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## Aspects of Guardianship in Virginia

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## ASPECTS OF GUARDIANSHIP IN VIRGINIA

### A. INTRODUCTION

"A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of administering his own affairs<sup>1</sup>."

As can be seen, the definition mentions nothing to give effect to the popular idea that a guardian implies an orphan or at least that the father is dead. This is a common misconception and has no legal significance. Furthermore, such a broad statement makes the term applicable to persons charged with the care of lunatics, aged, and profligates, etc., while "guardian" as employed in the Virginia Code refers to a person charged with the care and management of a minor.

The history of guardianship is as old as civilization itself, since the normal and most frequent guardian-ward relationship is that of a guardian by nature, i.e., the natural parents of the minor<sup>2</sup>. At Roman law, a person charged with the minor's person and his education was called a "tutor", while a person charged with the estate of a minor was called a "curator". This distinction still exists in Virginia; however, the term "guardian" encompasses both curator and tutor, and it is therefore incumbent upon the lawyer to ascertain the power of the guardian when dealing with a problem of this nature<sup>3</sup>. A guardian in Virginia may have power over the person, the estate, or both.

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<sup>1</sup> Black's Law Dictionary (3rd Ed.).

<sup>2</sup> Va. Code, § 31-1 (1950).

<sup>3</sup> Va. Code §§ 31-1 to 31-36 (1950); §§ 31-19 to 31-25 (1950) being enacted by the General Assembly in 1956 (Acts of Assembly, 1956, Ch. 226) was repealed by the General Assembly in 1958 (Acts of Assembly, 1958, Ch. 557). Effective date of repeal, July 1, 1958.

Of the many forms of guardianship which existed at common law, Virginia now recognizes five: guardian by nature<sup>4</sup>, testamentary guardian<sup>5</sup>, guardian by election<sup>6</sup>, court appointed guardian<sup>7</sup>, and guardian ad litem<sup>8</sup>. Other types of guardian relationships which are relevant to the above mentioned are: curator<sup>9</sup>, guardian de facto<sup>10</sup>, prochien ami<sup>11</sup>, conservator<sup>12</sup>, and committee<sup>13</sup>.

The functions of each of the above vary slightly either as to the power bestowed upon them or the method of application of the power due to a particular circumstance: natural guardians are charged with the care of the person of the minor<sup>14</sup>, testamentary guardians usually have control of the estate since it would be repugnant to public policy to permit a guardian to control the ward's person if a natural parent were surviving<sup>15</sup>, both the guardian by election and court appointed guardian have control and custody over the person and the estate of the ward<sup>16</sup>, a guardian ad litem is appointed by the court solely where the minor is a defendant in an action and the only duties are to faithfully represent the interest or estate of the minor<sup>17</sup>, a curator is appointed by the court until the proper appoint-

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<sup>4</sup> Va. Code § 31-1 (1950).

<sup>5</sup> Va. Code § 31-2 (1950).

<sup>6</sup> Va. Code § 31-5 (1950). See 1958 Cumulative Supplement for amendment.

<sup>7</sup> Va. Code § 31-5 (1950). See 1958 Cumulative Supplement for amendment.

<sup>8</sup> Va. Code § 8-88 (1950).

<sup>9</sup> Va. Code § 31-7 (1950).

<sup>10</sup> *Evans v. Pierce, et al.*, 15 Gratt. (Va. 56) 513 (1860).

<sup>11</sup> Va. Code § 8-87 (1950).

<sup>12</sup> Va. Code §§ 26-68 to 26-71 (1950).

<sup>13</sup> Va. Code § 37-201 (1950) (Insane); Va. Code § 53-305 (1950) (Convict).

<sup>14</sup> Va. Code § 31-1 (1950).

<sup>15</sup> Va. Code § 31-2 (1950).

<sup>16</sup> Va. Code § 31-8 (1950).

