# WEST VIRGINIA CODE CHAPTER 44A

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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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## §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.

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## §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.

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**§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

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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.

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**§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.

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## §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.

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## §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.

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## §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.

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**§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



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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.

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**§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

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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.

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## §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.

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## §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.

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## §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.

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## §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.

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**§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.

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## §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.

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## §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.

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## §44A-3-1. Duties of guardian of protected person.

(a) The guardian of a protected person owes a fiduciary duty to the protected person and is responsible for obtaining provision for and making decisions with respect to the protected person's support, care, health, habilitation, education, therapeutic treatment, social interactions with friends and family, and, if not inconsistent with an order of commitment or custody, to determine the protected person's residence.

(b) A guardian shall maintain sufficient contact of not less than once very six months with the protected person to know of the protected person's capabilities, limitations, needs, and opportunities.

(c) A guardian shall be required to seek prior court authorization to change the protected person's residence to another state, to terminate or consent to a termination of the protected person's parental rights, to initiate a change in the protected person's marital status, to deviate from a protected person's living will or medical power of attorney, or to revoke or amend a durable power of attorney executed by the protected person.

(d) A guardian shall exercise authority only to the extent necessitated by the protected person's limitations, and, where feasible, shall encourage the protected person to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage personal affairs.

(e) A guardian shall, to the extent known, consider the express desires and personal values of the protected person when making decisions, and shall otherwise act in the protected person's best interests and exercise reasonable care, diligence, and prudence.

(f) Upon the petition of an interested party or upon its own motion, the court or Mental Hygiene Commissioner may order the guardian to take appropriate action to address the needs and best interests of the protected person as required by this section.

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**§44A-3-2. Reports by guardian of protected person.**

(a) Any guardian appointed pursuant to the provisions of this chapter shall file periodic reports, in accordance with section eleven of this article including:

(1) A description of the current mental, physical, and social condition of the protected person;

(2) A description of the protected person’s living arrangements during the reported period;

(3) The medical, educational, vocational, and other professional services provided to the protected person and the guardian’s opinion as to the adequacy of the protected person’s care;

(4) A summary of the guardian’s visits with the protected person, the guardian's social interactions with the protected persons, the guardian's efforts and activities on behalf of the protected person, including the guardian's efforts facilitating on behalf of the protected person social interactions with friends and families, and the guardian's efforts facilitating the protected person engagement in social activities;

(5) A statement of whether the guardian agrees with the current treatment or habilitation plan;

(6) A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship;

(7) Any other information requested by the court or useful in the opinion of the guardian;

(8) The compensation requested and the reasonable and necessary expenses incurred by the guardian; and

(9) A verification signed by the guardian stating that all of the information contained in the report is true and correct to the best of his or her knowledge.

(b) The court may order the guardian to attend a hearing on the report by motion of the court or Mental Hygiene Commissioner, or upon the petition of any interested person. A report of the guardian may be incorporated into and made a part of the accounting of the conservator.

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**§44A-3-3. Distributive duties and powers of the conservator of a protected person.**

(a) A conservator of a protected person, without the necessity of seeking prior court authorization, shall apply the income and principal of the estate as needed for the protected person's support, care, health, and if applicable, habilitation, education or therapeutic needs. A conservator shall also apply the income and principal as needed for the support of any legal dependents who are unable to support themselves and who are in need of support.

(b) A conservator, when making distributions, shall exercise authority only to the extent necessitated by the protected person's limitations, and shall, where feasible, encourage the protected person to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage the estate and his or her financial affairs. A conservator shall also consider the size of the estate, the probable duration of the conservatorship, the protected person's accustomed manner of living, other resources known to the conservator to be available, and the recommendations of the guardian.

(c) A conservator shall, to the extent known, consider the express desires and personal values of the protected person when making decisions, and shall otherwise act in the protected person's best interests and exercise reasonable care, diligence and prudence.

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**§44A-3-4. Management powers and duties of conservator.**

(a) A conservator, in managing the estate, shall act as a fiduciary and serve in the best interests of the protected person and, in addition, has the following powers which may be exercised without prior court authorization, except as otherwise specifically provided:

(1) To invest and reinvest the funds of the estate in accordance with a standard of prudent investing;

(2) To collect, hold, and retain assets of the estate, including land in another state, and to receive additions to the estate;

(3) To continue or participate in the operation of any unincorporated business or other enterprise;

(4) To deposit estate funds in a state or federally insured financial institution, including one operated by the conservator;

(5) To manage, control and sell at public sale, for cash or for credit, the personal property of the estate: Provided, That the conservator has provided written notice by certified mail to those persons named on the petition as the protected person's nearest relatives at their last known address at least fourteen days prior to any sale of the personal property;

