WEST VIRGINIA CODE CHAPTER 44A ARTICLE 2

WV Legislature

§44A-2-1. Filing of petition; jurisdiction; fees; special revenue account established.

(a) A petition for the appointment of a guardian or conservator shall be filed with the clerk of the circuit court in the county in which the alleged protected person resides or, if an alleged protected person has been admitted to a health care or correctional facility, in the county in which that facility is located. A petition for the appointment of a conservator for a missing person shall be filed with the clerk of the circuit court in the county in which the missing person last resided. The circuit clerk is not required to accept for filing a petition that is not administratively complete.

(b) The circuit court in which the proceeding is first commenced shall have exclusive jurisdiction unless that court determines that a transfer of venue would be in the best interests of the person alleged to need protection.

(c) The fee for filing a petition shall be $110 payable upon filing to the circuit clerk, $75 of which shall be retained by the circuit clerk and $35 of which shall be remitted by the circuit clerk to the special revenue account in the state Treasury created in subsection (e) of this section.

(d) The person bringing the petition shall be responsible for fees for filing the petition and other papers, for service of process, and for copies of court documents and transcripts. In the event that a guardian, conservator, or both, is appointed by the court, such fees shall be reimbursed to the individual who filed the petition from the protected person’s estate, if funds are available. Any person who is pecuniarily unable to pay the fees and costs as set forth in article one, chapter fifty-nine of this code and article two, chapter fifty-one of this code will not be required to pay the fees and costs.

(e) There is hereby created in the state Treasury a special revenue account, which shall be an interest-bearing account, to be known as the Enforcement of Guardianship and Conservatorship Act Fund.

(f) The reports of guardians and inventory and accountings of conservators required by this chapter shall be examined multiannually by the, fiduciary commissioner or other person appointed by the court in accordance with section eleven, article three of this chapter.

(g) The special revenue account known as the Enforcement of Guardianship and Conservatorship Act Fund, previously administered by the State Auditor, shall, on and after the amendment and reenactment of this section, be administered by the West Virginia Supreme Court of Appeals. All moneys previously collected for deposit into the fund pursuant to this chapter and not expended in accordance with this chapter shall be transferred to the West Virginia Supreme Court of Appeals. All collections shall be deposited and used for payment of fiduciary commissioner or other person appointed by the court for review of the reports required by section eleven, article three of this chapter and the education program required by section ten, article one of this chapter.

WV Legislature

§44A-2-1a. Filing of a petition where protected person is a minor.

A petition for the appointment of a guardian, conservator or both of a minor may be filed if the minor is at least seventeen years and ten months of age and the petition alleges that the minor would qualify as a "protected person", as that term is defined in section four, article one of this chapter, if he or she were an adult. The hearing provided for in section nine of this article shall occur no sooner than fourteen days prior to the alleged protected person's eighteenth birthday if the trier of fact is the mental hygiene commissioner and no more than seven days prior to said date if the circuit judge conducts the hearing.

WV Legislature

§44A-2-2. Who may file petition; contents.

(a) A petition for the appointment of a guardian, a conservator, or both, may be filed by the individual alleged to be a protected person, by a person who is responsible for the individual's care or custody, by the facility providing care to the individual, by the person that the individual has nominated as guardian or conservator, by a person acting as a de facto guardian or de facto conservator or by any other interested person, including, but not limited to, the Department of Human Services.

(b) A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship to the alleged protected person, and shall, to the extent known as of the date of filing, include the following:

(1) The alleged protected person's name, date of birth, place of residence or location and post office address;

(2) The names and post office addresses of the alleged protected person's nearest relatives, in the following order:

(i) The spouse and children, if any; or if none

(ii) The parents and brothers and sisters, if any; or if none

(iii) The nearest known relatives who would be entitled to succeed to the person's estate by intestate succession as set forth in article one, chapter forty-two of this code.

Once a relative or several relatives have been identified in one of the aforementioned categories, relatives in a lower category do not have to be listed in the petition;

(3) The name, place of residence or location and post office address of the individual or facility that is responsible for the person's care or custody, any person acting as a de facto guardian or de facto conservator or any medical power of attorney representative or appointed surrogate, and a detailed list of the acts performed by such person on behalf of the protected person;

(4) The name, place of residence or location and post office address of any person designated as a surrogate decisionmaker for the alleged protected person, or of any representative or representatives designated under a durable power of attorney, medical power of attorney or living will, of which the alleged protected person is the principal, and the petitioner shall attach a copy of any of those documents, if available;

(5) The name, post office address and phone number of the attorney representing the petitioner in the petition and appointment proceedings;