<sup>17</sup> Va. Code § 8-88 (1950).

ment and qualification of a guardian and has all the powers and the duties as a guardian appointed by the court and shall be equally responsible<sup>18</sup>, a guardian de facto, or de son tort, is purely a creature of a court of equity, and is one who takes possession of an infant's property without right or lawful authority and will be required to account in the same manner as if he were de jure<sup>19</sup>, the prochien ami, or next friend, is any person who sues in the name of the minor, subject to the court's disapproval that he is not acting for the benefit of the minor<sup>20</sup>, a conservator is appointed by the court to take care of an absentee's estate and the court can order the conservator to support the wife, children, or any other suitable dependents<sup>21</sup>, a committee is appointed by the court to control the estate of any person who is insane or otherwise incompetent<sup>22</sup>, or a convict<sup>23</sup>.

## B. JURISDICTION TO APPOINT GUARDIAN

The status of guardianship is acquired by court appointment with the exception of the natural parents of the minor as stated in the Virginia Code § 31-1 (1950), and testamentary guardians in the Virginia Code § 31-2 (1950).

The jurisdiction of appointment of guardians is precisely stated by statute:

The circuit court of any county, or the circuit court or corporation court of any city, except the City of Richmond, in which any minor resides, or, if he be a resident out of the state, in which he has any estate, or the judge in vacation, or the clerk at any time may appoint a guardian for him unless he have a guardian appointed

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<sup>18</sup> Va. Code § 31-7 (1950).

<sup>19</sup> *Gayle v. Hayes*, 79 Va. 542 (1884); *Anderson v. Smith*, 102 Va. 697, 48 S.E. 29 (1904); *Watts v. Watts*, 104 Va. 269, 51 S.E. 350 (1905); *Starke v. Storm*, 115 Va. 651, 79 S.E. 1057 (1913).

<sup>20</sup> *Wilson v. Smith*, 22 Gratt. (63 Va.) 493 (1872); *Womble v. Gunter*, 198 Va. 522, 95 S.E.2d 213 (1958); Va. Code § 8-87 (1950).

<sup>21</sup> Va. Code §§ 26-68, 26-69 (1950).

<sup>22</sup> Va. Code § 37-201 (1950).

<sup>23</sup> Va. Code §§ 53-305 (1950) (Resident), 53-306 (1950) (Non-Resident).

as aforesaid by his father or mother. The Chancery Court and Hustings Court, Part Two, of the City of Richmond, within their respective territorial jurisdictions as defined by law and the judges in vacation, and the clerks and their duly qualified deputies at any time, shall have this power.

All appointments of guardians heretofore made by clerk of the courts hereinbefore mentioned, whether in term, time or vacation, are declared to be as valid and binding and the same force and effect as if such appointments had been specifically authorized by law at the time they were made<sup>24</sup>.

This power to appoint has been understood to mean in the capacity as courts of chancery. The statute does not specifically state this but it has been decided judicially<sup>25</sup>. It is stated in the Virginia Code<sup>26</sup> that the courts acting in their capacity as courts of equity are “. . . to hear and determine all matters between guardians and wards . . .” In *Buchanan v. Buchanan*, the court said:

. . . the court of chancery as representing the parental and protecting power of the Commonwealth, has jurisdiction to determine controversies concerning the guardianship of a minor; to make orders for his support, if any property capable of being so applied be within the reach of the court; and in extreme cases as we have seen, even to control the right of a father to the custody of his child<sup>27</sup>.

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<sup>24</sup> Va. Code § 31-4 (1950); Va. Constitution § 101—Power of clerk of court to appoint Guardian. Clerks of courts; jurisdiction in cases of wills, insane persons, etc.—The General Assembly may confer upon the clerks of the several courts having probate jurisdiction, jurisdiction of the probate of wills, and of the appointment and qualification of guardians, personal representatives, curators, appraisers, and committees of persons adjudged insane or convicted of felony, and in the matter of the substitution of trustees. Also see, *Horn v. Horn*, 195 Va. 912, 81 S.E.2d 593 (1954).