(6) To perform a contract entered into by a protected person, including, without limitation, a contract to convey or purchase real property as approved by any court having jurisdiction;

(7) To renew a lease entered into by a protected person as lessor or lessee with or without an option to purchase, including leases for real and personal property and leases and other arrangements for exploration and removal of minerals or other natural resources notwithstanding that the lease or other arrangement may extend beyond the term of the conservatorship;

(8) To borrow money and to place, renew or extend an encumbrance upon any property, real or personal, including the power to borrow from a financial institution operated by the conservator, subject to the provisions of section twelve of this article;

(9) To abandon property when, in the opinion of the conservator, it is valueless or is so encumbered or in a condition that it is of no benefit to the estate: Provided, That the conservator has provided written notice to those persons named on the petition as the protected person's nearest relatives at their last known address at least fourteen days prior to any abandonment of the property: Provided, however, That any items listed in the initial inventory as valueless may be abandoned no sooner than thirty days following the filing of the initial inventory without written notice;

(10) To make ordinary or extraordinary repairs or alterations in buildings or other property and to grant easements for public or private use, or both, with or without consideration;

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(11) To vote a security, in person or by general or limited proxy, and to consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other enterprise;

(12) To sell or exercise stock subscription or conversion rights and to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(13) To hold a security in the name of a nominee or in other form without disclosure of the conservatorship, so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with a security so held;

(14) To insure the assets of the estate against damage or loss, and the guardian and conservator against liability with respect to third persons;

(15) To allow, pay, reject, contest or settle any claim by or against the estate or protected person by compromise or otherwise, and to release, in whole or in part, any claim belonging to the estate to the extent it is uncollectible;

(16) To pay taxes, assessments and other expenses incurred in the collection, care and administration of the estate;

(17) To pay any sum distributable for the benefit of the protected person or for the benefit of a legal dependent by paying the sum directly to the distributee, to the provider of goods and services, to any individual or facility that is responsible for or has assumed responsibility for care and custody, to a distributee's custodian under a Uniform Gifts or Transfers Act of any applicable jurisdiction, or by paying the sum to the guardian of the protected person or, in the case of a dependent, to the dependent's guardian or conservator;

(18) To employ persons, including attorneys, accountants, investment advisors, or agents; to act upon their recommendations without independent investigation; to delegate to them any power, whether ministerial or discretionary; and to pay them reasonable compensation;

(19) To maintain life, health, casualty and liability insurance for the benefit of the protected person, or legal dependents;

(20) To manage the estate following the termination of the conservatorship and until its delivery to the protected person, or successors in interest; and

(21) To execute and deliver all instruments and to take all other actions that will accomplish or facilitate the exercise of the powers conferred in accordance with the provisions of this chapter.

(b) Any person acting as a conservator for more than one protected person shall maintain funds for each protected person in separate accounts.

(c) No conservator may make loans from the accounts of the protected person to himself,

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herself or his or her spouse.

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## §44A-3-5. Sale or mortgage of real estate.

(a) A conservator shall not sell real estate and shall not be authorized to mortgage any real estate without approval of the court.

(b) Following a petition by the conservator for the sale or mortgage of real property, the court or mental hygiene commissioner shall appoint a guardian ad litem and set a hearing on the petition. The conservator shall personally serve the protected person and serve by certified mail all persons entitled to notice pursuant to the original petition at least thirty days prior to the hearing.

WV Legislature

## §44A-3-6. Protective arrangements.

Upon petition therefor, the court may authorize a conservator to enter into a protective arrangement, to disburse the estate of the protected person and to petition for termination of the conservatorship. “Protective arrangements” include, but are not limited to, the payment, delivery, deposit, or retention of funds or property; the sale, mortgage, lease, or other transfer of property; the execution of an annuity contract, a contract for life care, a deposit contract, or a contract for training and education; and the addition to or establishment of a suitable trust.

WV Legislature

**§44A-3-7. Estate planning.**

(a) Upon petition, the court may authorize a conservator to exercise the following powers over the estate or financial affairs of a protected person which the protected person could have exercised if he or she were not subject to conservatorship:

(1) To make gifts to charity or other donees and to convey interests in any property;

(2) To provide support for individuals who are not legal dependents;

(3) To amend or revoke trusts or to create or make additions to revocable or irrevocable trusts even though such trusts may extend beyond the life of the protected person;

(4) To disclaim, renounce, or release any interest or power, or to exercise any power;

(5) To exercise options or change the beneficiary on or withdraw the cash value of any life insurance policy, annuity policy, or retirement plan;

(6) To elect against the estate of the protected person’s spouse;

(7) To withdraw funds from multiple party bank accounts, to change the beneficiary on or dispose of any payable or transfer on death arrangement, or to dispose of any property specifically devised or bequeathed under the protected person’s will.

