WEST VIRGINIA CODE CHAPTER 44A ARTICLE 1

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§44A-1-1. Short title and legislative findings.

This chapter is known and may be cited as the "West Virginia Guardianship and Conservatorship Act".

The Legislature finds that section six, article eight of the Constitution of the State of West Virginia gives it the discretionary authority to pass legislation which "...provides that all matters of probate, the appointment and qualification of personal representatives, guardians, committees and curators, and the settlements of their accounts..." be under the exclusive jurisdiction of circuit courts. The Legislature further finds and declares that the use of the word "all" does not require an interpretation that the Legislature must place every aspect of such matters with circuit courts, but, that because of the discretionary authority given, the Legislature may transfer, from time to time, only those matters which it believes would be better served under the jurisdiction of circuit courts.

The Legislature further finds and declares that legal proceedings requiring a tribunal to determine whether persons should be appointed to manage the personal or financial affairs of individuals deemed mentally incompetent, intellectually disabled, mentally handicapped or missing involve considerations of constitutionally protected rights which can best be resolved within the circuit courts of this state.

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§44A-1-2. Determinations and appointments under prior law.

(a) Any person determined to be "mentally incompetent", "intellectually disabled" or "mentally handicapped" and for such reason deemed to be in need of a guardian or committee pursuant to any order entered and in effect before the effective date of this chapter is deemed to be a "protected person" within the meaning of this chapter, after its effective date, unless any such determination be revoked or otherwise modified.

(b) Any person heretofore appointed to serve as a committee for an incompetent person and any person appointed to serve as a guardian for an individual with an intellectual disability or for a mentally handicapped person, is, as of the effective date of this chapter, deemed to be: (1) A guardian, within the meaning of this chapter, if the order appointing such person provides that the person so appointed has responsibility only for the personal affairs of a mentally incompetent, intellectually disabled or mentally handicapped person; (2) a conservator, within the meaning of this chapter, if the order appointing such person provides that the person so appointed had responsibility only for managing the estate and financial affairs of a mentally incompetent intellectually disabled or mentally handicapped person; or (3) a guardian and a conservator, within the meaning of this chapter, if the order appointing such person does not set forth limitations of responsibility for both the personal affairs and the financial affairs of a mentally incompetent intellectually disabled, or mentally handicapped person.

(c) After the effective date of this chapter, the circuit courts have exclusive jurisdiction of all matters involving determinations of mental incompetency, intellectual disability or mental handicap, including the jurisdiction of any proceedings pending as of that effective date. All orders entered before the effective date of this chapter in those cases shall remain in full force and effect until terminated, revoked or modified as provided herein.

(d) All persons heretofore appointed to serve as a committee or as a guardian retain their authority, powers and duties in that capacity, except to the extent that their authority, powers and duties as guardian or conservator under the provisions of this chapter are more specifically enumerated, in which event the committee or guardian has the authority, powers and duties so enumerated.

Wherever in the Constitution, the Code of West Virginia, Acts of the Legislature or elsewhere in law a reference is made to a committee for an incompetent person, such reference shall be read, construed and understood to mean guardian and/or conservator as defined in this chapter.

(e) The provisions of this chapter providing for the presentation of reports by guardians and the presentation of accountings by conservators may not be retroactively applied, and applicable law in effect before the effective date of this chapter controls as to any reports or accountings to be made or filed for any period before the effective date of this chapter.

(f) As used in this section, "prior law" refers to article eleven, chapter twenty-seven of this

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code, relating to the appointment of committees for mentally incompetent persons, and to article ten-a, chapter forty-four, relating to the appointment of guardians for individuals with an intellectual disability and mentally handicapped persons, as those articles were in effect before the effective date of this chapter.

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§44A-1-3. Advance directives.