<sup>25</sup> *Ficklin v. Ficklin*, 2 Va. Cas. 204 (1820); *Durrett v. Davis*, 24 Gratt. (65 Va.) 302 (1874).

<sup>26</sup> Va. Code § 31-40 (1950).

<sup>27</sup> 170 Va. 458, 197 S.E. 426 (1938).

### C. GENERAL EFFECT OF APPOINTMENT

The statutes have made a distinction between the method of appointment of a guardian by election and a court appointed guardian although for all intents and purposes they are identical. In the case of a minor under the age of fourteen years, the proper court will nominate and appoint a guardian. If the minor is over fourteen years, the minor himself may nominate a guardian which, however, is subject to the court's approval before the appointment is conferred<sup>28</sup>. The Court is under no obligation to accept the ward's nomination and appoint said nominee, but may appoint someone other than the person selected by the ward<sup>29</sup>. The wardship, therefore, results not so much from the election of the infant as from the appointment of the court. Consequently, this type of guardian may be considered as identical with that appointed by the chancery court<sup>30</sup>.

By statute a guardian ad litem for an infant defendant shall be appointed by the court in which the suit is pending or if in vacation by the judge of the same or by the clerk of the court and where it is deemed necessary for the best interest of the minor, the guardian ad litem may be removed and a new guardian ad litem appointed<sup>31</sup>. The necessity of the appointment of a guardian ad litem to represent the interest or estate of a minor is strongly supported by case law, and that ". . . a personal judgment rendered against an infant for whom no guardian ad litem has been appointed is void. The rule is the same whether applied in law or equity<sup>32</sup>.

A *prochien ami* as previously noted is not a court appointed officer. However, if it appears that the suit is not for the benefit

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<sup>28</sup> Va. Code § 31-5 (1950).

<sup>29</sup> *Ham v. Ham*, 15 Gratt. (56 Va.) 74 (1859).

<sup>30</sup> *Minor's INSTITUTES*, Vol. 1, p. 427.

<sup>31</sup> Va. Code § 8-88 (1950).

<sup>32</sup> *Turner v. Barrand*, 102 Va. 324, 46 S.E. 318 (1904); *Jefferies v. Jefferies*, 123 Va. 147, 96 S.E. 197 (1918); *Kanter v. Holland*, 154 Va. 120, 152 S.E. 328 (1930); *Broyhill v. Dawson*, 168 Va. 321, 191 S.E. 779 (1937).

of the minor or the next friend is not a proper person, the court may either dismiss the suit without prejudice or assign another *prochien ami* to prosecute the action<sup>33</sup>. A curator is appointed by the court or judge until a guardian is appointed<sup>34</sup>. Natural guardians are recognized by statute as being the rightful guardians and no judicial appointment is therefore necessary<sup>35</sup>. A testamentary appointee is also recognized by statute and will be accepted as the proper person unless he fails to qualify<sup>36</sup>.

#### D. TESTAMENTARY APPOINTMENT

At common law the father of a minor was the sole possessor of the power to make testamentary appointments of guardians. This rule was adhered to in Virginia until 1892, when the legislature amended the Code<sup>37</sup> so that both mother and father could make a testamentary appointment of a guardian for the estate left by the deceased spouse to the minor<sup>38</sup>. A surviving spouse succeeds as the natural guardian notwithstanding that there be a guardian appointed by the deceased spouse's will or by appointment as long as the surviving spouse remains unmarried and fit<sup>39</sup>. In the absence of a chancery appointment to the contrary this guardianship by nature prevails, even though the surviving spouse may remarry<sup>40</sup>.

#### E. EFFECT OF ILLEGITIMACY ON NATURAL GUARDIANSHIP

The natural guardian statute is applicable only to legitimate children; however, it has been decided judicially that the father of an illegitimate child succeeds as guardian in the event of

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<sup>33</sup> Va. Code § 31-14 (1950); *Wilson v. Smith*, 22 Gratt. (63 Va.) 493 (1872); *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943).