(b) The court, in authorizing the conservator to exercise any of the above powers, shall primarily consider the decision which the protected person would have made, to the extent that the decision can be ascertained. The court shall also consider the financial needs of the protected person and the needs of legal dependents for support, possible reduction of income, estate, inheritance or other tax liabilities, eligibility for governmental assistance, the protected person’s prior pattern of giving or level of support, the existing estate plan, the protected person’s probable life expectancy, the probability that the conservatorship will terminate prior to the protected person’s death, and any other factors which the court believes pertinent.

(c) No order may be entered under this section unless notice of hearing is first given to the protected person, to the beneficiaries of the protected person’s estate plan and to the individuals who would succeed to the protected person's estate by intestate succession. No trust may be amended or revoked without prior notice of hearing to the trustee thereof.

(d) In making a determination under this section, the court shall be entitled to compel the production of documents, including the protected person's will.

(e) Nothing in this section shall be construed to create a duty on the part of a conservator to revise a protected person's estate plan.

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## §44A-3-8. Conservator's inventory.

(a) Within sixty days following entry of an order of appointment, a conservator shall file with the court an inventory of the real and personal estate of the protected person which has come into the conservator's possession or knowledge. The inventory shall include, with reasonable detail, a listing of each item of the estate, its approximate fair market value and the type and amount of encumbrance to which it is subject. The inventory shall list with reasonable detail any items that the conservator believes are valueless and intends to abandon. If any real or personal estate comes into the possession or knowledge of the conservator subsequent to the filing of the initial inventory, the conservator shall either amend the inventory or list the same in the next accounting required to be filed with the court, as described in this section.

(b) A conservator shall mail a copy of the inventory to the individuals and entities who received notice of hearing, as specified in section six, article two of this chapter, no later than fourteen days following its presentation of the inventory.

(c) Any person who knowingly violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25 nor than more $100.

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**§44A-3-9. Accountings by conservator.**

Any conservator appointed pursuant to the provisions of this chapter shall file periodic accountings as provided for under section eleven of this article.

(a) The accounting shall include:

(1) A listing of the receipts, disbursements and distributions from the estate under the conservator's control during the period covered by the accounting;

(2) A listing of the estate;

(3) The services being provided to the protected person;

(4) The significant actions taken by the conservator during the reporting period;

(5) A recommendation as to the continued need for conservatorship and any recommended change in the scope of the conservatorship.

(6) Any other information requested by the court or useful in the opinion of the conservator;

(7) The compensation requested and the reasonable and necessary expenses incurred by the conservator; and

(8) A verification signed by the conservator stating that all of the information contained in the accounting is true and correct to the best of his or her knowledge.

(b) The court may order the conservator to attend a hearing on the accounting by motion of the court or upon the petition of any interested person. An accounting by a conservator may be incorporated into and made a part of the report of the guardian.

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## §44A-3-10. Waiver of accountings.

(a) The court, upon petition therefor, may waive the requirement that accountings be filed or may permit accountings to be filed less frequently than annually if it determines that the expense involved or burden placed on the conservator in preparing and presenting annual accountings outweighs the benefit and protection afforded thereby to the protected person.

(b) In determining whether accountings may be waived or filed less frequently than annually, the court shall consider:

(1) The relationship of the conservator to the protected person;

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

(3) The amount of the bond;

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

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

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

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

(8) Any other factors which the court deems appropriate.

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**§44A-3-11. Filing of reports and accountings; misdemeanor for failure to file; reporting elder abuse.**

(a) Reports of guardians and accountings of conservators, as described in this article shall be filed with the circuit clerk of the county in which appointed and also with the fiduciary commissioner of the county or other person if the court has made a referral in its order:

(1) Within six months of being appointed;

(2) By December 31 of each year thereafter;

(3) When the court orders additional reports or accountings to be filed;

(4) When the guardian or conservator resigns or is removed; and

(5) When the appointment of the guardian or conservator is terminated, except that in the case of a guardian, the court may determine that there is no need for a report upon the termination; and in the case of a conservator, no accounting is required if all persons entitled to any proceeds of the estate consent thereto.

(b) The circuit clerk shall notify the court if the required reports are not filed or are administratively incomplete. The fiduciary commissioner, or other person appointed by the court or mental hygiene commissioner, shall review the reports and accountings multiannually, and may request additional information from the guardian or conservator. If the reports or accountings are not filed, or if there are any questions or discrepancies in the reports or accountings, the person reviewing the report shall notify the court or mental hygiene commissioner for further investigation or action of the court, including, but not limited to, a court order requesting copies of bank or investment records, appointing counsel to investigate the matter or setting a hearing on the matter.