(6) Whether the person's incapacity will prevent attendance at the hearing and the reasons

WV Legislature

therefor;

(7) The type of guardianship or conservatorship requested and the reasons for the request;

(8) The proposed guardian or conservator's name, post office address and, if the proposed guardian or conservator is an individual, the individual's age, occupation, criminal history and relationship to the alleged protected person;

(9) The name and post office address of a guardian nominated by the alleged protected person if different from the proposed guardian or conservator, and, if the person nominated as a guardian or conservator is an individual, the individual's age, occupation, criminal history and relationship to the alleged protected person;

(10) The name and post office address of any guardian or conservator currently acting, whether in this state or elsewhere;

(11) If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment;

(12) If the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment; and

(13) If the appointment of a conservator is requested for a missing person, the specific circumstances under which the person is considered missing.

WV Legislature

§44A-2-3. Evaluation report.

The petition shall include a report by a licensed physician or psychologist evaluating the condition of the alleged protected person which shall contain, to the best information and belief of its signatory or signatories:

(1) A description of the nature, type and extent of the person's incapacity, including the person's specific cognitive and functional limitations;

(2) Evaluations of the person's mental and physical condition and, where appropriate, educational condition, adaptive behavior and social skills;

(3) If the appointment of a guardian is requested, a description of the services, if any, currently being provided for the person's health, care, safety, habilitation, or therapeutic needs, and a recommendation as to the most suitable living arrangement and, where appropriate, treatment or habilitation plan and the reasons therefor;

(4) An opinion as to whether the appointment of a guardian or conservator is necessary, the type and scope of the guardianship or conservatorship needed, and the reasons therefor;

(5) If the petition states that the incapacity of the alleged protected person will prevent attendance at the hearing, an opinion as to whether such attendance would be detrimental to the person's health, care, or safety;

(6) If the alleged protected person will attend the hearing, a statement as to whether the individual is on any medications that may affect the person's actions, demeanor and participation at the hearing;

(7) The signature of the evaluating physician or psychologist, and the signatures of any other individuals who performed, supervised or reviewed the assessments or examinations upon which the report is based or who made substantial contributions toward the report's preparation; and

(8) The date or dates of the assessments and examinations upon which the report is based.

The court, for good cause shown, may grant leave to file the petition without an evaluation report. If such leave is granted, the court shall order the appropriate assessments or examinations and shall order that a report be prepared and filed with the court.

WV Legislature

§44A-2-4. Statement of financial resources.

Prior to a hearing for a conservatorship, the petitioner shall file a statement of the financial resources of the alleged protected person which shall to the extent known list the person's social security number, list with reasonable detail the approximate value of the person's real and personal property, and the person's anticipated annual gross income and other receipts.

WV Legislature

§44A-2-5. Confidentiality.

Upon filing of a petition requesting appointment of a guardian or conservator, all pleadings, exhibits and other documents contained in the court file shall be considered confidential and not open for public inspection, either during the pendency of the case or after the case is closed. The protected person, and his or her attorney, may inspect or copy the file. Another party may file a petition stating the reasons for inspecting or copying the file and, upon good cause shown, the court or mental hygiene commissioner may authorize the party, or his or her attorney, to inspect and copy the file.

WV Legislature

§44A-2-6. Notice of hearing.

(a) Upon the filing of the petition and evaluation report, the court shall promptly issue a notice fixing the date, hour and location for a hearing to take place within sixty days.

(b) The alleged protected person shall be personally served with the notice, a copy of the petition and the evaluation report not less than fourteen days before the hearing. The person may not waive notice and a failure to properly notify the person shall be jurisdictional.

(c) A copy of the notice, together with a copy of the petition, shall be mailed by certified mail, return receipt requested, by the petitioner, at least fourteen days before the hearing to all individuals seven years of age or older and to all entities whose names and post office addresses appear in the petition. In the case of a missing person, a copy of the petition for the appointment of a conservator shall be mailed by certified mail, return receipt requested, by the petitioner, at least fourteen days before the hearing to the last known address of the missing person. A copy of certified mail return receipts shall be filed in the office of the circuit clerk on or before the date of hearing. It is the responsibility of the petitioner to obtain proper service and file the appropriate documentation with the circuit clerk before the hearing.

(d) The notice shall include a brief statement in large print of the purpose of the proceedings and shall inform the alleged protected person of the right to appear at the hearing, the right to an attorney and the right to object to the proposed appointment. Additionally, the notice shall include the following statement in large print:

POSSIBLE CONSEQUENCES OF A COURT FINDING

THAT YOU ARE INCAPACITATED

At the hearing you may lose many of your rights. A guardian may be appointed to make personal decisions for you. A conservator may be appointed to make decisions concerning your property and finances. The appointment may affect control of how you spend your money, how your property is managed and controlled, who makes your medical decisions, where you live, whether you are allowed to vote and other important rights.