<sup>34</sup> Va. Code § 31-7 (1950).

<sup>35</sup> Va. Code § 31-1 (1950).

<sup>36</sup> Va. Code § 31-2 (1950) (Appointment), § 31-3 (1950) (Qualification).

<sup>37</sup> Va. Acts of Assembly, 1891-92, Ch. 255, p. 431.

<sup>38</sup> Va. Code § 31-2 (1950).

<sup>39</sup> *Armstrong v. Stone, et. ux.*, 9 Gratt. 102, 105 (1852).

<sup>40</sup> *Id.* at p. 107; *Coffee and Wife v. Black*, 82 Va. 567 (1866).

the death of the mother. This of course does not negate the paramount rule in all guardianship actions that “. . . all the rights of a parent or guardian to the custody of the child are subordinate to the interest of the child itself. Where that interest demands it, the rights of the father, mother, or guardian all may be disregarded<sup>41</sup>.” The reasoning permitting the father of an illegitimate child to have custody is “. . . that we cannot assume him to be wanting in affection because his child is illegitimate.” The Court also quoted with approval the following dictum from *Moritz v. Carnhart*:

Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regards to maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it<sup>42</sup>.

#### F. NON-RESIDENT GUARDIAN

The present Virginia statute<sup>43</sup>, prohibits a non-resident from being appointed or allowed to qualify in the capacity of a guardian. In the case of a corporation being nominated, it must be authorized to do business in the State.

This prohibition extends to foreign guardians already appointed in the alien state, but is ameliorated by permitting the appointment of a co-fiduciary to assist the non-resident guardian where the non-resident guardian is desirous of serving. The co-fiduciary so appointed must be a resident of the state or a corporation authorized to do business in the state. Where the non-resident guardian is a natural parent, the resident guardian is not intended to have control over the person of the minor. If the minor is living in a foreign state but has an estate in Virginia, it is proper to appoint a guardian in the state<sup>44</sup>.

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<sup>41</sup> *Hayes v. Strauss*, 151 Va. 136, 144 S.E. 432 (1928).

<sup>42</sup> 7 *Watts* (Pa.) 302, 32 Am. Dec. 762 (1838).

<sup>43</sup> Va. Code §26-59 (1950).

<sup>44</sup> *Taliaferro v. Day*, 82 Va. 79 (1886).



## G. QUALIFICATION OF A GUARDIAN

The judge or court or clerk by which the guardian is appointed shall require a bond with security to be given by the appointees where it is deemed necessary, for the best interest of the minor. If the judge or clerk fails to require a bond, the official in default shall be liable to the ward for any damages sustained due to the omission<sup>45</sup>. Where the value of the ward's estate does not exceed the amount of five hundred dollars, the court may permit a guardian to qualify without requiring security on the guardian's bond<sup>46</sup>. The appointee upon refusal or inability to give bond shall be replaced either by the immediate appointment of another person to serve as guardian or by an interim appointment of a curator to act until a guardian is appointed<sup>47</sup>. The requirement of giving bond is not necessary for a testamentary guardian provided the will so directs<sup>48</sup>. Also, where it appears that the law of a foreign state in which the infant resides and the foreign guardian was appointed does not require a bond, the court may in its discretion not require a bond and may permit the money and estate be paid to the foreign guardian<sup>49</sup>.

## H. TERMINATION OF GUARDIANSHIP

The authority of a guardian remains effective until the minor attains the age of twenty-one years or in the case of a female minor until she marries. Although the marriage of a female minor terminates the guardianship, a receiver shall be appointed to manage the estate until she attains the age of twenty-one years<sup>50</sup>. A testamentary guardian's duties also

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<sup>45</sup> Va. Code § 31-6 (1950); See 1958 Cumulative Supplement for amendment.

<sup>46</sup> Va. Code § 26-4 (1950).

<sup>47</sup> *Page v. Taylor*, 2 Munf. (16 Va.) 492 (1811). -

<sup>48</sup> Va. Code § 31-6 (1950); See Va. Code § 6-95 (1950) (Bank acting in fiduciary capacity not required to give security).