(c) If the court has in its order made a referral to the fiduciary commissioner of the county:

(1) The accounting shall be governed by and the fiduciary commissioner shall handle the same under the provisions of sections ten, eleven, twelve, thirteen and fourteen, article four, chapter forty-four of this code, except that all compensation and expenses of the conservator shall be allowed and approved only by the circuit court in accordance with the provisions of section thirteen, article one of this chapter.

(2) The fiduciary commissioner may not publish any notice concerning the filing of a proposed accounting, but shall serve a copy of the proposed accounting of the conservator together with the notice by United States mail on the protected person, all individuals and entities given notice of the petition and any other person or entity found to be interested in the affairs of the protected person, all of whom have standing to file exceptions to or falsify the accounting before the fiduciary commissioner.

(3) In the settlement of the accounting of a conservator, the fiduciary commissioner is

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entitled to fees as are allowed for fiduciary commissioners in the handling of accountings of a decedent's estate, or as otherwise set by order of the circuit court.

(4) If the court or mental hygiene commissioner appoints a person other than the fiduciary commissioner to review the reports, such person shall report to the court as required by this article. The court shall establish a fee for reviewing a report which shall be paid by the Supreme Court of Appeals from the Enforcement of Guardianship and Conservatorship Act Fund.

(5) Any party feeling aggrieved of a settlement or decision by the fiduciary commissioner concerning the accounting may on motion filed within four months of the settlement or decision appeal the same to the circuit court.

(d) Any guardian or conservator who knowingly violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $100 nor more than $500.

(e) The parties, attorneys or mental hygiene commissioner shall report violations of this section, or any other alleged elder abuse violations, including criminal elder abuse pursuant to §61-2-29 of this code, to the Department of Human Services or county prosecutor for further investigation and action.

(f) The West Virginia Supreme Court of Appeals shall prescribe forms for reports, accountings and inventories required to be filed pursuant to the provisions of this article.

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## §44A-3-12. Self-dealing and conflicts of interest.

(a) Unless court approval is first obtained, or unless such relationship existed prior to the appointment and was disclosed in the petition for appointment, a conservator may not:

(1) Have any interest, financial or otherwise, directly or indirectly, in any business transaction or activity with the conservatorship;

(2) Acquire an ownership, possessors, security, or other pecuniary interest adverse to the protected person, or to the estate, or an interest in an asset in which the protected person also owns an interest;

(3) Directly or indirectly purchase, lease, or sell any property from or to the protected person or from or to the estate;

(4) Borrow or loan funds to the protected person or to the estate, except for reasonable advances without interest for the protection of the estate;

(5) Compromise or otherwise modify a debt owed by the conservator to the protected person or to the estate;

(6) Employ individuals or entities who were associated with or employed by the conservator prior to the appointment; or

(7) Directly or indirectly purchase, lease or sell property or services from or to any entity in which the conservator or a relative of the conservator is an officer, director, shareholder or proprietor, or owns a significant financial interest.

(b) Any activity prohibited by this section is voidable by the court upon the petition of any interested person or upon a motion of the court. This section does not limit any other remedies which may be available for a breach by the conservator or others of their fiduciary duty to the protected person or to the estate.

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## §44A-3-13. Personal liability of guardians.

(a) A guardian shall have a fiduciary duty to the protected person for whom he or she was appointed guardian and may be held personally liable for a breach of that duty, including being required to pay restitution for any embezzled or concealed funds.

(b) A guardian is not liable for the acts of the protected person, unless the guardian is personally negligent, nor is a guardian required to expend personal funds on behalf of the protected person.

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## §44A-3-14. Personal liability of conservators.

(a) A conservator shall have a fiduciary duty to the protected person for whom he or she was appointed conservator and may be held personally liable for a breach of that duty, including being required to pay restitution for any embezzled or concealed funds.

(b) Unless otherwise provided in the contract, a conservator is not personally liable on a contract entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal the representative capacity or to identify the estate in the contract.

(c) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally negligent.

(d) Claims based upon contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, or torts committed in the course of administration of the estate, may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(e) A successor conservator is not personally liable for the contracts or actions of a predecessor. However, a successor conservator is not immunized from liability for a breach of fiduciary duty committed by a predecessor if the successor learns of the breach and fails to take reasonable corrective action.

