WEST VIRGINIA CODE CHAPTER 44 ARTICLE 10

WV Legislature

§44-10-1. Testamentary guardians.

Every father or mother, may, by last will and testament, appoint a guardian for his or her child, born or to be born, and for such time during its infancy as he or she may direct. Where both father and mother have so appointed guardians, only that guardian who is the appointee of the parent last living shall be entitled to the custody of the person of such child.

WV Legislature

§44-10-2. Appointment void for renunciation or failure to qualify.

If any person so appointed shall renounce the trust, or fail to appear before the county court before whom such will shall be proved, within six months after the probate thereof, and declare his acceptance of the trust, and give bond as provided in this article, such appointment shall be void.

WV Legislature

§44-10-3. Appointment and termination of guardian for a minor.

(a) The circuit court and family court have concurrent jurisdiction to appoint a guardian for a minor.

(b) Venue for a petition for appointment of guardianship is in the county in which the minor has resided for the past six months unless the court finds extraordinary circumstances for a sooner filing. If the child is a nonresident of this state and only the guardianship of the estate is sought the petition may be filed in the county in which the child has an estate.

(c) All proceedings shall be conducted in accordance with the Rules of Practice and Procedure for Minor Guardianship Proceedings.

(d) Any responsible person with knowledge of the facts regarding the welfare and best interests of a minor may petition for an appointment of a guardian except a parent or other person whose rights to the minor have been terminated. No guardianship petition may be considered if the child who is the subject of the petition is involved in another court proceeding relating to custody or guardianship or if the petitioner is a parent seeking custodial rights adverse to the other parent.

(e) Within two days of the filing of a petition for the appointment of a guardian, the circuit clerk shall notify the court. The court shall hold a hearing upon the petition for the appointment of a guardian within ten days after the petition is filed. If all persons entitled to service in accordance with the Rules of Practice and Procedure for Minor Guardianship Proceedings have not been served at least five days prior to the hearing or have not waived service the court shall continue the hearing but may appoint a temporary guardian pursuant to subsection (g) below.

(f) The court may appoint a guardian for a minor if the court finds by clear and convincing evidence that the appointment is in the minor’s best interest and:

(1) The parents consent;

(2) The parents' rights have been previously terminated;

(3) The parents are unwilling or unable to exercise their parental rights;

(4) The parents have abandoned their rights by a material failure to exercise them for a period of more than six months; or

(5) There are extraordinary circumstances that would, in all reasonable likelihood, result in serious detriment to the child if the petition is denied.

(g) Whether or not one or more of the conditions of subsection (f) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists or that a period of transition into the custody of a parent is needed so long as the

WV Legislature

appointment is in the best interest of the minor. The temporary guardian has the authority of a guardian appointed pursuant to subsection (f) but the duration of the temporary guardianship may not exceed six months. A temporary guardianship may be extended beyond six months upon further order of the court finding continued need in the best interest of the minor.

(h) Any suitable person may be appointed as the minor's guardian. A parent shall receive priority subject only to the provisions of subsections (d) and (f) above. However, in every case the competency and fitness of the proposed guardian must be established and a determination made that the appointment is in the best interest of the child.

(i) The court, the guardian or the minor may revoke or terminate the guardianship appointment when:

(1) The minor reaches the age of eighteen and executes a release stating that the guardian's estate was properly administered and that the minor has received the assets of the estate from the guardian;

(2) The guardian or the minor dies;

(3) The guardian petitions the court to resign and the court enters an order approving the resignation; or

(4) A petition is filed by the guardian, the minor, a parent or an interested person or upon the motion of the court stating that the minor is no longer in need of the assistance or protection of a guardian due to changed circumstances and the termination of the guardianship would be in the minor's best interest.

(j) For a petition to revoke or terminate a guardianship filed by a parent, the burden of proof is on the moving party to show by a preponderance of the evidence that there has been a material change of circumstances and that a revocation or termination is in the child's best interest.

(k) A guardianship may not be terminated by the court if there are any assets in the estate due and payable to the minor. Another guardian may be appointed upon the resignation of a guardian whenever there are assets in the estate due and payable to the minor.

(l) Other than court orders and case indexes, all other records of a guardian proceeding involving a minor are confidential and shall not be disclosed to anyone who is not a party to the proceeding, counsel of record for the proceeding, the court presiding over the proceeding or other family or circuit court presiding over another proceeding involving the minor absent a court order permitting examination of such records.

WV Legislature

§44-10-4. Right of minor to nominate guardian.

(a) If the minor is above the age of fourteen years, he or she may in the presence of the circuit or family court, or in writing acknowledged before any officer authorized to take the acknowledgment of a deed, nominate his or her own guardian, who, if approved by the court, shall be appointed accordingly.

