

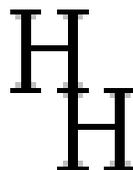
CONSERVATOR SALES

Of Real Estate in Virginia

Prepared by:

Ross C. Hart

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HART & HART ATTORNEYS, LTD.

40 WEST MAIN ST PO BOX 567 SALEM, VA 24153
540-375-3281 F/540-375-7677 *office@hhatty.com*

CONSERVATOR SALES OF REAL ESTATE

Ross C. Hart; February 2016

Sale of real property for a disabled owner can be tedious. Virginia law, with its former agrarian economy history – gives real estate a special place in our society. When agriculture was the lifeblood of the economy the land was the family support and the law wanted to preserve that. Now, urban real estate is more a commodity than support but the legal steps to sell it for an incapacitated person have not kept up.

Virginia is less than uniform in how the sales of real estate by conservators are handled, not only among the various areas/circuits, but sometimes within the same circuit. Some judges give permission to sell in the initial order appointing a conservator without any further oversight; many want you to get their approval. The more urban areas refer approval of a sale to the Commissioner of Accounts¹. If there's only a guardian (i.e. no conservator), there's the cumbersome (in name and process) "Actions for Sale . . . of Lands of Persons under a Disability" proceeding under 8.01- 68 *et seq.* Case law is non-existent; even title companies have few underwriting guidelines but approach each sale case-by-case.

The best advice when initiating a guardianship/conservatorship is THINK AHEAD to what will be needed down the road and how can you make it easier on you and your client.

I. Petition for Guardianship/Conservatorship

- A. Even if a 'no asset' guardian only case, ask for a conservatorship. If, at the hearing, it's not needed the court can decline to appoint or 'take it under advisement if one is needed in future'.
- B. INCLUDE a request for power to sell real estate – bonus points for listing exactly what is owned; if none is known to be owned, make it generic in case something is found or they inherit something.
- C. This gives immediate family notice that the court will consider appointing a conservator and that any real estate could be sold. See 64.2-2002 B 3 (petition must

¹ As part of research for this, I asked COA's for their thoughts and Edward R. Stolle, COA-Virginia Beach kindly posted my inquiry on the Virginia COA's private list-serv and sent me replies; responses incorporated throughout outline.

list spouse, children, parents, adult siblings or 3 other relatives) and they get notice under 64.2-2004 C.

D. Is there a local rule? *See, e.g., 7th Circuit Local Rule 08-01, entered 7 October 2008; available at www.nngov.com/circuit-court.*

II. Order appointing Conservator – authority to sell

A. Considerations for each method

1. Local Practice/Prejudice – “A good lawyer knows the law; a great lawyer knows the judge”. Determine how it’s done in your neck of the woods.
2. Speed – how long will it take to get approval after a buyer is found? Will this ‘chill’ the sale as buyers need to get their financing in order and remove all clouds.
3. Cost/complexity/paperwork – what will need to be done to get the approval? What does the ‘deciding authority’ (judge/COA/Conservator) need.
 - a. Bond
 - b. Valuation/justification of price
 - c. Other issues (repairs needed, severity if need for funds, etc.)
4. Risk – If there are dysfunctional family members, what risk will the Conservator have if accusations for selling too low or on perceived unfavorable terms.
5. Other issues – disabled family member in home; Estate planning?

B. Do nothing and walk (or run) away. Evaluate the property for value and if it’s close to ‘upside down’ consider abandoning it. Nothing worse than doing a whole bunch of work and not having the funds to pay for it.

1. Local Practice/Prejudice – Is there an expectation that the property should be sold or managed?
2. Speed – putting it “behind” vs. time to market and get approvals.
3. Cost/Complexity/paperwork – is approval needed to abandon? From COA or Judge? Short Sales are a pain on a good day, that a conservator is involved means it’s not a ‘good day’ and the likelihood of the conservator getting paid for the efforts is greatly diminished.
 - a. Bond – if property value included in initial order will need to adjust.

- b. Equity - Valuation/justification of price – appraisal or real estate agent opinion (see D-3, below) less the balance of debts against the property (Mortgages and judgment liens)
 - c. Other issues (repairs needed, severity if need for funds, etc.)
 - 4. Risk –
 - a. Property – what type neighborhood is it in? subject to vandalism?
 - b. Conservator - increased for allowing a supposed asset to ‘dissipate’.
 - 5. Other issues
 - a. Approval of abandonment – sample court motion/order and COA letter attached. Practice pointer: call COA and ask their opinion.
 - b. Medicaid – Foreclosure of property is NOT an ‘uncompensated transfer’. M1450.400K.
- C. Plenary - Blanket authority without restriction – basically court grants conservator ‘*carte blanche*’ to sell property without further need for review. The Code does not mandate further review or approval: 64.2-2022 B says “The Court *may* impose . . . “ which is permissive language, not mandatory.
 - 1. Local Practice/Prejudice – Not a common method but not unheard of.
 - 2. Speed – not an issue as there will not be any delay.
 - 3. Cost/Complexity/paperwork – none more than any other sale by a fiduciary (such as executor with power to sell)
 - a. Bond – presumably included in initial order otherwise need to adjust
 - b. Valuation/justification of price – appraisal or real estate agent opinion (see C-3, below)
 - c. Other issues (repairs needed, severity if need for funds, etc.)
 - 4. Risk –
 - a. Property – what type neighborhood is it in? subject to vandalism?
 - b. Conservator - increased if dysfunctional family member decides to sue for misfeasance for selling too cheap.