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**§44A-3-14a. No liability of present conservator or guardian for prior acts or failure to act of preceding conservators, guardians or committees.**

No liability may accrue to any present conservator or guardian appointed pursuant to the provisions of this chapter solely for the prior acts or failure to act of any committee or guardian appointed under prior law, as defined in subsection (f), section two, article one of this chapter, or solely for the prior acts or failure to act of any preceding conservator or guardian, as defined in section four, article one of this chapter. No liability may accrue to any guardian or committee appointed under prior law, as defined in subsection (f), section two, article one of this chapter, solely for the acts or failure to act of any preceding guardian and committee.

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## §44A-3-15. Protection for persons conducting business with guardians and conservators.

Any individual or entity who, in good faith, conducts business with a guardian or conservator as to any matter or transaction is entitled to presume that the guardian or conservator is properly authorized to act. The fact that an individual or entity conducts business with a guardian or conservator with knowledge of the representative capacity does not alone require an inquiry into the authority of the guardian or conservator, except that any such individual or entity shall be charged with knowledge of restrictions which may appear in an order appointing the guardian or conservator. No individual or entity shall be required to see to the proper application of any funds or property paid to or delivered to a conservator.

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## §44A-3-16. Court modification of powers and duties of guardian or conservator.

Nothing in this chapter shall prohibit the court from limiting the powers which may otherwise be exercised by a guardian or conservator without prior court authorization, from authorizing transactions which might otherwise be prohibited, or from granting additional powers to a guardian or conservator. Nothing in this chapter shall prohibit a guardian or conservator from seeking court authorization, instructions or ratification for any actions, proposed actions, or omissions to act.

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## §44A-3-17. Petition by certain persons for access to persons in guardianship; hearing and court order.

(a) As used in this section, unless the context otherwise requires, “relative” means a spouse, parent, grandparent, stepparent, child, grandchild, sibling or half sibling. The term includes said relationships that are created as a result of adoption.

(b) A relative may file a petition in circuit court seeking access to and information about a protected person which may include the opportunity to have visitation and contact with the protected person. The petition may be filed in the circuit court of the county in which the protected person resides or if the protected person has been admitted to a health care facility in a county other than that in which he or she resides in the circuit court of the county in which the heath care facility is located.

(c) The court shall schedule a hearing on the petition within sixty days of the petition being filed: Provided, That if the petition alleges that the protected person’s health is in recent significant decline or he or she is at imminent risk of death, an emergency hearing shall be scheduled as soon as practicable. The court may continue a hearing for good cause shown.

(d) Service of process upon the guardian shall be by personal service, consistent with the West Virginia Rules of Civil Procedure. Service of the petition shall be effected at least ten days prior to the scheduled hearing date: Provided, That where an emergency hearing is sought pursuant to subsection (c) of this section, service of process upon the guardian shall be as far in advance of the scheduled hearing date as possible.

(e) Upon notice and hearing the court may:

(1) Deny the petition;

(2) Order the guardian to allow the petitioner access to the protected person upon finding, by a preponderance of the evidence, that the guardian is preventing access by the petitioner to the protected person, and that contact with the petitioner is in the best interests of the protected person.

(f) The court may, in its discretion, order the disclosure to the petitioner of such confidential information, as delineated in section one of article three of chapter twenty-seven of this code, as it may deem appropriate.

(g) The court may, in its discretion, award the prevailing party in an action brought under this section court costs and reasonable attorney’s fees. Court costs and attorney’s fees awarded under this subsection may not be paid from the protected person’s estate, unless the court orders otherwise.

(h) If the court grants the petition it may, in its discretion, retain jurisdiction over the matter and modify its order consistent with the best interests of the protected person.

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(i) The provisions of this section apply to all guardianship of protected persons regardless of the date guardianship was established.

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## §44A-3-18. Guardian's duty to inform certain relatives about protected person's health and residence.

(a) The provisions of this section apply to relatives who have been granted access to a protected person under section seventeen of this article.

(b) Except as provided by subsection (d) of this section, the guardian of a protected person shall as soon as practicable inform such relatives if:

(1) The protected person dies;

(2) The protected person is admitted to a medical facility for a period of three days or more;

(3) The protected person's residence has changed; or

(4) The protected person is staying at a location other than his or her usual place of residence for a period that exceeds two calendar weeks.

(c) In the case of the death of the protected person, the guardian shall inform the relative of any funeral arrangements and the location of the protected person's final resting place.

(d) A relative entitled to receive information regarding a protected person under this section may waive the notice required thereof by this section by providing a written waiver to the guardian. A guardian shall file any such written waiver with the court.

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## §44A-4-1. Termination of appointment of guardian or conservator.

(a) The appointment of a guardian or conservator shall terminate upon the death, resignation or removal of the guardian or conservator.