The existence of a living will, medical power of attorney, durable power of attorney or other advance directive, duly executed by a person alleged to be a “protected person”, as defined in section four of this article, or the prior appointment of a surrogate decisionmaker for the protected person may eliminate, limit or supersede the need for the assistance or protection of a guardian or conservator, and any person so appointed is to be the first preferred nominee for guardian or conservator, as set forth in section eight, article two of this chapter.

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§44A-1-4. Definitions.

As used in this chapter, unless a different meaning is clearly required by the context:

(1) “Conservator” means a person appointed by the court who is responsible for managing the estate and financial affairs of a protected person, and, where the context plainly indicates, the term “conservator” means or includes a “limited conservator” or a “temporary conservator”.

(2) “De facto guardian” means a person who is not the medical power of attorney representative or appointed surrogate and has assumed substantial responsibility for any of the personal affairs of another person later found to be a protected person.

(3) “De facto conservator” means a person who is not the power of attorney representative or appointed surrogate and has assumed substantial responsibility for managing any portion of the estate and financial affairs of another person later found to be a protected person.

(4) “Estate” means real and personal property or any interest in the property and means anything that may be the subject of ownership.

(5) “Guardian” means a person appointed by the court who is responsible for the personal affairs of a protected person, and, where the context plainly indicates, the term “guardian” means or includes a “limited guardian” or a “temporary guardian”.

(6) “Interested person” means:

(A) An individual who is the subject of a guardianship or conservatorship proceeding;

(B) A guardian or conservator of a protected person; and

(C) Any other person with an actual and substantial interest in the proceeding, either generally or as to a particular matter, as distinguished from a person who has only a nominal, formal, or technical interest in or connection with the proceeding.

(7) “Limited conservator” means a person appointed by the court who has only those responsibilities for managing the estate and financial affairs of a protected person, as specified in the order of appointment.

(8) “Limited guardian” means one appointed by the court who has only those responsibilities for the personal affairs of a protected person, as specified in the order of appointment.

(9) “Living will” means a living will existing and duly executed in accordance with the provisions of article thirty, chapter sixteen of this code.

(10) “Medical power of attorney” means a power of attorney existing and duly executed in accordance with the provisions of article thirty, chapter sixteen of this code or existing and

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executed in accordance with the laws of another state.

(11) “Missing person” means an adult individual, eighteen years of age or older, who is absent from his or her usual place of residence in the state and whose whereabouts are unknown for a period of six months or more.

(12) “Person” means, generally, a natural person, any corporation, association, partnership or other business entity, any political subdivision or other public agency, public official or any estate, trust or other collection of properties to which the law attributes the capacity of having rights or duties.

(13) “Protected person” means an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, is not sufficient evidence that the individual is a protected person within the meaning of this subsection. “Protected person” also means a person whom a court has determined is a missing person.

(14) “Surrogate decisionmaker” means an individual identified as such by an attending physician in accordance with the provisions of article thirty, chapter sixteen of this code.

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§44A-1-5. Rules of civil procedure.

The West Virginia "Rules of Civil Procedure for Trial Courts of Record" shall apply to all proceedings instituted under the provisions of this chapter except as is otherwise specifically provided.

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§44A-1-6. Relationship to other laws.

Nothing in this chapter may be construed to supersede the provisions of the Uniform Veterans' Guardianship Act, article fifteen, chapter forty-four of this code, nor any provisions of this code regarding testamentary guardianships or appointments of guardians for minors.

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§44A-1-7. Transfer of venue following appointment.

(a) Following the appointment of a full or limited guardian or conservator or committee, the court with jurisdiction over the proceeding may order the transfer of jurisdiction to another circuit court in this state or to an appropriate tribunal in another state if it appears to the court that the interests of the protected person will be best served by such transfer. Transfer of jurisdiction to another state shall be in accordance with the provisions of chapter forty-four-c of this code.

(b) Upon the transfer, the previously appointed guardian or conservator shall report to the county of transfer that is assuming jurisdiction. Any changes to the appointments shall be made by the court assuming jurisdiction.

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§44A-1-8. Persons and entities qualified to serve as guardian and conservator; default guardian and conservator; exemptions from conservator appointment.