<sup>49</sup> Va. Code § 26-23 (1950).

<sup>50</sup> Va. Code § 31-9 (1950). See Va. Code § 55-44 (1950) (Receiver appointed for female minor). General termination statutes: Guardian ad litem, Va. Code § 8-88 (1950); Resident co-fiduciary, Va. Code § 26-67 (1950); Conservator, Va. Code § 26-70 (1950).

terminate as stated, except when the will expresses a desire for an earlier termination. The status of guardianship shall terminate if precedent to the occurrence of one of the above events the guardian should die<sup>51</sup>, be removed<sup>52</sup>, resign<sup>53</sup>, or the ward should die. Where the court has deemed it necessary to remove a guardian the court shall then appoint a new guardian upon the removal of the old guardian or appoint a curator to serve during the interim between the revocation order and the new appointment<sup>54</sup>.

## I. NEXT FRIEND SUITS

“Any minor entitled to sue may do so by his next friend<sup>55</sup>.” According to the procedure in Virginia, suits may be commenced and prosecuted by the next friend without a formal appointment by the court and the approval of the person as being beneficial to the interest of the minor is implied, unless expressly disallowed. In the event that the next friend is found to be either an unsuitable person or the suit is not for the benefit of the minor, the court may either assign another person to prosecute or dismiss the suit without prejudice<sup>56</sup>. The suit by a next friend must be brought in the name of the minor and this may be done without the consent of the minor or even in the face of the minor’s objection<sup>57</sup>. The next friend cannot waive any of the infant’s rights and it is error to decree on such waiver<sup>58</sup>. A decree rendered under

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<sup>51</sup> *Armstrong v. Walkup*, 12 Gratt. (53 Va.) 608 (1855).

<sup>52</sup> Va. Code § 31-14 (1950); Va. Code § 26-3 (1950).

<sup>53</sup> Va. Code § 26-46 (1950).

<sup>54</sup> Va. Code § 26-47 (1950) (Appointment of new fiduciary); Va. Code § 31-14 (1950) (Jurisdiction of a court to appoint a guardian after removal); Va. Code § 26-3 (1950).

<sup>55</sup> Va. Code § 8-87 (1950).

<sup>56</sup> *Wilson v. Smith*, 22 Gratt. (63 Va.) 493 (1872); *Jackson v. Counts*, 106 Va. 7, 54 S.E. 870 (1906).

<sup>57</sup> *Lemon v. Hansbarger*, 6 Gratt. (47 Va.) 301 (1849); *Sillings v. Bumgardner*, 9 Gratt. (50 Va.) 273 (1852); *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943).

<sup>58</sup> *Hite v. Hite*, 2 Rand (23 Va.) 409 (1824); *Armstrong v. Walkup*, 9 Gratt. (50 Va.) 102 (1852).

the "next friend" statute is binding against the infant in the same degree and manner as an adult<sup>59</sup>.

### J. MINOR'S PARTICIPATION

Notice of application for the custody of a minor need only be given to the natural parents or a person who actually has the custody of the minor<sup>60</sup>. It is not necessary to serve a subpoena upon an infant defendant unless a judgment *in personam* is desired. The procedure prescribed for the appointment of guardian ad litem will constitute due process of law<sup>61</sup>. In an answer to the bill it is necessary that the minor, if over fourteen years, and the guardian ad litem answer in person and under oath<sup>62</sup>. "When an infant is over fourteen years of age, it is error for him not to file an answer in proper person<sup>63</sup> . . . and the answer must be under oath<sup>64</sup>."