D. Jurisdiction Requires Court approval

1. Local Practice/Prejudice – More common in rural/smaller jurisdictions where access to the court is less regimented. Some judges feel it is their duty to review sales personally rather than delegate.
2. Speed – varies by locality and presence of a ‘sitting’ versus circuit riding judge. Issue is ‘chilling’ effect on a buyer being told someone ELSE has to approve the contract and they won’t have a final answer for up to several weeks. Practice hint: contract of sale should have a clause that Conservator will file a motion to approve within X business days (I use 5, a week) so buyer and agents can see that much progress.
3. Cost/Complexity/paperwork – Motion with copy of contract; order approving sale with endorsement of petitioner (if not also the conservator), the Guardian ad litem and in some jurisdictions the Commissioner of Accounts.
 - a. Bond – if not already sufficient will need to be increased; allow time to arrange with clerk and bonding company.
 - b. Valuation/justification of price –
 - Some judges will require a formal appraisal.
 - Some will allow an experienced real estate agent (remember, “Realtor™” is a trademarked term) – and an agent can usually provide a “Competitive Market Analysis (CMA) which, like an appraisal, lists similar properties and listing/sale prices.
 - c. Other issues (repairs needed, maintenance costs, severity if need for funds, etc.).
 - HOA dues, taxes, maintenance – and Medicaid impact on these.
 - “Sin List” – itemized listing of items needing repairs and the costs of each. (sample attached)
4. Risk
 - a. Property – cost of keeping – insurance, taxes, etc. vs off-loading.
 - b. Conservator – with court approval conservator is ‘hiding behind the judge’s robe’ and, unless actual fraud was involved, is nearly bullet proof.

5. Other issues –
 - a. “Listing” vs “contract to sell” – listing simply means that you are offering the property for sale. While court approval isn’t required to “List”, prudent counsel will include it in the initial order.
 - b. Notice of sale – if the petition asked for authority of sale and if the order ‘defers consideration of the sale of the property’ or ‘takes it under advisement’ without requiring any further notice, then any additional notice requirement is arguably dispensed with.
 - c. Medicaid (the proverbial elephant in the room). Practice hint – don’t mention Medicaid in the motion to approve or order of approval as that could run afoul of M1450.400 A (“the transfer(s) of assets was made for reasons exclusive of becoming or remaining eligible for Medicaid payment of LTC services sale solely to qualify for Medicaid’ if the actual sale price is less than Tax Assessed Value.
 - d. 21-day rule – usually ‘overlooked’
 - e. Attach order of approval as Exhibit to Deed – keeps future title examiners happy.
- E. Jurisdiction Requires Approval by Commissioner of Accounts (COA)
 1. Local Practice/Prejudice – common in more populated urban areas with heavy court case-loads. Is the default in the 17th Circuit [*see I-D, above*].
 2. Speed – Again, varies by locality and availability of the COA. Virginia COA’s try for a 48 hour turnaround and recognize the time sensitivity of the transaction, however it can take longer. ².
 3. Cost/Complexity/paperwork – A lot of this is driven by language in the order of appointment. Some lawyers simply parrot (cut and paste) the language in 64.2-2022-B which is clearly *permissive* in what a court **may** require, it is not a list of what must be done. Attention at this stage will make it easier on the conservator, counsel and the Commissioner and the bonus is it speeds up approval. ³

² One COA said “The biggest problem we see is people waiting until the last day or so before closing . . . “

³ Several COA’s said that a lot of attorneys do not pay attention to this part of the order and worse, too many attorneys simply cut/paste the language from 2022B down to the word “may”.

- a. Bond – if not addressed in initial order, a bond increase is required. Check with COA about amount. Some require new bond as condition of their approval.
 - b. Valuation/justification of price – The COA will expect a competent evaluation of the property, independent evaluation preferred. If counsel drafting the order parroted 2022-B, then an appraisal is needed; however, if the order says said “market analysis of property” then a CME could work. If available include ‘sin list’ of defects and cost to repair.
 - c. Other issues: MAKE IT EASY FOR THE COA.⁴ Tell the story in a cover letter and include:
 - Copy of the court order appointing conservator and setting forth procedure. (Yes, the COA should already have this, but by enclosing it as the first document of your package saves them the time to look for it, speeding the time for an answer!)
 - Copy signed contract for sale
 - Copy of Tax assessment
 - Documented evaluation of the property (above)
 - Proof of sufficient bond
 - Explanation of need for sale. (Depleted funds, Taxes, maintenance, HOA dues, fact owner cannot return, etc). Here, if the order directed the conservator to sell the property subject to review of contract by COA, no explanation needed.
 - Evidence of compliance with any notice or other requirement set forth in the order.
4. Risk
- a. Property – keeping with deterioration and expense vs offloading.
 - b. Conservator – almost the same level of protection as a court approval.
5. Other issues