(a) Any adult individual may be appointed to serve as a guardian, a conservator or both upon a showing by the individual of the necessary education, ability and background to perform the duties of guardian or conservator and upon a determination by the court that the individual is capable of providing an active and suitable program of guardianship or conservatorship for the protected person. The individual may not be employed by or affiliated with any public agency, entity or facility that is providing substantial services or financial assistance to the protected person except as set forth in section fifteen of this article.

(b) The court may, after first determining it to be in the best interest of the protected person, appoint coguardians, coconservators or both.

(c) Any person being considered by a court for appointment as a guardian or conservator shall provide information regarding any crime, other than traffic offenses, of which he or she was convicted and the court or mental hygiene commissioner may order a background check to be conducted by the State Police or county sheriff. The court shall consider this information in determining the person's fitness to be appointed a guardian or conservator.

(d) Any nonprofit corporation chartered in this state and licensed as set forth in subsection (e) of this section or a public agency that is not a provider of health care services to the protected person may be appointed to serve as a guardian, a conservator or both so long as the entity is capable of providing an active and suitable program of guardianship or conservatorship for the protected person and is not otherwise providing substantial services or financial assistance to the protected person.

(e) A nonprofit corporation chartered in this state may be appointed to serve as a guardian or conservator or as a limited or temporary guardian or conservator for a protected person if it is licensed to do so by the Secretary of Department of Human Services. The secretary shall propose legislative rules for promulgation in accordance with the provisions of chapter twenty-nine-a of this code, for the licensure of nonprofit corporations and shall provide for the review of the licenses. The rules shall, at a minimum, establish standards to assure that any corporation licensed for guardianship or conservatorship:

(1) Has sufficient fiscal and administrative resources to perform the fiduciary duties and make the reports and accountings required by this chapter;

(2) Will respect and maintain the dignity and privacy of the protected person;

(3) Will protect and advocate the legal human rights of the protected person;

(4) Will assure that the protected person is receiving appropriate educational, vocational, residential and medical services in the setting least restrictive of the individual’s personal

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liberty;

(5) Will encourage the protected person to participate to the maximum extent of his or her abilities in all decisions affecting him or her and to act in his or her own behalf on all matters in which he or she is able to do so;

(6) Does not provide educational, vocational, residential or medical services to the protected person; and

(7) Has written provisions in effect for the distribution of assets and for the appointment of temporary guardians and conservators for any protected persons it serves in the event the corporation ceases to be licensed by the Department of Human Services or otherwise becomes unable to serve as guardian.

(f) A duly licensed nonprofit corporation that has been appointed to serve as a guardian or as a conservator pursuant to the provisions of this article is entitled to compensation in accordance with the provisions of section thirteen of this article.

(g) Except as provided in sections thirteen and fifteen of this article, no guardian or conservator nor any officer, agent, director, servant or employee of any guardian or conservator may do business with or in any way profit, either directly or indirectly, from the estate or income of any protected person for whom services are being performed by the guardian or conservator.

(h) A person who has an interest as a creditor of a protected person is not eligible for appointment as either a guardian or conservator of the protected person except that a bank or trust company authorized to exercise trust powers or to engage in trust business in this state may be appointed as a conservator if the court determines it is capable of providing suitable conservatorship for the protected person.

(i) The Secretary of the Department of Human Services shall designate the adult protective services division of the county of appointment, or another agency under his or her jurisdiction, to be appointed as guardian when there is no other individual, nonprofit corporation or other public agency that is equally or better qualified and willing to serve. The department may not refuse to accept the guardianship appointment when ordered by the court but may not be appointed as conservator.

(j) The sheriff of the county in which a court has jurisdiction shall be appointed as conservator when there is no other individual, nonprofit corporation or other public agency that is equally or better qualified and willing to serve. The sheriff may not refuse to accept the conservatorship appointment when ordered by the court but may not be appointed as guardian.

