
90. *Id.*
91. *Id.* (alteration added) (emphasis added).
92. VA. CODE ANN. § 64.2-2000 (2020) (defining guardianship).
93. *Id.*
94. VA. CODE ANN. § 64.2-2003 (2020).

> 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 or durable power of attorney . . .[95]

The guardian ad litem is charged with taking the incapacitated person's wishes into account, but this must be balanced against other considerations.[96] For example, an incapacitated person may feel that they do not need a guardian; however, a guardian ad litem may decide that an incapacitated person cannot function in a way that would be in their "best interests."[97] In this case, it seems as if a guardian must be appointed, even if the incapacitated person does not wish for one to be.[98] Surely such an appointment will not always be in the ward's best interest, as it forces the ward to hand over all control to a third party.[99]

Proponents of this language may argue that Section C states that the guardian ad litem "shall address" the "wishes of the respondent, and recommendations of relatives" when making decisions.[100] However, this language merely rephrases the unhelpful concept of a ward's "best interest."[101] Whether the terminology is phrased as "wishes" or "best interest," the criteria of whatever this interest is has never been explicitly defined.[102] Therefore, proponents may simply wave away any criticism, arguing that as long as some arbitrary "best interest" standard is met that all is being done to protect wards. Moreover, the intersect appears to be easily overwritten at the opinion of the attorney appointed as guardian ad litem.[103] There appears to be nothing in the statute to prevent a guardian ad litem from going against an incapacitated person's best interest, as long as the guardian claims that other factors outweigh such interest.[104] This is more evidence why a ward must have the ability to sue in their own name:

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95. VA. CODE ANN. § 64.2-2003(B) (2020).

96. VA. CODE ANN. § 64.2-2005 (2020).

97. VA. CODE ANN. § 64.2-2003 (2020).

98. *See* VA. CODE ANN. § 64.2-2005 (providing statutory language); *see also* Balch, *supra* note 69.

99. *See* Balch, *supra* note 69 (providing examples in which some wards were forced to do just that).

100. VA. CODE ANN. § 64.2-2003(C) (2020).

101. *Cf. id.*

102. VA. CODE ANN. § 64.2-2003(C) (2020); VA. CODE ANN. § 64.2-2005 (2020).

103. *See* VA. CODE ANN. § 64.2-2005; *see also* Balch, *supra* note 69 (providing instances in which the ward's desires were overruled).

104. Balch, *supra* note 69 (proving that a GAL may act against a ward's expressed desires and still be found to be adhering to the ward's "best interests").

if a GAL is going to actively appoint a guardian to an incapacitated person against said person's wishes, there must be some form of legal recourse for the ward to object.

Furthermore, issues arise when the court utilizes the same guardian ad litem at the cost of others.[105] Experts suggest that failing to rotate between which "professional guardian" is appointed as a guardian ad litem can lead to the appearance of favoritism.[106] In other words, when a court repeatedly assigns the same GAL to every guardianship case that arises in its jurisdiction, it may appear that that GAL is being given preferential treatment.[107] More importantly, if the same person is being chosen over and over, the court may be failing to appoint other, more qualified individuals to the position.[108] On a more personal level, it may be true that certain GALs are better suited to fully understand or interact with specific individuals. However, if a GAL is not properly rotated, this help may not be available to an incapacitated person.[109] A district court in Virginia repeatedly assigned the same GAL to cases because they, for lack of more details, "trusted her" to do a good job.[110] However, while that GAL allegedly fulfilled all her pen and paper obligations to "notify" the respondent she was assigned to of their rights, "she almost never recommended" that they "exercise" those rights.[111] According to reports, "[n]one of the cases reviewed had a jury trial" and fewer still had defense attorneys.[112] More concerningly, it was only on occasion that the respondent whose rights were in question was even present at the hearing.[113] This single GAL report goes to show that a lack of diversity in GAL appointments can be significantly harmful to any incapacitated person who is assigned that GAL.[114] Just as the incapacitated person has no ability to sue an appointed guardian, there is also a clear lack of ability to contest who is assigned as guardian ad litem.[115] Furthermore, some Virginia courts do not even assure that a GAL is providing sufficient help to the person to whom they are assigned.[116] It is not clear, then, who is responsible for protecting the interests of these respondents if the GAL is insufficient or incompetent.

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Balch, *supra* note 69.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. Balch, *supra* note 69.