⁴ One COA commented “When there’s [an experienced] lawyer on board for the seller we have no problem. An inexperienced [real estate agent] trying to get it straight is something else”

- a. “Listing” vs “contract to sell” – listing simply means that you are offering the property for sale. While approval isn’t required to “List”, prudent counsel will include it in the initial order.
- b. Medicaid impact. Again, don’t mention Medicaid in the request (and hope the COA doesn’t put it in the letter) as that could run afoul of the ‘sale solely to qualify for Medicaid’ if the actual sale price is less than Tax Assessed Value.
- c. 15 -day rule – the COA has to submit the recommendation to the court and parties have 15 days from date filed to ask for a hearing before the Circuit Court. Like the 21-day rule, this is “honored” more in the breach than in compliance.
- d. Problems reported by COA’s (other than incomplete paperwork) – proposed sale for bargain price to a family insider or developer trying for an ‘aggressive deal’.
- e. Attach order of approval as Exhibit to Deed – keeps future title examiners happy.

III. Medicaid considerations

A. Property Exempt from sale

1. First 6 months institutionalization M1130.100 D2
2. Occupancy by spouse, underage child, disabled child or parent M1130.100 D3

B. Must make Initial “Reasonable Effort to sell” (vs “Continuing Effort to Sell”)

1. “Current Market Value [CMV]” IS SAME AS “Tax Assessed Value [TAV]” M1130.140 B.
2. List at “Not More than Current Market Value” M1130.140 B1
 - a. Might seem to allow price below CMV/TAV would work – especially if coupled with an independent appraisal. Allows listing at a price – below TAV – that will actually attract a buyer.
 - b. BUT Catch-22: Uncompensated Value rules in M1450.004-O
(Uncompensated Value is difference between FMV/TAV and “Gross Amount Due Seller”)

- c. Note that as of time application is filed if property was listed for up to 150% CMV/TAV, retroactive coverage can be given if list price is immediately lowered to 100% CMV/TAV M1130.140-B-2
- 3. Realtor Statement “unlikely to sell within 90 days’ & reasons – S1130.140-B-1-a
- 4. Any Co-Owner refuses to sell. S1130.140-B-1-e
- 5. See Retroactive provisions S1130.140-B-2
- C. Continuing Effort to Sell -S1130-140.B-3
 - 1. Continue listing at “not more than” 100% CMV/TAV. S1130-140.B-3-a
 - 2. Non-agent procedures outlined at 1130-140.B-3-b, & c.
 - 3. File Partition Suit S1130-140.B-3-d
 - a. Within 60 days of co-owner refusal
 - b. 9 months allowed for partition suit to progress.
 - 4. After a year of unsuccessful efforts, may sell at 75% CMV/TAV without the uncompensated transfer penalty in M1450; see S1130-140.B-4
- D. Costs of sale/Deductions from price M1450.610-H
 - 1. Eligibility worker first has to compare Gross Due Seller (from HUD-1 Settlement Statement) with CMV/TAV. M1450.610-H-1
 - 2. Manual gives no clear guidance on what deductions can be made.
 - 3. *“Note: Any funds deducted from the Gross Amount Due to Seller that are paid to another individual, such as funds for repair of the property, are not considered usual and customary fees and must be evaluated as a separate asset transfer. If the transfer was uncompensated then the amount of this transfer may be added to any uncompensated value from the sale of property, as the transfer occurred at the same point in time.”* (Italics original) See M1450.610-H-2, note following paragraph c.
 - 4. The note in the manual refers obliquely to ‘usual and customary fees’ without specification.

IV. Potpourri

A. Life (of a contract) after Death.

- 1. Entering a contract to sell real estate results in “Equitable Conversion” of the real estate to a personal property interest. See Clay v. Landreth, 187 VA 169, 45

S.E.2d 875, 1948. “That the doctrine of equitable conversion exists in Virginia cannot be doubted” id.

2. It’s not unheard of for the owner to die between contract and closing.
 3. 64.2-523 provides that personal representative record the contract with the deed from personal representative carrying out terms of contract.
 4. Quære: On theory that everyone enjoys sleepless nights, what results when:
 - a. Contract entered, but ward dies before approval obtained?
 - b. Contract entered, approval granted, ward dies during 15/21 day interim?
- B. Sale of devised property – sometimes it is necessary to sell property that the ward devised to someone. Refer to 64.2-415 before selling. Make sure proceeds from sale are segregated from other assets as the devisee may still get whatever’s left.
- V. Attached documents
- A. Sample “Sin List” – list of problems and cost for sale house
 - B. Sample Circuit Court motion and Order approving sale
 - C. Rule 08-1, 7th Judicial Circuit
 - D. Motion/Order/Notice abandon for Circuit Court
 - E. Sample ‘abandon’ letter to Commissioner of Accounts.