(b) If the minor is below the age of fourteen years and, if the court determines it is in the best interests of the minor, the court may consider the firm and reasonable preferences of a minor who, in the discretion of the court, is sufficiently matured that he or she can intelligently express a preference. He or she may in the presence of the circuit or family court, or in writing acknowledged before any officer authorized to take the acknowledgment of a deed, nominate his or her own guardian, who, if approved by the court, after giving that preference the weight warranted by the circumstances, shall be appointed accordingly.

(c) If the guardian nominated by the minor is not appointed by the court, or if the minor resides outside the state, or if, after being summoned, the minor neglects to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years.

WV Legislature

§44-10-5. Bond of guardian.

(a) Every guardian, except in the case of a testamentary guardian where the will otherwise directs and the court in which the will is recorded deems it unnecessary for the safety of the ward, shall give bond with security to be approved by the court by whom he or she is appointed, or before whom he or she accepts the trust, in such penalty as shall be prescribed by the court.

(b) The bond shall be given before the clerk of the court in which the petition is filed.

WV Legislature

§44-10-6. Curator; bond; powers and duties.

Until a guardian gives bond, or while there is no guardian, the circuit or family court, may, from time to time, appoint a curator, who shall give bond, and during the continuance of his or her trust, have all the powers and perform all the duties of a guardian, and be responsible in the same way.

WV Legislature

§44-10-7. Management of ward's estate; maintenance, education and custody; duration of guardianship; settlement.

Every guardian who is appointed as aforesaid, and gives bond when it is required, shall have the possession, care and management of his ward's estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education; and shall have also, except as otherwise provided in this article, the custody of his ward. Unless the guardian shall die, be removed or resign his trust (and the court before which he qualified may allow him to resign), he shall continue in office until his ward shall attain the age of eighteen years notwithstanding the ward may marry before that time, or, in the case of a testamentary guardianship, until the termination of the period limited therefor. At the expiration of his trust, he shall deliver and pay all the estate and money in his hands, or with which he is chargeable, to the person or persons entitled thereto. But the father or mother of any minor child or children shall be entitled to the custody of the person of such child or children, and to the care of his or their education. If living together, the father and mother shall be the joint guardians of the person of their minor child or children, with equal powers, rights and duties in respect to the custody, control, services, earnings, and care of the education of such minor child or children; and neither the father nor the mother shall have any right paramount to that of the other in respect to such custody, control, services or earnings, and care of the education of such minor child or children. If the father and mother be living apart, the court to which application is made from the appointment of a guardian, or before which any such matter comes in question, shall appoint, as guardian of the person of the minor child or children of such father and mother, that parent who is, in the court's opinion, best suited for the trust, considering the welfare and best interests of such minor child or children. No corporation or trust company shall be guardian of any minor child or children be entitled to the custody, control, services, earnings and care of the education of such minor child or children, and when any corporation or trust company is guardian of the estate of any minor child or children and neither of the parents of such child or children is living, or is a suitable person to act as guardian of the person of such child or children, then the court shall appoint a guardian of the person of such child or children who shall be entitled to the custody, control, services, earnings and care of the education of such minor child or children. Any corporation or trust company appointed as guardian of the estate of any minor child or children shall, unless for such minor child or children a nonresident of this state may be appointed guardian, be a corporation organized under the laws of this state and doing business in this state, or an authorized banking institution, defined as one authorized to exercise trust and fiduciary powers within this state under section fourteen, article four, chapter thirty-one-a of this code.

WV Legislature

§44-10-8. Disbursements and expenditures by guardians from income and corpus of estates of infant wards.

No disbursements, beyond the annual income of the ward's estate, shall be allowed to any guardian where the deed or will, under which the estate is derived, does not authorize it, unless the same shall have been authorized by the circuit court of the county in which the guardian was appointed or qualified. Any guardian, who may desire to spend more than the annual income of his ward's estate for any purpose, shall file in such circuit court a petition, verified by his oath, setting forth the reasons why it is necessary to make such expenditures, to which petition the ward shall be made defendant. The court shall appoint a guardian ad litem for the ward, who shall answer such petition, be present at the hearing, and represent the infant. Five days' notice shall be given to the defendant before such petition can be heard. At the hearing the evidence may be taken orally, and the court, if satisfied that such expenditure would be judicious and proper, may grant the prayer of the petition. Such petition may be filed and heard before the judge of such court in vacation as well as in term time. In the settlement of the guardian's accounts no credit shall be allowed him by the fiduciary commissioner or the court for expenditures for his ward, except for expenditures of the annual income of his ward's estate and for expenditures of such amounts of the principal of the ward's personal estate as are authorized by the court as provided by this section: Provided, That if the personal estate in the hands of the guardian does not exceed in amount the sum of $3,000, disbursement may be made by the guardian from the corpus of such personal estate for the ward's maintenance and education, after first securing the written approval so to do of and from the fiduciary commissioner to whom the settlement of the ward's estate was referred.