(b) The appointment further terminates upon the death of the protected person. The guardian or conservator shall file the certified death certificate of the protected person with the circuit clerk with a final report or accounting.

(c) A guardianship or conservatorship shall terminate whenever jurisdiction is transferred to another state or if ordered by the court following a hearing on the petition of any interested person.

(d) In the case of a missing person, a conservatorship shall terminate when the missing person is located or when the person's death is established by the production of a certified death certificate, or the person is presumed dead pursuant to the provisions of article nine, chapter forty-four of this code.

(e) The court or the mental hygiene commissioner shall prepare a termination order dismissing the guardianship or conservatorship case and discharging any bond posted by the guardian or conservator.

(f) A termination of an appointment does not affect the liability of a guardian or conservator for prior acts or the responsibility of a conservator to account for the estate of the protected person.

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## §44A-4-2. Appointment of successor guardian or conservator.

The court may appoint a successor guardian or conservator prior to or at the time of a termination. A successor guardian appointed prior to a termination shall be immediately empowered to assume the duties of office but shall be required to file the requisite oath, post any required bond, and complete mandatory education, if required by the court, within thirty days of the termination of the predecessor. A successor guardian or conservator shall succeed to the powers and duties of the predecessor unless otherwise ordered by the court.

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## §44A-4-3. Resignation of guardian or conservator.

A guardian or conservator shall petition the court for permission to resign at least sixty days prior to the effective date of resignation. The court shall grant the permission to resign, except for good cause, and, pursuant to the provisions of section two of this article, shall appoint a suitable successor who is willing to serve.

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## §44A-4-4. Removal of guardian or conservator.

Upon the petition of any interested person or upon the motion of the court, the court may remove a guardian or conservator or order other appropriate relief if the guardian or conservator:

(1) Is acting under an order entered pursuant to material misrepresentation or mistake, whether fraudulent or innocent;

(2) Has an incapacity or illness, including substance abuse, which affects his or her fitness to perform or is adjudged to be a protected person in this or in any other jurisdiction;

(3) Is convicted of a crime which reflects upon his or her fitness to perform;

(4) Wastes or mismanages the estate, unreasonably withholds distributions or makes distributions in a negligent or reckless manner or otherwise abuses powers or fails to discharge duties;

(5) Neglects the care and custody of the protected person or legal dependents;

(6) Has an interest adverse to the faithful performance of duties such that there is a substantial risk that the guardian or conservator will fail to properly perform those duties;

(7) Fails to file reports or accountings when required, or fails to comply with any court order;

(8) Fails to file sufficient bond after being ordered by the court to do so;

(9) Avoids service of process or notice;

(10) Becomes incapable of performing duties; or

(11) Is not acting in the best interests of the protected person or of the estate, with or without fault. The court may appoint a temporary guardian pending a determination on a petition for removal of a guardian or conservator.

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## §44A-4-5. Duty of guardian or conservator subsequent to death of protected person.

In the absence of an advanced directive, such as a will, living will or power of attorney, or preneed burial or cremation contract, after the death of the protected person, a guardian or a conservator, if there is no guardian, shall continue to have authority to make decisions regarding the body of the deceased protected person for the purposes of authorizing an autopsy and making funeral arrangements. The guardian's or conservator's authority shall continue until an executor or executrix or an administrator or administratrix has been appointed.

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## §44A-4-6. Petition for termination, revocation or modification; standards.

(a) Upon a petition filed pursuant to this section, or upon a petition for a writ of habeas corpus, duly filed, the court may terminate the appointment of a guardian or conservator.

(b) Upon petition by the protected person, by the guardian or conservator, by any other interested person, or upon the motion of the court, the court may terminate a guardianship, conservatorship, or both, or modify the type of appointment or the areas of protection, management or assistance previously granted. Such termination, revocation or modification may be ordered if:

(1) The protected person is no longer in need of the assistance or protection of a guardian or conservator;

(2) The extent of protection, management or assistance previously granted is either excessive or insufficient considering the current need therefor;

(3) The protected person's understanding or capacity to manage the estate and financial affairs or to provide for his or her health, care or safety has so changed as to warrant such action;

(4) No suitable guardian or conservator can be secured who is willing to exercise the assigned duties; or

(5) It is otherwise in the best interest of the protected person.

(c) In making a determination under this section, the court shall appoint legal counsel for the protected person and may appoint such other persons whom it deems qualified to make such evaluations as it shall determine appropriate.

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## §44A-4-7. Hearing on petition to terminate, revoke or modify.

A hearing on a petition to terminate, revoke or modify shall be conducted with the same notice and in the same manner and the protected person shall have the same rights as the protected person would obtain at a hearing on a petition for the appointment of a guardian or conservator. The protected person and the guardian or conservator shall attend the hearing except for good cause shown.