D. Plenary Guardianships

As mentioned above, a full guardianship is one that grants the guardian full control over the ward's finances, their safety, and more of their life choices.[117] No doubt due to this harsh degree of control, Virginia law states that courts "must consider less restrictive options to guardianship, including an advance directive and durable power of attorney, before resorting to guardianship."[118]

While this language was created, no doubt, to defend the rights of incapacitated persons,[119] any protection it may offer appears to be too little and too late. The respondent at a guardianship hearing already lacks say in whether a guardian is appointed.[120] They may plead their case that they are not incapacitated, and they may even request that a specific person be appointed their guardian, if one must be appointed at all.[121] Ultimately, it does not matter. If the court finds that it is in the person's best interest to appoint a guardian, then the court is obligated to do so.[122] Once a guardian is appointed, there is no method for removal other than a petition for termination.[123] Although a ward may, technically, petition for guardianship termination or a restoration of rights, the context surrounding this process makes it difficult.[124]

It is worth briefly addressing the process through which a guardianship may be terminated, and a person's rights restored. These processes are complex and time consuming.[125] Some organizations have taken it upon themselves to assist wards in restoring legal capacity, while others are barred from assisting at all, despite being well-suited to the task.[126] Ultimately, there are four main categories of people who have the power to petition for termination of a guardianship: the incapacitated person, the guardian, the court, or "any other person"—which the statute does not describe in more detail.[127]

First and foremost, language permitting an incapacitated person to petition for termination of a guardianship is misleading. While a

117. VA. CODE ANN. § 64.2-2000 (2020).
118. Balch, *supra* note 69.
119. *Id.*
120. VA. CODE ANN. § 64.2-2006 (2020).
121. *Id.*
122. VA. CODE ANN. § 64.2-2007(D) (2020).
123. VA. CODE ANN. § 64.2-2012 (2020).
124. *See id.*
125. Balch, *supra* note 69.
126. *Id.* (noting that the disAbility Law Center of Virginia can only help a few people each year and the Virginia Indigent Defense Commission does not handle guardianship cases).
127. VA. CODE ANN. § 64.2-2012(A) (2020).

ward may technically petition the court,[128] the language is unclear about whether the ward must do so through a guardian, just as in any other action to which the ward is a party.[129] Moreover, even if a ward may legally petition the court for termination, many wards may not have the resources or mental faculties to do so, even if the situation might be in their best interest.[130] If a GAL is appointed to assist the ward, the same problem applies as in guardianship appointment: there is no guarantee that the GAL would have the ward's best interest in mind or would even make a decision that coincides with the ward's expressed desires.[131]

The remaining three categories primarily fall into the same trap. Any of the categories, petition by guardian, interested party, or court, appear to be adequate avenues to a restoration of rights.[132] However, the problem remains that these remedies would likely only be available to ward who was not in an abusive relationship. As repeatedly stated in this Note, the goal of allowing a ward to file suit in their own name will primarily be beneficial to wards who are subject to a harmful power imbalance.[133] If an incapacitated person's rights are restored as a result of a guardian or third party, then the system is working as it should.[134] It is when this termination is sought by a ward with an incompetent GAL or hostile guardian that this language would be the least effective.[135]

By better understanding the arduous process through which a guardian is removed, it is easier to see that the process of appointing a guardian should not be taken lightly. Moreover, it makes the consequences all the more dire for a ward who is unable to bring suit: if a guardian is insufficient and the ward cannot sue, but the process of terminating a guardianship is also lengthy or inaccessible, then it is not unfair to say that the legal system has failed one of its primary duties: providing recourse to people who have been harmed.

E. Deciding When to Appoint a Guardian

Due to the difficulty of terminating a plenary guardianship,[136] the court should weigh the necessity of appointing a guardian against

128. *Id.*
129. *Id.*
130. *Cf. id.*
131. Balch, *supra* note 69.
132. VA. CODE ANN. § 64.2-2012 (2020).
133. *See supra* Part III (discussing examples of power imbalances).
134. *See* VA. CODE ANN. § 64.2-2012 (2020).
135. Balch, *supra* note 69 (detailing abuse from guardians that entailed when wards were not able to escape harmful situations).
136. VA. CODE ANN. § 64.2-2012 (2020).

the benefits of allowing an incapacitated person to remain independent.[137] The Virginia Code lists the considerations applied when deciding to appoint a guardian, including the ability to protect the respondent from abuse and neglect, as well as the respondent's best interests.[138] However, not included in this list is testimony from the incapacitated person about what they desire.[139] This testimony could presumably be covered under consideration of the respondent's "best interests," but the fact that it is not specified is concerning.[140] If an incapacitated person is not explicitly allowed to testify about why they should or should not have a guardian, then it seems impossible to determine whether any decision will truly be in their best interest.