WV Legislature

§44-10-9. Sale of personal estate to pay excess beyond income.

When any such disbursements shall be so allowed, the court shall, if necessary, order the sale of such portions of the personal estate of the ward as may be necessary to pay the balance of such expenditures over and above the income of his estate.

WV Legislature

§44-10-10. When guardian to pay interest.

If any balance, whether of profits received or estimated, or of interest or principal, be due by any guardian, or other person acting as guardian, at the end of any year, which ought to be invested or loaned out within a reasonable time for the benefit of the ward, and the same remain in the hands of such guardian or other person, he shall be charged with interest thereon from the end of the year in which such balance arose, and so on, as often as such shall be the fact, during the continuance of the trust.

WV Legislature

§44-10-11. Compound interest recoverable.

Any person acting as guardian shall have the right to demand and recover of any obligor in any bond or the maker of any other instrument in writing, payable to him as guardian, and held by him for the benefit of his ward, not only the principal sum due, with interest thereon after the rate prescribed by law; but also, when the interest on the principal sum is not paid punctually at the time stipulated in such bond or writing, to demand and recover interest upon the interest so due and unpaid.

WV Legislature

§44-10-12. Time allowed guardian for investment of funds.

Whenever a guardian shall collect any principal or interest belonging to his ward, he shall have sixty days to invest or loan the same, and shall not be charged with interest thereon until the expiration of such time, unless he shall have made the investment previous thereto, in which case he shall be charged with interest from the time the investment or loan was made: Provided, That if by due diligence any guardian is unable to loan any principal or interest belonging to his ward within the time aforesaid, and it becomes necessary for him to apply to the circuit court for authority or direction concerning such funds, such guardian shall not, pending a hearing of the matter, be chargeable with interest on the funds in his hands uninvested, unless the court or judge otherwise order.

WV Legislature

§44-10-13. Powers of chancery courts over guardians; when and how real estate may be sold for maintenance and education of wards.

The circuit court, in chancery, may hear and determine all matters between guardians and their wards, require settlement of the guardianship accounts, remove any guardian for neglect or breach of trust, and appoint another, or order another to be appointed, in his stead, and make any orders for the custody and tuition of an infant, and the management, preservation and investment of his estate; and when it shall be made to appear to the satisfaction of a circuit court on a bill in chancery, or by petition in a summary way, filed for the purpose by the guardian, that the proper maintenance and education, or other interests of an infant, require that the proceeds of his real estate, beyond the annual income thereof, should be applied to the use of such infant, it shall be lawful for the court to order the sale of, or to authorize a loan upon, his real estate, or such part thereof as may be necessary for the purpose, and, from time to time, make such decrees and orders as may be proper to secure the due application of the proceeds of such sale or loan; and to the extent that such proceeds may be so applied they shall be deemed personal estate, but no further. Every bill or petition filed under this section, and the proceedings thereon, shall conform to the procedure provided by law for authority to sell the real estate of an infant.

WV Legislature

§44-10-14. Minor settlement proceedings.

This section shall be known as the "Minor Settlement Proceedings Reform Act".

(a) If a minor suffers injury to his or her person or property, the parent, guardian or next friend of the minor may negotiate a settlement of the minor's claim for damages prior to or subsequent to the filing of an action for damages.

(b) Filing of petition or motion. -- In order to secure a release of the party or parties allegedly responsible for the injury or loss, the parent, next friend or guardian of the minor shall file a verified petition in the circuit court of the county in which the minor resides or in which an action for damages may be filed in accordance with the provisions of section one, article one, chapter fifty-six of this code: Provided, That if an action for damages of the minor is pending in circuit court, the petition shall be filed, verified and served as a motion in the pending action and may be filed by a parent, guardian or next friend.