(k) A conservator shall not be appointed when the alleged protected person's total assets are worth less than $2,000 or the alleged protected person's income is:

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(1) From the Social Security Administration and a representative payee has been appointed to act in the best interest of the individual;

(2) From Medicaid and the only income distributed to the individual is the personal account allotment; or

(3) Less than $50 per month or $600 per year. In these instances, the guardian, representative payee or health care facility, if there is no other person or entity, shall manage the personal care account or assets.

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§44A-1-9. Posting of bonds; actions on bond.

(a) The court has the discretion to determine whether the posting of a bond by a guardian, once appointed, is necessary. No bond is required of any sheriff or representative of the Department of Human Services appointed as conservator or guardian, respectively.

(b) The court shall order the posting of a bond by a conservator prior to appointment except where the conservator is excused from posting bond under the provisions of section eighteen, article four, chapter thirty-one-a of this code. In determining the amount or type of a conservator's bond, the court or mental hygiene commissioner shall consider:

(1) The value of the personal estate and annual gross income and other receipts within the conservator's control;

(2) The extent to which the estate has been deposited under an arrangement requiring an order of court for its removal;

(3) Whether an order has been entered waiving the requirement that accountings be filed and presented or permitting accountings to be presented less frequently than annually;

(4) The extent to which the income and receipts are payable directly to a facility responsible for or which has assumed responsibility for the care or custody of the protected person;

(5) The extent to which the income and receipts are derived from state or federal programs that require periodic accountings;

(6) Whether a guardian has been appointed, and if so, whether the guardian has presented reports as required; and

(7) Whether the conservator was appointed pursuant to a nomination which requested that bond be waived.

(c) Any required bond may be with a surety and in an amount and form as the court may order and the court may order additional bond or reduce the bond whenever the court finds that a modification is in the best interests of the protected person or of the estate. The court may allow a property bond in lieu of a cash bond. Proof of bonding must be submitted to the court within thirty days of entry of the order regarding bond.

(d) In case of a breach of any condition placed on the bond of any guardian or conservator, an action may be instituted by any interested person for the use and benefit of the protected person, for the estate of the protected person or for the beneficiaries of the estate.

(e) The following requirements and provisions apply to any bond which the court may require under this section:

(1) Sureties are jointly and severally liable with the guardian or conservator and with each

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other;

(2) By executing an approved bond of a guardian or conservator, the surety consents to the jurisdiction of the court in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party respondent. Notice of any proceeding must be delivered to the surety or mailed by registered or certified mail to the address of the surety listed with the court in which the bond is filed. If the party initiating a proceeding possesses information regarding the address of a surety which would appear to be more current than the address listed with the court, notice shall also be mailed by registered or certified mail to the last address of the surety known to the party initiating the proceeding;

(3) On petition of a successor guardian or conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the preceding guardian or conservator; and

(4) The bond of the guardian or conservator is not void after any recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(f) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the guardian or conservator is barred by adjudication or limitation.

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§44A-1-10. Mandatory education; written material; and forms.

(a) Any individual appointed to serve as a guardian or conservator must receive educational material or complete mandated educational training, unless the court enters an order stating that the individual does not require the mandated educational training because he or she has completed the mandated educational training within the last three years.

(b) Upon a determination that the individual who is the subject of proceedings under this chapter is a protected person, as defined in section four of this article, the required educational training must be completed within thirty days of the court's determination. Upon completion, the appointed guardian or conservator shall provide an affidavit to the court, certifying that the educational training has been completed, and the court shall forthwith issue the order of appointment in accordance with the provisions of section thirteen, article two of this chapter.

(c) The West Virginia Supreme Court of Appeals shall coordinate the education program for guardians and conservators, and shall update the program materials and requisite forms as necessary. The educational training may include the following:

(1) Written materials;

(2) Recorded information, whether audio, visual or both; or

(3) A combination of the above.

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§44A-1-11. Guardian or conservator who resides out of state to designate resident agent.