In practice, this lack of consideration for the incapacitated person's desires is a serious issue in Virginia guardianship cases.[141] In one 2019 case out of Richmond, Virginia, a man was sent to a hospital after a motorcycle accident.[142] Due to his injuries, the VCU Health system attempted to appoint one of their representatives to him, attorney Shawn Majette.[143] Majette told the judge that the VCU was attempting to admit the man to a rehab facility.[144] Due to the nature of the Richardson's accident, he had been declared mentally incapacitated, and the court had appointed Henrietta Cannon as GAL.[145] Cannon told the judge that the ward "was capable of making some decisions but not the decision to go to a rehab facility."[146] As a result, the court began the process of appointing Majette to be the *full* guardian for the man so the guardian could make the executive decision of admitting the man to a rehab facility.[147] However, the ward opposed being placed in a guardianship, and requested that a close friend be appointed power of attorney over his affairs instead.[148] Despite this request, both the GAL and the court disregarded the ward's wishes, because both felt that a power of attorney "might not be sufficient" to help with the various things the court decided the ward needed, such as Medicaid.[149] Ultimately, the court appointed Majette to be the man's "temporary guardian."[150] Although the man agreed

137. Balch, *supra* note 69.
138. VA. CODE ANN. § 64.2-2007(C) (2020).
139. *Id.*
140. *See id.*
141. *See* Balch, *supra* note 69.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. Balch, *supra* note 69.
148. *Id.*
149. *Id.*
150. *Id.*

to it initially, later reports showed that he had rejected Majette's assistance in checking into a rehab facility, and presumably never received the help that a guardianship was supposed to offer him.[151] Not only did the court go against the man's express wishes, but in doing so, perhaps prevented him from getting the help he would have received from a trusted friend—a friend that the man had requested to be appointed to him in the first place[152] and that the courts (and GAL) ignored in favor of some nebulous standard of "best interest."[153]

Interestingly, this decision to override the ward's wishes appears to directly conflict with language in the statute.[154] Virginia law explicitly states that the court must consider less restrictive options before placing someone under the restrictions of a guardianship.[155] While it is true that the court did consider the option of appointing the man's close friend, it ultimately went with Cannon's opinion as a GAL rather than his expressed desires.[156] Though unable to make financial decisions, the ward clearly stated his desires and specified a person as appointed power of attorney.[157] Even if the GAL is correct and a power of attorney is not sufficient for Medicaid assistance, it is problematic for a court-appointed guardian—often a complete stranger to the ward—to be the one making that decision.

The above case is an example of a pressing issue: if the opinion of a GAL and his ward conflict, and the GAL opinion is—apparently—weighted more heavily, then surely there are times where a GAL is not acting in a ward's best interests.[158] Virginia law clearly states that a guardian ad litem must consider several factors and then weigh these against the ward's best interests.[159] It could be argued that an incapacitated person may not know what is in their best interests, and that a guardian ad litem ought to decide for them. While this is sometimes the case, it is not the case in all proceedings, and it is certainly not relevant when an incapacitated person is able to explicitly state their desires. A court cannot claim that it is protecting incapacitated persons when it allows actions directly contradicting such a person's coherent, rational, and reasonable desires.

In another similar case, Richard Hayes fell off of the balcony at his home and was paralyzed.[160] While recovering at the VCU Medical

151. *Id.*
152. *Id.*
153. Balch, *supra* note 69.
154. VA. CODE ANN. § 62.4-2003 (2020).
155. *Id.*
156. Balch, *supra* note 69.
157. *Id.*
158. *Id.*
159. VA. CODE ANN. § 64.2-2007(D) (2020).
160. Balch, *supra* note 69.