(e) No person may be appointed a guardian or conservator without first receiving proper notice and having the opportunity to be present at a hearing.

WV Legislature

§44A-2-7. Appointment of counsel.

(a) The court shall appoint legal counsel for the alleged protected person to make recommendations to the court that are in the best interests of the alleged protected person. In appointing legal counsel, the court shall consider any known preferences of the alleged protected person, or an alleged protected person may hire and pay for an attorney of his or her choice.

(b) Legal counsel shall have the following major areas of concern: (1) Whether or not a guardian or conservator is needed; (2) limitation of the role of the guardian or conservator to the protected person's specific needs -- e.g., personal supervisor, business affairs, medical consent only; (3) if needed, assure that the person or entity that will act in the best interest of the protected person is appointed; (4) if needed, assure the adequacy of the bond; and (5) if needed, assure consideration of proper placement.

(c) In responsibly pursuing the major areas of concern set forth in subsection (b) of this section, counsel may perform any or all of the following: (1) Promptly notify the individual and any caretaker of the appointment of counsel; (2) contact any caretaker, review the file and all other relevant information; (3) maintain contact with the client throughout the case and assure that the client is receiving services as are appropriate to the client's needs; (4) contact persons who have or may have knowledge of the client; (5) interview all possible witnesses; (6) pursue discovery of evidence, formal and informal, including obtaining medical and financial records; (7) file appropriate motions, including temporary protective orders; (8) obtain independent psychological examinations, medical examinations, home studies, as needed; (9) advise the client on the ramifications of the proceeding and inquire into the specific interests and desires of the individual; (10) subpoena witnesses to the hearing; (11) prepare testimony for cross-examination of witnesses to assure relevant material is introduced; (12) review all medical reports; (13) apprise the decision maker of the individual's desires; (14) produce evidence on all relevant issues; (15) interpose objections to inadmissible testimony; (16) raise appropriate questions to all nominations for guardian and conservator and the adequacy of the bond; (17) take all steps to limit the scope of guardianship and conservatorship to the individual's actual needs, and make all arguments to limit the amount of the intervention; (18) ensure that the court considers all issues as to the propriety of the individual's current or intended housing or placement and that the limitations are set forth in the order; (19) inform the client of the right to appeal, and file an appeal to an order when appropriate; (20) file a motion for modification of an order or a petition for a writ of habeas corpus if a change of circumstances occurs which warrants a modification or termination upon counsel being reappointed by the court; and (21) otherwise zealously represent the interests and desires of the client while also reporting to the court what actions are in the best interests of the client.

(d) The protected person shall have the right to an independent expert of his or her choice to perform an evaluation and present evidence.

(e) A person appointed by the court as counsel for a nonindigent alleged protected person

WV Legislature

shall inform the court or the mental hygiene commissioner of his or her hourly rate at the onset of the case and seek approval of his or her fee for the case by submitting it to the court or the mental hygiene commissioner for approval using forms provided by the West Virginia Supreme Court of Appeals. The hourly rate and fee for the case must be reasonable in light of the going rate for legal services, the complexity of the matter and the amount of legal work involved. The court may set the fee at the time of appointment.

WV Legislature

§44A-2-8. Nomination of guardian or conservator of alleged or adjudicated protected person; preferences.

(a) Any person who has sufficient capacity to form a preference may at any time nominate any individual or entity to serve as his or her guardian or conservator. The nomination may be made in writing, by an oral request to the court, or may be proved by any other competent evidence. The designation of a representative under a valid medical power of attorney, a living will or of a surrogate decision-maker shall constitute competent evidence of the nomination of a guardian, and the designation of an attorney under a valid durable power of attorney shall constitute competent evidence of the nomination of a conservator.

(b) A guardian or conservator whose appointment has not been terminated or who has not been otherwise removed pursuant to the provisions of section four or section five of this article may nominate a successor guardian or conservator for consideration by the court. The nomination may appear in a will or other writing and shall contain a brief statement of the reason or reasons for the nomination.

(c) The court shall appoint the one so nominated if the nominee is otherwise eligible to act and would serve in the best interests of the alleged or adjudicated protected person.

WV Legislature

§44A-2-9. Hearing on petition to appoint.