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## §44A-5-1. Title.

This article may be cited as the “Standby Guardianship Act”.

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**§44A-5-2. Definitions.**

(a) “Attending physician” means the physician who has primary responsibility for the treatment and care of a qualified parent.

(b) “Designation” means a writing that is: (i) Voluntarily executed in conformance with the requirements of section five of this article, signed by a parent; and (ii) names a person to act as standby guardian.

(c) “Determination of debilitation” means a written determination made by an attending physician that a qualified parent is chronically and substantially unable to care for a minor child as a result of a debilitating illness, disease or injury. Such a determination shall include the physician's medical opinion to a reasonable degree of medical certainty regarding the nature, cause, extent and probable duration of the parent's debilitating condition.

(d) “Determination of incompetence” means a written determination made by the attending physician that to a reasonable degree of medical certainty a qualified parent is chronically and substantially unable to understand the nature and consequences of decisions concerning the care of a minor child as a result of a mental or organic impairment and consequently is unable to care for the child. Such a determination shall include the physician's medical opinion, to a reasonable degree of medical certainty, regarding the nature, cause, extent and probable duration of the parent's incompetence.

(e) “Functional parent” means a person other than a biological or adoptive parent, who is performing daily caretaking functions for the child.

(f) “Parent” means a biological or adoptive parent and includes a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

(g) “Petition” means a writing that is voluntarily executed and filed in the circuit court of the county in which the child resides in conformance with the requirements of section three of this article.

(h) “Qualified parent” means a parent who has been diagnosed, as evidenced in writing, by a licensed physician to be afflicted with a progressive or chronic condition caused by injury, disease or illness from which, to a reasonable degree of medical probability, the patient cannot recover and that is likely to lead to debilitation or incompetence.

(i) “Standby guardian” means a person who, in accordance with this article, is designated in writing or approved by the circuit court to temporarily assume the duties of guardian of the person or property, or both, of a minor child, on behalf of or in conjunction with a qualified parent, upon the occurrence of a triggering event. A standby guardianship shall be so construed as to enable the parent to plan for the future of a child, without terminating parental or legal rights by creating coguardianship rights between a parent and a standby

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guardian who has the authority to act in a manner consistent with the known wishes of a qualified parent regarding the care, custody and support of the minor child.

(j) “Triggering event” means the event upon the occurrence of which the standby guardian may be authorized to act. The triggering event shall be specified in a court order or written designation and shall be the earlier of a determination of incompetence or the death of a qualified parent. In the case of a standby guardian judicially approved pursuant to section three of this article, the triggering event may also be specified as the qualified parent's written consent to the commencement of the standby guardian's authority. In the case of a standby guardian designated pursuant to section five of this article, the triggering event may also be specified as: (i) A determination of debilitation of the qualified parent; and (ii) that parent's written consent to the commencement of the designated standby guardian's authority.

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**§44A-5-3. Petition for approval of standby guardian; fees.**

(a) Upon petition of a parent, functional parent or any person acting on parent's behalf, the circuit court of the county in which a child resides may approve a person as standby guardian for a child of a qualified parent upon the occurrence of a specific triggering event. If requested in the petition, the court may also approve an alternate standby guardian identified by the petitioner, to act in the event the standby guardian is unable or unwilling to assume the responsibilities of the standby guardianship.

(b) The petition shall include:

(1) The name and address of the petitioner and his or her relationship to the child, the name and address of the child's qualified parent, and the name and address of any other parent of the child whose identity and whereabouts are known to the petitioner or can reasonably be ascertained;

(2) The name, address and birth date of the child;

(3) The nature of the proposed triggering event and, if written consent is chosen as the proposed triggering event, any factors or circumstances that must be present before the qualified parent's written consent is effective;

(4) Whether a determination of incompetence or debilitation has been made and, if so, when and by whom;

(5) Whether there is a significant risk that the qualified parent will die imminently or become physically or mentally incapable of caring for the child or die as a result of a progressive chronic condition or illness; however, a petitioner shall not be required to submit medical documentation of a parent's medical status with the petition;

(6) The name and address of the person proposed as standby guardian and any alternate standby guardian, and if the parent is competent, that the qualified parent approves of the persons proposed;

(7) Whether the petitioner requests that the person proposed as standby guardian be given authority as a guardian of the person or guardian of the property of the minor, or both;

(8) A statement of any known reasons why the child's other parent is not assuming or should not assume the responsibilities of a standby guardian;

(9) Whether there is any prior judicial history or pending litigation regarding custody of the child; and

(10) The name and address of the attending physician.