### K. FINALITY OF DECREE AGAINST MINOR

A special status for the benefit of minors and incompetents extends the finality of a decree in that the judge may permit an injunction to the decree and allow a bill of review to be exhibited, provided, it is done within six months after the removal of the disability, which in the case of a minor would be attaining the age of twenty-one years<sup>65</sup>. This appears to be a statutory attempt to reiterate and affirm in part the common

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<sup>59</sup> *Gimbert v. Norfolk Southern R.R. Co.*, 152 Va. 684, 148 S.E. 680 (1929) which stated, "It is well settled with us that an infant, as a general rule, is as much bound by a decree against him as a person of full age. The law recognizes no distinction between a decree against an infant and a decree against an adult. And therefore it is that an infant can impeach only upon the grounds which would invalidate it in the case of another person, such as fraud, collusion, error."

<sup>60</sup> Va. Code § 31-17 (1950).

<sup>61</sup> RULES OF COURT, § 2-4; *Lile's PLEADING & PRACTICE* (3rd Ed.), p. 34, § 55.

<sup>62</sup> Va. Code § 8-679 (1950).

<sup>63</sup> *Cooper v. Hepburn*, 15 Gratt. (56 Va.) 551 (1860).

<sup>64</sup> *Swarby v. Harkrader*, 29 Gratt. (70 Va.) 112 (1877).

<sup>65</sup> Va. Code § 8-613 (1950) (Injunction against decree subject to bill of review).

law rule that "a decree in equity shall be held in the breast of the court." The bill of review may be entered only after the decree is final<sup>66</sup>, and the minor cannot impeach the decree except on the same grounds for which a person of full age could impeach<sup>67</sup>, and the cause must have existed at the time of the decree<sup>68</sup>. This statute, does not, nor was it intended, to preclude an infant from asserting his rights by his next friend against a decree prior to the infant attaining twenty-one years plus six months, and the infant may do so whenever he sees fit<sup>69</sup>.

## L. DEPOSITIONS

It is required that reasonable notice in writing shall be given to the adverse party when it is desirable to have depositions taken<sup>70</sup>. It has been decided judicially that when a minor is involved as a defendant in an action where a guardian ad litem had no notice, depositions taken in the cause could not be read against the infant parties<sup>71</sup>. Even if the guardian ad litem has received proper notice, it is also necessary in order to be permitted to read a deposition against the infant for the guardian ad litem to either be present upon the taking of the deposition or to agree upon interrogatories<sup>72</sup>. An analogous situation is that of the perpetuation of testimony of a minor witness in which case it is incumbent upon the court to appoint a guardian ad litem to attend on the minor's behalf<sup>73</sup>.

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<sup>66</sup> Dellringer v. Foltz, 93 Va. 729, 25 S.E. 998 (1896).

<sup>67</sup> Kavanaugh v. Shacklett, 111 Va. 423, 69 S.E. 335 (1910); Powers v. Howard, 131 Va. 275, 108 S.E. 900 (1921); See, Note 58, *supra*.

<sup>68</sup> Asberry v. Mitchell, 121 Va. 276, 93 S.E. 638 (1917).

<sup>69</sup> Va. Code § 8-354 (1950) (Right of infant to show cause against decree); Harrison v. Walton, 95 Va. 721, 30 S.E. 372 (1898).

<sup>70</sup> Va. Code § 8-307 (1950).

<sup>71</sup> Walker v. Grayson, 86 Va. 337, 10 S.E. 51 (1889); 2 V.D. 238, 23 S.E. 69 (1895).

<sup>72</sup> Va. Code § 8-309 (1950).

<sup>73</sup> Va. Code § 8-317 (1950).

## M. APPEAL OF QUALIFICATION OR APPOINTMENT

Any "person" who thinks himself aggrieved by either the appointment or qualification of a guardian may present a petition to appeal the decree<sup>74</sup>, irrespective of the jurisdictional amount of three hundred dollars which is normally required, except that the appeal be made within the statute of limitations<sup>75</sup>. The "person" referred to in the statute is a person who was a party to the suit in the court below, and who was aggrieved by the decree therein rendered. In order to render one a proper party to an appeal, these two circumstances must be met<sup>76</sup>. Generally, an appeal bond is required to be posted before the appeal can take effect. However, where the appeal is being made to protect the estate of an infant, no such bond is necessary<sup>77</sup>.