(c) Contents of petition or motion. -- The petition or motion shall request approval by the court of the terms of the proposed settlement, the release of liability and the manner of distribution of settlement proceeds. The petition or motion shall also state the following:

(1) The name, gender and age of the minor;

(2) The facts of the injury and damages of the minor relied upon in requesting the court to consider and approve the proposed settlement and release;

(3) The circumstances and events leading to the injury or loss at issue and the identities of the persons or entities alleged to be responsible for the injury or loss;

(4) The identities of the persons or entities to be released;

(5) The circumstances of the minor at the time of the petition or motion;

(6) The relationship of the petitioner or moving party to the minor;

(7) The nature and effect of the injury;

(8) The sum of expenses expended for the treatment and care of the minor for the injuries at issue;

(9) An estimate of future expenses for the treatment and care of the minor related to the injury and how such expenses would be satisfied from the settlement proceeds;

(10) A proposal as to how the costs and expenses of processing the settlement and release are to be satisfied;

(11) A proposal for distribution of other settlement proceeds; and

WV Legislature

(12) A request for such other relief as the court may determine is appropriate in the best interests of the child.

(d) Guardian ad litem. -- Upon the filing of a petition or motion, the court shall appoint a guardian ad litem to:

(1) Review and confirm the facts set forth in the petition and the facts and circumstances of the minor, including the injuries and losses of the minor alleged to have been caused by the party or parties to be released as alleged in the petition or motion; the treatment and conditions past, present and in the foreseeable future of the minor as a result of the injuries and losses at issue; the proposed amounts and procedures for distribution of settlement proceeds; and other relevant information appearing in the petition or motion or otherwise; and

(2) File an answer to the petition or motion on behalf of the minor, stating the opinion of the guardian ad litem as to whether or not the proposed settlement and release and the proposed distribution of proceeds are in the best interest of the minor.

(e) Hearing. -- A hearing shall be conducted on the petition or motion, at which time the court shall take testimony and consider arguments regarding the alleged injuries or losses and the proposals for the settlement, release, initial payment of expenses and the distribution of settlement proceeds: Provided, That the court may order that the minor appear and testify if the court finds that his or her appearance or testimony is appropriate for consideration by the court of the proposed settlement.

(f) Release form. -- If the court grants the requested relief, a release of the claim of the minor against the persons or entities alleged to be responsible for the injuries or losses and who are identified in the petition or motion to be released from liability, any other persons or entities making payment on behalf of those persons or entities and any subsidiaries or successor persons or entities shall be executed by a party authorized by the court to execute the release. The release shall be in form or effect as follows:

I, ..., the [guardian or other person authorized to execute the release] of ....., a minor, in consideration of the sum of $....., and under authority of an order of the circuit court of ..... County, entered on the ..... day of ....., 20....., pursuant to West Virginia Code 44-10-14, do hereby release ..... from all claims and demands on account of injuries allegedly inflicted upon the minor and any property of the minor on the ..... day of ....., ..., at .....

_____

[Guardian or other person authorized by the court to execute the release] of .....

(g) Order approving or rejecting settlement. -- The court shall enter an order with findings of fact and granting or rejecting the proposed settlement, release and distribution of

WV Legislature

settlement proceeds. If the requested relief is granted, the court shall provide by order that an attorney appearing in the proceeding or other responsible person shall negotiate, satisfy and pay initial expense payments from settlement proceeds, the costs and fees incurred for the settlement and any bond required therefor, expenses for treatment of the minor related to the injury at issue, payments to satisfy any liens on settlement proceeds, if any, and such other directives as the court finds appropriate to complete the settlement and secure the proceeds for the minor.

(1) In allowing the payment of settlement proceeds for attorney fees, legal expenses, court costs and other costs of securing the settlement in such reasonable amounts as the court finds in its discretion to be appropriate, the court shall consider the amount to be paid as damages, the age and necessities of the minor, the nature of the injury, the difficulties involved in effecting the settlement, legal expenses and fees paid to attorneys in similar cases and any other matters which the court determines should be considered in achieving a proper and equitable distribution of settlement proceeds.

(2) In allowing any sums to be paid to the minor or to another person to be used for the immediate personal benefit of the minor, the court shall state further the terms under which such payments shall be made, including the use for which such sums may be expended and the times on which such payments shall be made: Provided, That such payments shall be made no later than twenty-four months after entry of the order.

(3) The order shall provide that settlement proceeds remaining after the initial payment of expenses shall be deemed net settlement trust proceeds.

(4) If the net settlement proceeds are less than $25,000, the court may order that the person authorized to pay the initial expenses deposit net settlement trust proceeds into a regulated financial institution or institutions with a principal place of business in this state, in interest bearing certificates of deposit or accounts or securities that are fully insured by federal deposit insurance, in the name of the minor and payable by the financial institution only to the minor upon presentation of proper identification after the minor attains the age of majority: Provided, That such person may be authorized by the court to transfer funds to a substitute qualified institution or institutions from the financial institution or institutions initially selected: Provided, however, That any substitution shall be reported to any fiduciary commissioner or supervisor of the county that the court has designated to review of the status of the investment and security of net settlement trust proceeds: Provided further, That whenever net settlement trust proceeds are deposited into a bank pursuant to the provisions of this paragraph, such bank shall, within ten days of receipt of such funds, file with the clerk of the court an acknowledgment that the funds have been received and that such funds may be withdrawn only by the minor upon his or her reaching the age of majority or upon order of the court.

