

TITLE 31 PART C.

GUARDIAN AND WARD GUARDIANSHIP OF MINOR.

Drafting note: Existing Title 31 has been relocated to proposed Chapters 17, 18, and 19 of proposed Subtitle IV of Title 64.2. Proposed Subtitle IV collects the various provisions dealing with fiduciary relationships, including the guardianship of minors.

CHAPTER 17.

NATURAL AND TESTAMENTARY GUARDIANS.

CHAPTER 2.

APPOINTMENT OF GUARDIAN BY COURT OR CLERK.

Drafting note: Existing Chapters 1 and 2 of existing Title 31 have been combined into proposed Chapter 17 of Title 64.2.

§ ~~31-1~~ 64.2-1700. Natural guardians.

The ~~father and mother~~ parents of ~~every legitimate an~~ unmarried minor child, ~~if living together and being themselves respectively competent to transact their own business and not otherwise unsuitable, shall be~~ are the joint natural guardians of the person of such child, with equal legal powers and ~~equal~~ legal rights ~~in with~~ regard to such child; ~~and upon, provided that the parents are living together, are respectively competent to transact their own business, and are not otherwise unsuitable. Upon~~ the death of either parent, the survivor shall be the natural guardian of the person of such child. If either parent has abandoned ~~his~~ the family, the other parent shall be the natural guardian of the person of such child.

Drafting note: Primarily technical changes, except that the elimination of the requirement that parents are only the natural guardians of “legitimate” children may be viewed as a substantive change. This change is arguably necessary as the section’s current distinction between parents of legitimate and illegitimate children is possibly unconstitutional.

The United States Supreme Court has held that treating married and unmarried parents differently violates the Equal Protection Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972). See also *Beyah v. Shelton*, 231 Va. 432, 434, 344 S.E.2d 909 (1986) (holding that an unmarried father has standing to object to a petition to change the name of the child and that, in light of *Stanley*, the contrary conclusion “may deprive the unwed father of the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the United States Constitution.”). Cf. *Williams v. Williams*, 24 Va. App. 778, 782, 485 S.E.2d 651 (1997), *aff’d as modified*, 256 Va. 19, 501 S.E.2d 417 (1998) (holding the parents have a constitutionally protected fundamental liberty interest to raise their children and the “fundamental right to parental autonomy in child rearing.” With the exception of a minor technical change (striking “or her” after “his” in the last sentence), this section has not been amended since the *Stanley* decision.

§ ~~31-2~~ 64.2-1701. Testamentary guardians.

A. Every parent may by ~~his last will and testament~~ appoint (i) a guardian of the person of his minor child and (ii) a guardian for the estate bequeathed or devised by the parent to his minor child for such time during the ~~child's~~ minor's infancy as the parent ~~shall direct~~ directs. A

guardian of a minor's estate shall have ~~the~~ custody and control of the estate committed to his care, ~~but no~~ A guardian of the person of a minor other than a parent ~~shall be~~ is not entitled to ~~the~~ custody of the person of ~~his ward~~ the minor so long as either ~~parent survives of the minor's~~ parents is living and such ~~surviving~~ parent is a fit and proper person to have ~~the~~ custody of the ~~child~~ minor.

B. The appointment of any guardian pursuant to subsection A shall be void if the guardian (i) renounces the guardianship or (ii) fails to appear in the court in which the will is admitted to probate within six months after the probate to accept the guardianship and give any bond required under § 64.2-1704.

Drafting note: The term “devised” is added after “bequeathed” in order to cover both real and personal property. There are also technical changes. Proposed subsection B incorporates existing § 31-3.

~~§ 31-3. When appointments void.~~

~~If any person so appointed renounces the guardianship or fails to appear in the court in which the will is proved within six months after the probate thereof and declare his acceptance of the guardianship, and give bond as hereinafter provided, such appointment shall be void.~~

Drafting note: Relocated to subsection B of proposed § 64.2-1701.

~~§ 31-4 64.2-1702. Jurisdiction of appointments~~ Appointment of guardians.