## M. CONCLUSION

Collectively, the Virginia guardianship statutes are excellent, both as to their thoroughness of coverage and their equitable application. However, with all deference to the necessity of brevity in statutory construction and procedure, it is suggested that there be included in the Code a definite procedure for the filing of an application of guardianship and particularly that notice be given to interested parties beyond that which is presently required, namely, mother, father, or the person who actually has custody of a minor<sup>78</sup>.

At present the procedure for filing application is an informal proceeding. Apparently all one need to do is to appear before the clerk of the court and orally request to be appointed guardian and, provided one can qualify by posting the appropriate bond and security, the clerk of the court may within the discretion of that office decide that he is a proper person,

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<sup>74</sup> Va. Code § 8-462(1) (a) (iv) (1950).

<sup>75</sup> Va. Code § 8-463 (1950).

<sup>76</sup> *Southern R. Co. v. Glenon*, 102 Va. 529, 46 S.E. 776 (1904); *Snavelly v. Snavelly*, 151 Va. 270, 144 S.E. 422 (1928).

<sup>77</sup> Va. Code § 8-477 (1950).

<sup>78</sup> Va. Code § 31-17 (1950).

and duly qualify and appoint him as guardian. Notwithstanding that the appointment is based upon a first-come-first-served concept and that the discretionary power granted to the clerk of the court is perhaps excessive, there remains the fact that no notice is given to any party, except those mentioned previously<sup>79</sup>, and the only person who may appeal a guardianship appointment must have been (1) a party to the suit, and (2) aggrieved by the decree. Obviously, if a person does not receive notice of an application for guardianship, he will probably not appear to contest it. Having not appeared, he will thus not be a party to the suit and hence unable to appeal the appointment. The irony of the situation is that it may produce an awkward and inequitable result to the minor, the very person the State is trying to shield, since unless the person appointed is not in some way unsuitable, regardless of how superior another would be, it is impossible to remove the first guardian. This leads to an illogical and incongruous result when considered in the light of the purpose of the guardian-ward relationship.

Unquestionably, the purpose is to promote the best interest of the child. As stated in *Fleshwood v. Fleshwood*<sup>80</sup>, "many citations might be added but through them all runs the fixed purpose to advance the interest of the child. This is ever the dominant consideration"—or in *Hayes v. Straus*<sup>81</sup>, ". . . in Virginia all the rights of a parent or guardian to the custody of a child are subordinate to the interest of the child itself. Where that interest demands it, the rights of the father, mother, or guardian, all may be disregarded." And in the Code<sup>82</sup> itself ". . . the court . . . in awarding the custody of the child . . . shall give primary consideration to the welfare of the child . . ."

In many states, a petition or application is filed at the proper jurisdictional court prior to appointment as guardian. Notice must be given that an application has been made, or

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<sup>79</sup> *Supra*, Note 77.

<sup>80</sup> 144 Va. 767, 130 S.E. 648 (1925).

<sup>81</sup> 151 Va. 136, 144 S.E. 432 (1928).

<sup>82</sup> Va. Code § 31-50 (1950).

notice of hearing on the application to the natural parents, persons having custody of the minor, and the next of kin. If notice were given to this more inclusive group of interested parties, which could easily be incorporated into the present statute, it would permit persons who may be more suitable than the one who has applied, to contest the appointment. This would serve to eliminate possible future litigation, probable discord among the relatives, and at the same time provide a procedure for procuring the best appointee.

By deductive reasoning it seems that if the State is so desirous of serving the best interests of the minor, it should manifest this desire by providing a proper procedure that would be most likely to achieve the result that the *most* suitable person, not merely *a* suitable person, be appointed guardian. Obviously, the best interests of the child are not served unless the most suitable guardian is appointed. An injustice has been done to the child and the State has not fully lived up to its duty as representing the parental and protective power of the Commonwealth when it permits a person less than the most suitable to serve as guardian.

WILLIAM H. COLONA