A guardian or conservator who is or who later becomes a nonresident of this state shall file with the clerk of the circuit court in the county in which the proceeding is pending or where he or she was appointed guardian/conservator a designation of an agent residing in this state to accept service of process. Such filing shall be made promptly following the change of residence. No bank authorized to execute trust powers or engage in trust business in this state shall be considered to be a nonresident of this state for purposes of this section regardless of the location of the main office of the bank.

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§44A-1-12. Appointment of guardian or conservator acting in another state.

(a) A guardian, conservator or like fiduciary appointed in another state may be appointed to serve as a guardian or conservator in this state upon presentation of a petition therefor, proof of appointment, and a certified copy of such portion of the court record in the other state as the court in this state may require.

(b) Upon proper notice of hearing to all persons entitled to such notice under section six, article two of this chapter, a hearing shall be held, at which the court may, in its discretion, determine that the appointment in another state has sufficiently fulfilled the requirements of this chapter. Upon such determination, appointment will be ordered forthwith, and the guardian/conservator shall immediately assume all responsibilities and duties required under the provisions of this chapter.

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§44A-1-13. Compensation.

(a) Any guardian or conservator, whether full, temporary, or limited, is entitled to reasonable compensation as allowed by the court from the estate, including reimbursement for costs advanced. The frequency and amount of all compensation must be approved by the court.

(b) No guardian or conservator may use funds out of the estate in defense of an allegation of wrongdoing made on behalf of the protected person against the guardian or conservator.

(c) Attorneys appointed to represent individuals under this article shall be paid a reasonable rate of compensation from the estate, as approved by the circuit court, or, in the event the court determines that the estate is devoid of funds for the payment of such fees, the attorney shall be paid at a rate prescribed by and from funds allocated by the Supreme Court of Appeals.

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§44A-1-14. Temporary protective orders.

The court or mental hygiene commissioner may, at the request of a petitioner or upon its own motion, issue temporary protective orders freezing bank or investment accounts, ordering the production of records and otherwise prohibiting or limiting the expenditure, sale or other legal transfer of any assets of the alleged protected person until a final order is entered revoking the protective orders.

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§44A-1-15. Eligibility of guardians or conservators employed pursuant to a Department of Human Services waiver program.

(a) A person employed pursuant to a written contract or other employment arrangement with a licensed provider of behavioral health services for the purpose of providing services to a protected person, may be appointed by a court as the guardian or conservator of the protected person if:

(1) Payment for services provided under the contract or employment agreement is made pursuant to a waiver program;

(2) The person is related to the protected person by blood, marriage or adoption;

(3) The contract or arrangement is disclosed in writing to the court; and

(4) The court finds that the appointment is in the best interests of the protected person.

(b) Without the prior approval of a court, a guardian or conservator may not enter into a written contract or other employment arrangement with a licensed provider of behavioral health services in which the guardian or conservator will receive compensation pursuant to a waiver program.

(c) For the purposes of this section:

(1) "Behavioral health services" means services provided for the care and treatment of persons with mental illness, intellectual disability, developmental disabilities or alcohol or drug abuse problems in an inpatient, residential or outpatient setting, including, but not limited to, habilitative or rehabilitative interventions or services and cooking, cleaning, laundry and personal hygiene services provided for such care; and

(2) "Waiver program" means a Department of Human Services administered waiver program, including, but not limited to, the "MR/DD" or "Intellectual and Developmental Disabilities" waiver program authorized by section 1915(c) of the Social Security Act.

(d) A person appointed to serve as a guardian or conservator prior to the effective date of this section, enacted during the 2011 Regular Session of the Legislature, who meets the requirements contained in subsection (a), shall retain his or her authority, powers and duties in that capacity under the provisions of this section: *Provided*, That the guardian or conservator informs the court, in writing, that he or she is employed pursuant to a written contract or other employment arrangement with a licensed provider of behavioral health services under the waiver program.

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