(5) The order shall provide that within sixty days of the entry of the order, a statement of initial expense payments and an inventory of net settlement trust proceeds and any income earned thereon shall be filed by the person authorized to pay initial expenses with the

WV Legislature

fiduciary commissioner or supervisor of the county commission designated by the court to review the status of settlement proceeds for the minor.

(6) The order shall direct that a certified copy of the order of the court approving the settlement be provided by the clerk of the circuit court to the fiduciary commissioner or supervisor designated by the court to review the status of settlement proceeds.

(h) Appointment of conservator and reports to fiduciary officers. -- The court may appoint a conservator to serve as the person responsible for investment and control of net settlement trust proceeds until the minor attains the age of majority or at such later time as the court may order upon terms the court finds to be in the best interest of the minor, taking into consideration any special needs of the minor at any age. The conservator may be a guardian appointed pursuant to section three of this article or other responsible person.

(1) Neither the corpus nor income accumulated on net settlement trust proceeds shall be used for the maintenance or care of the minor during his or her minority, absent unusual circumstances or special needs of the minor specified in the order approving the settlement. The corpus or income earned thereon may not be invaded, revised or subjected to assignment, levy, garnishment or other order, except as shall be first approved by order of the court approving the settlement.

(2) The court shall determine the amount and necessity for bond of the conservator and for any surety of the bond of the conservator, payable on behalf of the minor in an amount sufficient to protect the principal of net settlement trust proceeds, unless the court finds the conservator is already under bond and surety of bond sufficient for the purpose. The bond of the conservator and surety for the bond of the conservator shall be in form and type acceptable to the fiduciary commissioner or supervisor of the county commission designated by the court to review the reports of the conservator and shall be conditioned to account for and pay over the amount of net settlement trust proceeds as provided for by the order of the court. The clerk of the circuit court shall provide to the office of such fiduciary commissioner or supervisor a certified copy of the court's order approving the settlement and distribution of proceeds and such fiduciary commissioner or supervisor shall file and record the order with any bond of the conservator that may be required by the court approving the settlement and distribution of proceeds.

(3) A report of net settlement trust proceeds and income earned thereon for each calendar year shall be filed by the conservator by February 1 next following the end of the calendar year in the order approving the settlement is entered and every year thereafter in accordance with the terms of the court order.

(4) If the amount of net settlement trust proceeds is less than $25,000, the court may include in the order approving the settlement a waiver of any or all of the requirements regarding reference to a fiduciary officer, the filing of the order or of any other reports or statements of accounts with a fiduciary commissioner or supervisor of the county commission designated by the court, the posting of bond and corporate or other surety of bond of the

WV Legislature

conservator and any listing and publication of accounts.

WV Legislature

§44-10-15.

Repealed.

Acts, 2002 Reg. Sess., Ch. 80.

WV Legislature

§44-10-16. Settlement of derivative claims.

(a) Nothing contained in this article may limit the derivative rights of a parent or guardian to compromise and settle any claim they may personally have for damages arising out of injury to their minor child or ward for whom they are responsible. This authority to compromise and settle derivative claims includes, without limitation, the authority to compromise and settle claims for the costs of medical or other care for the child or ward attributable to the bodily injury.

(b) The separate settlement of a derivative claim by a parent or guardian does not limit any person, including the parent or guardian, from seeking damages for the minor child or ward.

(c) Any release or waiver of a right to bring a legal action to assert a derivative claim, made and executed prior to the commencement of a civil action, shall be in writing and shall be binding against the person who accepts valuable consideration in exchange for the release or waiver of right to bring the legal action: Provided, That in the event a parent or guardian fully repays the consideration received in exchange for a release or waiver of a right to bring a derivative claim or action to the appropriate entity within ninety days after the commencement of a civil action brought on behalf of the child or ward who was injured, the parent or guardian may fully assert the derivative claim in conjunction with the child or ward's claim: Provided, however, That if more than a year has elapsed since the payment of the consideration, full repayment shall include, in addition to the principal sum paid, legal interest on the principal sum calculated in accordance with section thirty-one, article six, chapter fifty-six of this code.

(d) Nothing contained in this section may be construed to reduce the limitation period for filing any civil action for damages arising out of the bodily injury of a minor child.

WV Legislature