(a) The court may hear the petition for the appointment of a guardian or conservator or may designate the mental hygiene commissioner in the circuit to serve as the trier of fact at the hearing on the petition: Provided, That the court shall be the trier of fact at the hearing on a petition for the appointment of a conservator for a missing person. If a mental hygiene commissioner is appointed, a mental hygiene commitment proceeding may not be held simultaneously with a proceeding for the appointment of a guardian or conservator. The designated mental hygiene commissioner shall submit written findings of fact and recommendations to the court upon conclusion of the hearing. The court may accept or reject the recommendations of the mental hygiene commissioner. Only the court may enter an order appointing a guardian or conservator.

(b) The hearing may be held at such convenient place as the court or mental hygiene commissioner directs, including the place where the alleged protected person is located. The hearing shall be closed to the public. The proposed guardian or conservator shall attend the hearing except for good cause shown. Any individual or entity may apply for permission to observe or participate at the hearing, and the court or mental hygiene commissioner shall grant the request if reasonably satisfied that the applicant's participation would be in the best interests of the alleged protected person.

(c) The alleged protected person is entitled to attend the hearing, to oppose the petition, to be represented by an attorney, to present evidence, to compel the attendance of witnesses and to confront and cross-examine all witnesses. If the alleged protected person is present at the hearing, the court or mental hygiene commissioner shall verbally inform the person of such rights, of the contents of the petition, and of the purpose and legal effect of the appointment of a guardian or conservator. Except in the case of a missing person, the hearing shall not proceed if the alleged protected person is not present unless there is an affidavit of a physician presented to the court, qualified expert testimony to warrant a finding that the presence of the individual is not possible due to a physical inability or that such presence would significantly impair his or her health, or evidence that the person refuses to appear.

(d) The standard of proof to be applied in determining whether the alleged protected person is a person for whom a guardian or conservator should be appointed is clear and convincing evidence.

(e) The court shall make specific findings of fact and conclusions of law in support of any orders entered.

(f) Upon request, a transcript of the proceedings of appointment shall be provided for the purposes of an appeal.

(g) In the case of a hearing held on a petition for the appointment of a conservator for a missing person, the court must be satisfied by clear and convincing evidence that the person

WV Legislature

has been missing and their whereabouts are unknown for six months or more and the appointment of a conservator is necessary to protect the interests of and to manage the estate and the financial affairs of the missing person. If the court finds there is no necessity to appoint a full conservator, the court may appoint a limited conservator to manage the estate and financial affairs of the missing person. The court may, only as a last resort, appoint a sheriff to serve as a conservator for a missing person.

WV Legislature

§44A-2-10. Factors to be considered by court.

(a) The court alone shall determine whether a guardian or conservator should be appointed, the type of guardian or conservator and the specific areas of protection, management and assistance to be granted. Any determination that the individual is a protected person shall contain a specific finding that the person meets the definition set forth in section four, article one of this chapter. In making the determination, the court shall consider the suitability of the proposed guardian or conservator, the limitations of the alleged protected person, the development of the person's maximum self-reliance and independence, the availability of less restrictive alternatives including advance directives and the extent to which it is necessary to protect the person from neglect, exploitation, or abuse.

(b) Except as provided in section eight of this article, the selection of the guardian or conservator is in the discretion of the court. The court shall select the individual or entity best qualified to act in the best interest of the protected person, after consideration of the proposed guardian's or conservator's geographic location, familial or other relationship with such person, ability to carry out the powers and duties of the office, commitment to promoting such person's welfare, any potential conflicts of interest, the criminal history of the proposed guardian or conservator and the recommendations of the spouse, the parents, children or other interested relatives, whether made by will or otherwise. The court may only appoint one guardian and one conservator and it need not appoint the same individual or entity to serve as both guardian and conservator.

(c) A guardianship or conservatorship appointed under this article shall be the least restrictive possible, and the powers shall not extend beyond what is absolutely necessary for the protection of the individual.

WV Legislature

§44A-2-11. Limited guardianships.

(a) A limited guardian may be appointed for an individual who is deemed to be a protected person in need of a guardian within the meaning of section four, article one of this chapter, but is capable of addressing some of the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs.

(b) A limited guardian may be appointed for an individual who otherwise is deemed to be a protected person within the meaning of this chapter, and who resides in a supervised setting such that the individual's health, care, safety, habilitation and therapeutic needs are being attended to without interference, but whose impairment warrants the appointment of a substitute decision-maker for purposes of the ultimate decisions of the location of residence and major medical decisions, and the like.

(c) A limited guardian may be appointed for the sole purpose of providing for an individual who otherwise is deemed to be a protected person within the meaning of this chapter, and whose health, care, safety, habilitation and therapeutic needs are being attended to in a supervised residence, but whose only need is for a substituted decision-maker in the event of a major medical decision.