Center, Hayes specifically requested that he not be sent to a specific nursing home which was far away from his family.[161] His family had already been assisting him in finding a place to live and would be around to take care of him.[162] Ultimately, the hospital system "petitioned the Richmond Circuit Court to have [Hayes] declared incapacitated" so that the court could appoint a hospital attorney as his guardian.[163] As a result, the court gave the hospital the power to discharge Hayes and have him "admitted to the nursing home despite his objections."[164] Hayes was promptly admitted.[165] According to his family, Hayes "spent the last year of his life in [the] nursing home" in an environment where he was powerless to help himself.[166] Hayes "often went hungry and was rarely moved out of his bed."[167] Medical records showed that, at the time of death, Hayes "had heart failure, kidney failure, sepsis, malnutrition, and at least nine bed sores."[168] All these symptoms were suffered as the result of incompetent nursing care, from a facility where Hayes was sent to against his express desires.[169] It is unconscionable that a person be relegated to a nursing home against his own volition, only to die there shortly thereafter in appalling conditions.[170] It is possible that this result could have been avoided if the court had simply acquiesced to Hayes' desire and allowed him to remain with his family.[171] Surely, this would be more in line with a ward's "best interest," especially if this interest is supported by family and friends.[172] However, in the end Hayes was sent to a facility far away from his family only to pass away in abhorrent conditions.[173] All of this was legal because a court-appointed guardian approved it.[174]

Ultimately, it is unclear how a court can claim to factor in a ward's "best interest" when appointing a guardian, especially when factors such as the ward's express desires are regularly ignored.[175] The disconnect between law and practice[176] further emphasizes the

161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. Balch, *supra* note 69.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. Balch, *supra* note 69.
173. *Id.*
174. *Id.*
175. VA. CODE ANN. § 64.2-2019 (2020) (defining "best interest").
176. *Compare* VA. CODE ANN. § 64.2-2019 (2020) (defining "best interest"), *with* Balch, *supra* note 69.

need for a legal remedy allowing a ward to file suit in their own name. If a ward must file through a guardian, then that guardian may simply disregard the ward's interest in favor of their own, such as in the Hayes incident.[177] A ward must have avenues for protection, especially against a guardian who may not act in the best interest of the ward.

IV. COMPARISON BETWEEN VIRGINIA LAW AND OTHER STATES

Guardianship law varies across the United States.[178] It is important to compare the different approaches and distinctions in order to see what methods are most successful. This in turn will help Virginia protect incapacitated persons more effectively.

Other states benefit from laws that clearly protect incapacitated persons.[179] Georgia, for example, explicitly states that a ward may recover for breach of duty against their guardian.[180] Georgia's state code also directly addresses the process of suspending or revoking a guardian.[181] Virginia, however, has no such clear language.

Virginia law requires that all private guardians submit an annual report to Social Services on the ward's well-being, among other things.[182] However, one examination by the *Richmond Times Dispatch* found that "annual reports were missing from court files in at least 50 [guardianship] cases" that the newspaper reviewed.[183] Furthermore, the reports that were available "contained little detail" and suggested that many of the guardians "had rarely or never visited their wards during the year."[184] The director of the American Bar Association weighed in saying, although "Virginia's guardianship laws are strong on paper . . . [Virginia is] the only state in the nation that does not require the guardianship reports be monitored directly by the court."[185] Instead, guardianship reports go to the "local department of social services."[186] The drawback here, according to the director of Virginia's Adult Protective Services, is that

177. Balch, *supra* note 69.
178. *Compare* GA. CODE ANN. § 29-4-53 (2020), *with* VA. CODE ANN. § 64.2-2005 (although similar, each state has its own variation of statute that controls what guardians may do).
179. *See, e.g.*, GA. CODE ANN. § 29-4-53 (2020).
180. *Id.*
181. GA. CODE ANN. § 29-4-52 (2020).
182. VA. CODE ANN. § 64.2-2005 (2020).
183. Balch, *supra* note 69.
184. *Id.*
185. *Id.*
186. *Id.*

social workers are limited both in availability and the amount of oversight they are able to give on annual guardianship reports.[187]

V. THE FLAWED POWER DYNAMIC BETWEEN WARD AND GUARDIAN

Guardians maintain significant control over what happens to their ward.[188] A fiduciary, one of the least restrictive forms of guardianship, may take possession of an incapacitated person's estate, suits related to the estate, and retain the estate for the fiduciary's own debt.[189] Therefore, plenary guardianships, which are far more encompassing,[190] increase the potential for abuse from the guardian.

