

# FAQs About Guardianship and Leasing Apartments for Landlords

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Since 2012, the Commonwealth of Virginia has taken major steps to increase access to rental housing in local communities for individuals with intellectual and developmental disabilities (I/DD) in the Department of Justice Settlement Agreement target population. Some individuals deemed incapacitated by a court of law may have a court-appointed “guardian,” or substitute decision-maker. Landlords who are familiar with the basics of guardianship will be able to involve guardians appropriately in the leasing process, execute enforceable leases, and assure equal access to housing for people with disabilities.

## **Q: What is a guardian?**

**A:** According to the Code of Virginia, a **guardian** is “a person appointed by the court 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, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence.” In Virginia, there is a separate role for substitute financial decision making, called a **conservator**, which is “a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person.” The guardian and conservator may be the same person.

## **Q: When is guardianship needed?**

**A:** A guardian or conservator is appointed for a person who the court has found to be incapable of receiving and evaluating information effectively or of responding to people, events, or environments to such an extent that the person lacks the capacity to make decisions concerning his or her health and well-being. The purpose of the guardianship and/or conservatorship is to protect the incapacitated person or his or her assets from abuse, neglect, or exploitation. The appointment of a guardian or a conservator removes a person’s right to make decisions for himself and should be a last resort, after less restrictive options have been considered (e.g., power of attorney, advanced medical directive, special needs trust, representative payee).

## **Q: What are the different types of guardianship?**

**A:** There are multiple types of guardianship that the court authorizes depending on the individual’s needs and situation. The most common types landlords are likely to see are described briefly below.

**Guardianship** - Unless the Court order appointing the guardian limits his/her authority, the guardian is responsible for making **all personal and personal care decisions for the incapacitated person**. However, each guardianship is tailored to the individual and may retain or remove certain rights. Virtually all guardianships take away the right to enter into a contract. Guardianship is a last resort, when there are no less restrictive methods that will provide the needed protection. Guardians must report annually to the local department of social services about the care provided to the incapacitated adult.

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**Conservator** –A conservator is appointed to make financial decisions for the person, including paying bills, investing money and selling property. Conservators also have the power to ratify or reject a contract entered into by an incapacitated person. A conservator is required to post surety on a bond with the court and report to the court about all income received and funds expended. The Court order appointing the conservator can place limits on the financial decisions he/she can make, if the incapacitated person only needs assistance with certain financial matters (e.g., paying bills, completing tax returns).

For a complete list of guardianship types, see: <http://www.vda.virginia.gov/pdfdocs/guardbook.pdf> and <http://www.vacsb.org/Misc/Guide%20to%20Consent%202012%20Revision.pdf>.

### **Q: Can a person under guardianship sign a rental lease or other legal contracts?**

**A:** If Guardianship and Conservatorship has been granted, the incapacitated person should not sign any legal contracts unless allowed by the court order. It is possible under Limited Guardianship for the incapacitated person to retain certain rights if the Court has so ordered. If those rights, especially the right to make decisions about residence, are not retained by the incapacitated person, the guardian should be asked to sign the lease or contract. If the court authorizes a conservatorship, the power to ratify contracts is included, so the conservator should be asked to sign the lease or contract. Both guardians and conservators should sign their names and identify their representative capacity (e.g., “Guardian for Full Name of Incapacitated Person” or “Conservator for Full Name of Incapacitated Person.”).

Landlords should ask for a copy of the full guardianship order that was issued by the court when the guardian was appointed. The order will indicate what type of guardianship was authorized (full or limited guardianship and/or conservatorship). Read the text of the order to determine what type of substitute decision-making is authorized. If it is a limited guardianship or conservatorship, identify what decisions the guardian is authorized to make (e.g., health, medical treatment, residence, social activity, etc.) or what powers the conservator has (to ratify contracts, pay bills, invest money, sell property, borrow funds, etc.) in order to determine whether the guardian or the individual should sign the lease.

### **Q: Can guardians co-sign leases for incapacitated persons?**

**A:** Co-signing involves a promise to pay another person’s debt arising out of a contract if that person fails to do so. By co-signing a lease, a guardian or conservator would obligate themselves to be personally liable to pay an incapacitated person’s debt such as back rent, penalties or damages. If a tenant who is incapacitated needs a co-signer, then it is not a conflict for the individual serving as Guardian to voluntarily take on this liability. This would typically occur only when a family member is serving. *However, do not confuse a guardian or conservator signing a lease agreement for an incapacitated person with a guardian or conservator co-signing a lease agreement for an incapacitated person.* A guardian or conservator who has been granted the legal authority to sign the lease agreement on an incapacitated person’s behalf does so because the incapacitated person does not have the ability to make this decision for him or herself.

### **Q: What are a guardian’s responsibilities related to compliance with the lease terms for an apartment?**

**A:** Guardians are generally responsible for making decisions regarding the incapacitated person’s residence. If a tenant or occupant who has a guardian commits a lease infraction, including but not limited to, non-payment of rent, damage to the unit, unapproved occupancy or illegal activity, both the tenant/occupant and the guardian must be notified of the violation so the guardian can decide how to

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respond (e.g., work with the incapacitated person to cure the violation, vacate the unit, negotiate with the landlord, pursue relief through the court). Guardians who are responsible for residency decisions and conservators who are responsible for financial decision-making/ratifying contracts will also be responsible for submitting income redeterminations (where applicable), signing lease addenda/amendments and property rules.

**Q: Is a guardian financially liable for the tenant's rent and any other fees or penalties?**

**A:** The guardian is not a tenant or occupant, and cannot be held liable for the acts of the incapacitated person as a tenant or occupant, unless grossly personally negligent (e.g., if the guardian is unaware of the person's health status and well-being and has not sought necessary care). Guardians are not required to spend their own funds to care for the incapacitated person (Virginia Code §64.2-2019). Therefore, while the guardian should be notified of late rent, fees and penalties, and legal proceedings; any summons for unlawful detainer and requests for writs of possession should be filed in the tenant's name with a copy to the guardian.

As long as a conservator reveals his/her representative capacity and identifies the estate (e.g., the incapacitated person's property) in the contract, he/she also cannot be held personally liable. Claims based upon lease contracts entered into by a conservator in a fiduciary capacity may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable.

**Q: With whom should I communicate about routine matters such as notices about inspections, pest treatment, parking/pool passes, etc.?**

**A:** The best approach is to have a conversation with the tenant/occupant and the guardian or conservator prior to or upon move-in. Ask them how they would prefer to handle notices about routine matters (e.g., send only to tenant, only to guardian, or to both). Likewise, find out to whom notices about other issues such as lease violations, lease addenda, policy changes, and lease renewals should be distributed. Make sure you obtain contact information for the guardian and/or conservator.

**Q: What legal documents outline the authorities of the guardian?**

**A:** A guardian's authority can be very broad or can be limited to making specific decisions. Likewise, the authority of a conservator may also be limited depending on the situation of the incapacitated person. The extent of the guardian's or conservator's authority are set forth in guardianship order the judge issued at the time of the guardian's appointment and in the Virginia Code (see Title 64.2 Chapter 20).