WV Legislature

§44A-2-12. Limited conservatorships.

A limited conservator may be appointed for an individual deemed to be a protected person in need of a conservator within the meaning of section four, article one of this chapter, but whose property or financial affairs are so limited that there is only one or more designated contexts for which a limitation of the individual's legal rights is warranted.

WV Legislature

§44A-2-13. Order of appointment; notice; notice of appointment.

(a) An order appointing a guardian or conservator may only be issued by the court upon the following:

(1) The guardian or conservator has subscribed to and filed an oath promising to faithfully perform the duties of the office in accordance with all provisions of this chapter;

(2) Posting of any bond, if required; and

(3) The completion of mandatory education, as required under the provisions of section ten, article one of this chapter, unless the court enters an order stating that an individual does not require educational training because he or she has completed the mandatory education within the last three years.

(b) In addition to the findings of fact and conclusions of law required in section nine of this article, the order shall include the specific areas of protection or assistance granted in the case of a guardian and the specific areas of management and assistance granted in the case of a conservator and address other areas of concern pursuant to the circumstances of the case.

(c) Within fourteen days following the entry of an order of appointment, the guardian or conservator shall mail a copy of the order of appointment, together with a brief statement in large print of rights to seek an appeal for modification or termination, to the protected person and to all individuals and entities given notice of the petition.

(d) Within ten days following the entry of an order of appointment, the circuit clerk shall mail a notice of appointment for recordation in the office of the clerk of the county commission to be recorded with the records of deeds and records of powers of attorneys, and listed in the appropriate indexes under the name of the protected person stating the case name and number, the name of the protected person, and the names of the guardian and conservator so that persons are put on notice of the existence of a guardianship or conservatorship.

WVLegislature

§44A-2-13a. Time of entry of orders.

The mental hygiene commissioner or the court shall prepare an order within fourteen days of the hearing directing the appointees to complete the mandatory education and post any required bond within thirty days of the hearing. After the mandatory education is completed and the bond posted, then the court shall enter a final order on the petition within fourteen days.

WV Legislature

§44A-2-14. Temporary guardians and conservators.

(a) The court may appoint a temporary guardian or temporary conservator, or both, under this section upon a finding that an immediate need exists, that adherence to the procedures otherwise set forth in this chapter for the appointment of a guardian or conservator may result in significant harm to a person or the estate, and that no other individual or entity appears to have authority to act on behalf of the person, or that the individual or entity with authority to act is unwilling, or has ineffectively or improperly exercised the authority.

(b) A temporary guardian or temporary conservator shall have only those powers and duties that are specifically set forth in the order of appointment. The appointment of a temporary guardian or temporary conservator shall expire within six months unless it is terminated or extended for up to six months by the court or mental hygiene commissioner for good cause shown following a hearing.

(c) An appointment of a temporary guardian or temporary conservator shall be made upon timely and adequate notice to the protected person after appointment or notice of appearance of counsel and after all other protections have been afforded, in accordance with due process of law, including any other conditions as the court may order. The protected person may petition the court for a substitution of a temporary guardian or temporary conservator at any time.

(d) Within five days following the entry of an order of appointment, a temporary guardian or temporary conservator shall mail a copy of the order of appointment, together with a brief statement in large print of rights to seek an appeal for modification or termination, to the person for whom the appointment was made and to all individuals and entities that would be entitled to notice of hearing on a petition for appointment as set forth in section six of this article.

WV Legislature

§44A-2-15. Notice of hearing on petitions subsequent to the appointment of a guardian or conservator.

(a) Except as otherwise provided herein or as ordered by the court for good cause shown, notice of hearing on a petition for an order subsequent to the appointment of a guardian or conservator shall be personally served upon the protected person and mailed to an appointed counsel or attorney of record, to those individuals who would be entitled to notice of the filing of an original petition to appoint, to any facility that is responsible for the care and custody of the protected person, to the guardian or conservator, if the guardian or conservator is not the petitioner, and to other individuals or entities as the court may order.

(b) Unless otherwise ordered by the court, the notice shall be personally served upon the protected person and mailed by the petitioner by certified mail return receipt requested to other parties entitled to notice at least fourteen days prior to the hearing and shall be accompanied by a copy of the petition and other relevant documents. A copy of the certified mail return receipts shall be filed in the office of the circuit clerk on or before the date of the hearing.

(c) The court or mental hygiene commissioner may conduct hearings on subsequent petitions filed pursuant to this chapter.

WV Legislature