In 2008, a fifty-year-old Nashville woman fell down her stairs, leaving doctors unsure if she would survive.[191] The woman, Ginger Franklin, did not have anyone assigned to take care of her affairs in the event that she was incapacitated.[192] Therefore, her aunt petitioned the court for a guardian, who immediately placed Franklin in a group home for seriously mentally ill adults.[193] When Franklin recovered, she discovered that the guardian had sold her home and all of its contents, leaving her to work in the group home for no pay.[194] The guardian's actions were legal because, under Kentucky law,[195] he had complete control over Franklin's assets and legal decisions.[196] After two years of struggling, Franklin regained her freedom and eventually sued her guardian.[197]

The U.S. Government Accountability Office (GAO) receives reports of statistics on guardianship of elders.[198] This includes cases of financial exploitation, abuse, and neglect.[199] While elder abuse is its own category of abuse, elders with guardians remain within the category of incapacitated persons, and often have some overlap with incapacitated adults.[200] During a twenty-year span, "GAO identified

187. *Id.*
188. VA. CODE ANN. § 64.2-2024 (2020).
189. *Id.*
190. VA. CODE ANN. § 64.2-2000 (2020).
191. Emily Gurnon, *Guardianship In The U.S.: Protection or Exploitation?*, FORBES (May 23, 2016, 10:47 AM), https://www.forbes.com/sites/nextavenue/2016/05/23/guardianship-in-the-u-s-protection-or-exploitation/#ddc5b013b491 [https://perma.cc/KSX9-C5CL].
192. *Id.*
193. *Id.*
194. *Id.*
195. KY. REV. STAT. § 387.660(5) (2020).
196. Gurnon, *supra* note 191.
197. *Id.*
198. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 2.
199. *Id.*
200. *See* VA. CODE ANN. § 64.2-2000 (2020) (using the same terms and definitions regarding guardianship for both incapacitated and elderly individuals).

hundreds of allegations of physical abuse, neglect and financial exploitation."[201] This neglect occurred across forty-five states, as well as the District of Columbia.[202] In twenty specific cases, GAO "found that guardians stole or otherwise improperly obtained $5.4 million in assets from 158 incapacitated victims."[203] GAO found several common issues in each of these cases.[204] These "themes" included things such as courts failing to "adequately screen potential guardians" or appointing guardians with criminal convictions.[205] Another common issue was the lack of communication between the courts and the federal agencies in charge of managing guardians.[206] As a result, abusive guardians continued unchecked.[207] The report lists specific instances of abuse against twenty victims of various ages with mental incapacities.[208] GAO found that the guardians "sexually and physically abused residents" of an unlicensed group home and then fraudulently billed Medicare for services allegedly provided.[209]

As part of the report, the GAO tested the guardianship certification process of four states.[210] In these tests, the GAO attempted to use false information to obtain guardianship certification.[211] The GAO succeeded in all four states.[212] This undermines assurances that guardians are qualified to complete their role safely.[213] A separate GAO report, exclusively addressing elder abuse, showed many similar statistics.[214] For example, two of the main types of elder abuse suffered at the hands of guardians are financial exploitation and neglect.[215] There are undoubtedly hundreds more examples of abuse being committed at the hands of guardians.[216] The imbalance of power between ward and guardian would likely be subject for concern normally, even if a ward had the ability to sue their guardian for

201. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 2.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 8.
208. *Id.* at 2.
209. *Id.*
210. *Id.*
211. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 3.
212. *Id.* at 24 (obtaining certification in two states and meeting certification requirements in the other two states).
213. *Id.* at 3.
214. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS 1 (2016).
215. *Id.* at 5.
216. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 5.

breach of duty. However, this flawed dynamic is made all the more worrisome by the fact that the ward has no ability to charge their guardian with any form of abuse or mistreatment under Virginia statute.[217] It seems clear that the next logical step should be for the courts to establish some form of recourse for the ward that would allow him to use the legal system as protection from abuse, just as a fully capacitated person would.

VI. POTENTIAL SOLUTIONS TO A WARD'S INABILITY TO BRING SUIT

The most important measure Virginia must take, be it through the courts or legislature, is granting wards the right to sue independent of a guardian. Any other changes, no matter how effective, will only function as a stopgap measure to help lower the rates of abuse. As long as guardians maintain the final say in issues such as their ward's ability to see family or live at home rather than a mental hospital,[218] there will not be true recourse for an incapacitated person in an abusive situation. However, until this happens, there are other possibilities for alleviating the power imbalance faced by incapacitated persons under a guardianship. These possibilities include changing statutory language among states, blanket alternatives to guardianship, stricter sanctions for breach of fiduciary duty, as well as improved governmental oversight.[219]

A. Changing Statutory Language

The most powerful solution to a ward's inability to bring suit in their own name is to revise Section 62.4-2025 of the Virginia Code.[220] Examining this issue at the federal level, there is precedent to do this.[221] The Federal Rules of Civil Procedure have two different categories for "minor[s] or incompetent persons."[222] For incompetent persons with a representative, the following "*may* sue" on the person's behalf: "(A) a general guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary."[223] For an incompetent person without a representative, the individual "*may* sue by a next friend or by a guardian ad litem."[224] Moreover, "[t]he court must appoint a guardian ad litem—or