The circuit court or the circuit court clerk of any county or city in which a minor resides or, ~~if the minor is an out-of-state resident,~~ in which ~~he~~ the minor has any estate, ~~if he is an out-of-state resident,~~ may appoint a guardian for the estate of the minor, and may appoint a guardian for the person of the minor unless ~~he has~~ a guardian has been appointed ~~as aforesaid by his father or mother~~ for the minor pursuant to § 64.2-1701.

Drafting note: Technical changes.

~~§ 31-5 64.2-1703. How appointments made~~ Nomination of guardians.

~~If the minor is under the age of fourteen years, the court or clerk may nominate as well as appoint his guardian; if the~~ A. A ~~minor is above that age he who is at least 14 years old~~ may, in the presence of the court or clerk, or in writing acknowledged before any officer qualified to take acknowledgments, nominate his own guardian for the estate or person of the minor, who, ~~if approved by the court or clerk,~~ shall be appointed ~~accordingly; but~~ if the court or clerk find that the guardian nominated is suitable and competent. If the guardian nominated by the minor is not appointed ~~or,~~ if the minor resides without the Commonwealth, or if, ~~after being summoned by the court or clerk, he does not nominate a person deemed~~ finds that the guardian nominated is not suitable and competent ~~by,~~ the court or clerk, ~~a guardian may be nominated~~ nominate and ~~appointed~~ appoint a guardian for the minor in the same manner as if the minor were ~~under the age of fourteen less than 14 years old.~~

B. In no case shall any person not related to the ~~infant~~ minor be appointed guardian until ~~thirty~~ 30 days have elapsed since the death or disqualification of ~~the~~ any natural or testamentary

guardians, and the minor's next of kin have had an opportunity to petition the court for appointment and unless the court or clerk is satisfied that such nonrelated person is competent to perform the duties of his office.

Drafting note: Technical changes.

§ ~~31-6~~ 64.2-1704. Guardians to give Guardian's bond; surety thereon.

A. Before ~~the appointment of~~ any person may be appointed the guardian for the estate of a minor, the person ~~seeking appointment shall~~, in the circuit court or before the circuit court clerk, shall take an oath that he will faithfully perform the duties of his office to the best of his judgment and give his bond in an amount at least equal to the value of the minor's personal estate coming under his control.

B. Every guardian for the estate of a minor shall provide surety upon his bond unless it is waived pursuant to § ~~26-4~~ 64.2-1411 or, in the case of a testamentary guardian, it is waived by the testator's will ~~waives surety; however,~~ However, upon the motion of the court or clerk, ~~on its or his own motion~~ or upon the motion of another interested person, the court or clerk may at any time; require surety upon a guardian's bond. Every order appointing a guardian shall state whether or not surety is required.

~~When~~C. If the same guardian qualifies upon the estate of two or more ~~wards~~ minors who are members of the same family, ~~only one qualification and such guardian shall only be required to give~~ one guardianship bond ~~shall be required.~~

Drafting note: Technical changes.

§ ~~31-6.1~~ 64.2-1705. Redetermination of guardian's bond.

Upon a guardian's request, the clerk shall redetermine the penalty of the guardian's bond in light of any reduction in the current market value of the estate under the guardian's control, whether such reduction is due to disbursements, distributions, valuation of assets, or disclaimer of fiduciary power, if such reduction is reflected in an accounting that has been confirmed by the circuit court or an inventory that has been approved by the commissioner of accounts. This provision shall not apply to any bond set by the court.

Drafting note: Technical changes.

§ ~~31-7~~ 64.2-1706. When court may appoint temporary guardians; bond; powers and duties.

Until a guardian appointed by the circuit court or clerk has given his bond, or while there is no guardian, the court or clerk may, ~~from time to time,~~ appoint a temporary guardian, who shall give his bond ~~as aforesaid, and during the continuance~~ pursuant to § 64.2-1704. Any temporary guardian during the period of his guardianship shall have all the powers and responsibilities of and shall perform all the duties of a guardian, ~~and be responsible in the same way.~~

Drafting note: Technical changes.