217. VA. CODE ANN. § 64.2-2012 (2020).
218. Balch, *supra* note 69.
219. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 18–19.
220. *Cf.* VA. CODE ANN. § 64.2-2025 (2020).
221. FED. R. CIV. P. 17(c).
222. *Id.*
223. *Id.* (emphasis added).
224. *Id.* (emphasis added).

issue another appropriate order—to protect . . . [an] incompetent person who is unrepresented in an action."[225]

The language fails to specify whether this applies only to the respondent, or also to the petitioner.[226] However, cases such as *C.M. v. Beaverton School District* seem to suggest that petitioners must be represented by a court-appointed guardian, so long as that petitioner is incapacitated.[227] The key component of the language on the federal level is the phrase "may sue."[228] The rules state that an incompetent person may bring suit in this manner. The word "may" is distinct from the Virginia language of "must," where the incapacitated person has no choice in how he brings suit.[229] Federal courts have held that "Rule 17(c) is permissive, not mandatory."[230] Furthermore, Rule 17(b)(3) states that courts should apply state law when determining whether a guardian has the capacity to sue on a ward's behalf.[231] The state law that applies is the state in which the individual who is being represented is domiciled.[232]

However, federal case law appears to lean in favor of requiring a guardian to bring suit for a ward, if only because Rule 17 requires that federal courts defer to state law on the issue.[233] Therefore, because states often require mandatory appointment of GALs if the incapacitated person lacks a representative, federal courts generally treat Rule 17 as mandatory, even if it is not technically written as such.[234]

States seem to follow the federal precedence.[235] Many states also appear to follow the same statutory language as Virginia, where an incapacitated (or incompetent) person is *required*, rather than permitted, to sue through a guardian or other party.[236]

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225. *Id.* (alteration added).

226. *See id.*

227. C.M. v. Beaverton Sch. Dist. 48J, No. 3:17-cv-1662, 2019 U.S. Dist. LEXIS 62606 *5–6 (D. Or. Apr. 11, 2019).

228. FED. R. CIV. P. 17(c)(1).

229. VA. CODE ANN. § 64.2-2012 (2020).

230. *See* Von Bulow v. Von Bulow, 634 F. Supp. 1284, 1292 (S.D.N.Y. 1986) (emphasizing the beginning of the focus on the permissive nature of Rule 17(c)).

231. FED. R. CIV. P. 17(b)(3).

232. FED. R. CIV. P. 17(b)(1).

233. *Cf.* FED. R. CIV. P. 17(b)(3).

234. *See Guardianship Laws by State*, JENNY HATCH JUST. PROJECT, http://jennyhatchjusticeproject.org/50_state_review [https://perma.cc/KRL5-84US] (last visited Dec. 6, 2021) (explaining that states such as Virginia, Nevada, Minnesota, Idaho, West Virginia, North Carolina, and South Carolina, among others, all have mandatory language such as "shall" when referring to a court appointing representation for an incapacitated person). For examples of federal courts citing the Rule 17(b) requirement of deferring to state law, rather than providing any guidance at a federal level, see Galanova v. Bailey, No. 17-CV-4915, 2018 U.S. Dist. LEXIS 231487 at *3 (S.D.N.Y. Oct. 12, 2018); C.M. v. Beaverton Sch. Dist. 48J, No. 3:17-cv-1662, 2019 U.S. Dist. LEXIS 62606 *2–3 (D. Or. Apr. 11, 2019).

235. *Guardianship Laws by State*, *supra* note 234.

236. *Id.*

B. Alternatives to Guardianship

While granting wards a right to independently sue may take time, courts may nevertheless take steps to ameliorate harm done in the meantime. In Virginia, there is a strong push to talk about alternatives to guardianship.[237] The disAbility Law Center of Virginia strongly advocates for what is called "supportive decision making" rather than legal guardianship.[238]

Some states also considered the idea of less restrictive means, such as a caregiver.[239] Others have more basic alternatives to guardianship.[240] Georgia, for example, lists alternatives such as a durable or financial power of attorney, a living trust or living will, various placement procedures, or even a representative payee status.[241] Placement procedures would assist in placing an incapacitated person in a safe location to recover, such as a nursing home or personal care home.[242] This is especially important for individuals who may not have a permanent incapacity and would not wish to be under a full guardianship when they recover.[243]

C. Harsher Punishments

The GAO reported that those convicted of elder abuse were sentenced up to thirty years in prison, depending on the severity of the crime.[244] Moreover, judges have found that guardians are not immune to lawsuits.[245] In Tennessee, Ginger Franklin filed a suit against her public guardian, Jeanan Stuart, alleging that Stuart had failed to fulfill her fiduciary duties.[246] Circuit Court Judge Hamilton Gayden initially held that Franklin could not sue on allegations "that Stuart mishandled her financial affairs."[247] However, Judge Gayden found that Franklin could recover for damages that resulted from the poor

237. Balch, *supra* note 69.
238. *Id.*
239. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 19.
240. *Id.*
241. *Alternatives to Guardianship*, ATHENS-CLARKE COUNTY UNIFIED GOVERNMENT, https://www.accgov.com/1113/Alternatives-to-Guardianship [https://perma.cc/VLJ2-P3DW] (last visited Dec. 6, 2021).
242. *Placement Procedures,* ATHENS-CLARKE COUNTY UNIFIED GOVERNMENT, https://www.accgov.com/1123/Placement-Procedures [https://perma.cc/X77B-8K34] (last visited Dec. 6, 2021).
243. *Id.*
244. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 10.
245. Walter F. Roche Jr., *Judge rules that public guardian isn't immune from lawsuit*, TENNESSEAN (June 30, 2014), https://www.tennessean.com/story/news/crime/2014/06/30/judge-rules-public-guardian-immune-lawsuit/11807381 [https://perma.cc/GP8F-T6ED].
246. *Id.*
247. *Id.*

financial decisions made by Stuart.[248] Judge Gayden referenced a prior ruling within the state, saying that a guardian's "failure to act in the best interest of the ward is actionable" in a court of law.[249] By raising the repercussions for a guardian who does not act in the best interest of their ward, courts can begin to put a stop to abuses of power and the resulting harm that may be done.

However, there are documented challenges to sanctioning abuse by a guardian, particularly elder abuse.[250] Some guardians have overcharged their wards for guardianship fees.[251] This was possible because guardians are sanctioned by courts and the courts approve the payments.[252] This sanctioning by the court makes it almost impossible for prosecutors to bring action against these guardians.[253]

D. Improved Oversight

The federal government is not directly involved in monitoring guardianship programs.[254] However, federal agencies can "provide indirect support to state guardianship programs by providing funding" as well as sharing information that can help to improve "best practices."[255] The federal Protection and Advocacy of Individual Rights program (hereinafter PAIR) demonstrates this idea.[256] PAIR's stated purpose is to "support . . . [protection and advocacy] system[s] in each State [in order] to protect the legal and human rights of individuals with disabilities."[257] While individuals with a disability must meet certain criteria to qualify for PAIR advocacy services,[258] this funding provides oversight and helps prevent guardianship abuse. PAIR creates an incentive for states to proactively provide support for guardians and their charges: if a state does not have an active client assistance program in place, then it is not eligible to receive PAIR funding, which comes in the form of government grants.[259] Specifically, PAIR grant money that remains after the client assistance program receives its share may be reallocated by the Secretary to the State in which the program resides.[260] Therefore, if a state does

248. *Id.*
249. *Id.*
250. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 13.
251. *Id.*
252. *Id.* at 24.
253. *Id.*
254. *Id.* at 6 (explaining that state courts are in charge of monitoring).
255. *Id.* at 1.
256. 29 U.S.C.S. § 794e.
257. *Id.*
258. *Id.*
259. 29 U.S.C.S. § 732(b).
260. 29 U.S.C.S. § 732(e).

not have a client assistance program in place, it does not receive funding under PAIR.[261] Furthermore, it is not enough to simply have an assistance program in place: such program must meet specific criteria in order to receive its payment for any fiscal year.[262] This program criteria includes, but is not limited to, having the "authority to pursue legal, administrative, and other appropriate remedies to ensure the protection [and safety]. . . of individuals with disabilities who are receiving treatments" or other services from the State.[263] Therefore, states have clear motivations to create client assistance programs on behalf of the state.[264] These programs in turn help to create increased oversight for people with disabilities, including incapacitated persons who are under a guardianship.[265]

Another example of potentially helpful oversight is the National Adult Maltreatment Reporting System, established by the Department of Health and Human Services (HHS) in 2017.[266] This system acquires data from each state's Adult Protective Services (APS) agency and compiles it into one giant database.[267]

Additionally, experts argue that the manner in which GALs are handled could greatly improve the safeguards for incapacitated persons.[268] The assistant director of the American Bar Association on Law and Aging has conducted "national studies on public guardianship and guardianship monitoring."[269] She held that "some courts and some states" have begun rotating who they appoint as guardian ad litem in order to avoid potential conflicts or favoritism.[270]

E. Education

In addition to improved oversight, increasing the education requirements could be a combatant to guardianship abuse.[271] In Washington, a court-appointed guardian is required to complete a training to obtain a guardianship certification.[272] Florida also requires family members to undergo an unspecified amount of training in

261. 29 U.S.C.S. § 732(a).
262. 29 U.S.C.S. § 732 (also known as the PAIR Act).
263. 29 U.S.C.S. § 732(b)(1).
264. *Id.*
265. 29 U.S.C.S. § 794e.
266. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 12–13.
267. *Id.* at 12.
268. Balch, *supra* note 69.
269. *Id.*
270. *Id.*
271. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 20.
272. *Id.* For examples of other states that do not require any person seeking a guardianship to go through court mandated training with the state, see N.C. GEN. STAT. § 7B-600 (2021); WASH. REV. CODE ANN. § 26.12.175 (LexisNexis).

order to become a guardian.[273] However, many states do not require an educational training to become a guardian at all.[274] In Virginia, an educational course as well as a law degree is required to become a guardian ad litem.[275] However, it is unclear if there are general educational requirements for those interested in becoming guardians.[276]

Experts have stated that "[s]ystem reformation [of guardianship] can and should take the form of greater clarity and training," especially in the case of guardians ad litem.[277]

Ultimately, while these fixes would no doubt help to protect wards from abuse, these improvements seem to be temporary solutions to a permanent problem. Courts must begin to address the issue at its source: a guardianship system where a ward has no ability to sue in their own name is a system that will always be conducive to abusive environments.

CONCLUSION

As the country enters 2022, Virginia continues to be one of many states that do not allow wards to sue in their own names.[278] Despite repeated stories of abuse,[279] repeated evidence by experts,[280] and repeated testimony that other states are more willing to adapt,[281] Virginia continues to refuse to go the distance in protecting one of its most vulnerable populations. *Lopez-Rosario* and *Cook* continue to be the two controlling cases in guardianship law, and both explicitly prevent a ward from bringing suit in their own name.[282] The courts continue to show indifference to the plight of wards entering into guardianships against their will. It is not enough sanction abusive guardians after the fact: this amounts to nothing more than a cursory slap on the wrist for the abuser, and a lifetime of trauma and even death on the part of the ward. Furthermore, arguments that incapacitated persons give up certain rights when entering into

273. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 20.

274. *Id.*

275. *Frequently Asked Questions: Guardian Ad Litem for Children Program*, VIRGINIA'S JUDICIAL SYSTEM, http://courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/faq_children.pdf [https://perma.cc/Q54M-NQS9] (last visited Dec. 6, 2021).

276. *Id.*

277. *Abuse of Power: Exploitation of Older Americans by Guardians and Others they Trust*: *Before the S. Special Comm. on Aging* (Apr. 18, 2018) (statement of Pamela B. Teaster, Prof. & Director, Ctr. of Gerontology at Virginia Tech).

278. VA. CODE ANN. § 64.2-2025 (2020).

279. Balch, *supra* note 69.

280. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54, at 6–7.

281. GA. CODE ANN. § 29-4-53 (2020).

282. Cook v. Radford Cmty. Hosp., Inc., 536 S.E.2d 906, 910 (Va. 2000); Lopez-Rosario v. Habib, 785 S.E.2d 214, 216 (Va. 2016).

a ward and guardian relationship hold no weight here,[283] particularly when these wards often have no ability to protest their entry into these relationships. Giving up specific legal rights does not and cannot mean that a person gives up their right to personhood or the ability to advocate for themself. Numerous states have moved to improve the quality of life for wards under a guardianship[284]: there is no excuse for Virginia to not follow in their footsteps.

However, abuse must not be the only precursor prompting statute amendments. Even in situations absent of abuse, an adult ward ought to hold the right to exercise control over their own person. While sometimes this right may require tempering or modification to protect the ward, the right must exist, just as it does for other adults. If a ward is unable to seek reprieve from their guardian in any circumstance, then it is disingenuous at best for a legal system to claim that it has this ward's best interest in mind. Incapacitated persons in Virginia must be given the ability to sue in their own name. They must be allowed to protect themselves through the court system, just the same as any other citizen.

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283. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 54.

284. *Id.* at 12–17.

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