(c) Upon filing of a petition, notice of the filing must be promptly given to each parent of the

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child whose identity and whereabouts are known to the petitioner, the child, if he or she is fourteen or more years of age, the proposed standby guardian and alternate, if any.

(1) The notice must be accompanied by a copy of the petition and shall be mailed by certified mail return receipt requested, by the petitioner.

(2) The notice should include a statement that no change in custody or other legal rights is effected by the appointment of a standby guardian and that it is not necessary for the recipient of the notice to appear. The notice should also state that any parent may request a hearing on the petition provided that such request is made within ten days from the date the notice was sent.

(d) A hearing must be held prior to any order approving the standby guardianship if there is another known parent who requests a hearing within ten days of the date that notice of filing was sent or if there is other litigation pending regarding the custody of the child.

(e) Prior to any hearing on the petition, the circuit court may appoint a discreet and competent attorney at law as guardian ad litem to represent the child pursuant to section ten, article four, chapter fifty-six of this code. If the petition for standby guardianship is filed by anyone other than a parent of the child, the circuit court shall appoint a guardian ad litem. The qualified parent shall not be required to appear at the hearing if he or she is medically unable to appear, except upon motion for good cause shown.

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## §44A-5-4. Circuit court's order approving standby guardianship; authority; when effective.

(a) When a petition is filed by a person other than a parent having custody of the child, the standby guardian may be appointed only with the consent of the qualified parent unless the circuit court finds that such consent cannot be given for medical reasons.

(b) Upon consideration of the factors set out in subsection (b), section three of this article and finding that: (i) The child's parent is a qualified parent; and (ii) appointment of a standby guardian is in the best interest of the child, the circuit court shall appoint the person requested in the petition as standby guardian, and, if requested, the requested alternate standby guardian. However, when a petition is filed by a person other than a parent having custody of the child, the standby guardian shall be appointed only with the consent of the qualified parent unless the court finds that such consent cannot be given for medical reasons.

(c) The order shall specify the triggering event and shall provide that the authority of the standby guardian is effective: (i) Upon receipt of either a determination of incompetence or a certificate of death; or (ii) if so requested in the petition, upon receipt by the standby guardian of the qualified parent's written consent and filing of this consent with the circuit court. The written consent shall be executed after the entry of the court order and signed by the qualified parent, or by another in his or her presence and on his or her behalf.

(d) As soon as practicable after entry of the order, a copy shall be served on the standby guardian.

(e) A standby guardian shall have the powers and duties of a guardian of the person and guardian of the property of a minor, unless otherwise specified in the order.

(f) The standby guardian shall file with the circuit court as soon as practicable but in no event later than thirty days following a parent's death, determination of incompetence or consent, a copy of the certificate of death, determination of incompetence or consent of the qualified parent upon which the standby authority is based and a determination of debilitation. Failure to file within the time specified shall be grounds for the circuit court to rescind the authority of the standby guardian upon petition of any person, but all acts undertaken by the standby guardian on behalf of and in the interests of the child be valid and enforceable until authority is rescinded.

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**§44A-5-5. Written designation of a standby guardian by a parent; commencement of authority; approval required.**

(a) A parent may execute a written designation of a standby guardian at anytime. The written designation shall be signed by the parent, witnessed by two adults. Another adult may sign the written designation on behalf of the parent if the parent is physically unable to do so, provided the designation is signed at the express request of the parent and in the presence of the parent. The designated standby guardian or alternate may not sign on behalf of the parent. The signed designation shall be delivered to the standby guardian and any alternate named as soon as practicable. The written designation shall state:

(1) The name, address and birth date of the child affected;

(2) The triggering event; and

(3) The name and address of the person designated as standby guardian or alternate.

(b) Following such delivery of the designation, the authority of a standby guardian to act for a qualified parent shall commence upon the occurrence of the specified triggering event and receipt by him or her of: (i) A determination of incompetence; (ii) a certificate of death of the parent; or (iii) a determination of debilitation and the qualified parent's written consent to such commencement signed by the parent or another on his behalf and at his direction as provided in subsection (a) of this section for the designation.

(c) A standby guardian under a designation shall have the authority of a guardian of the person and a guardian of the property of the child, unless otherwise specified in the designation.

(d) A designated standby guardian or alternate shall file a petition for approval with the circuit court as soon as practicable after the occurrence of the triggering event but in no event later than thirty days after the date of the commencement of his or her authority. The authority of the standby guardian shall cease upon his or her failure to so file, but shall recommence upon such filing. The petition shall be accompanied by a copy of the designation and a: (i) Determination of incompetence; (ii) determination of debilitation and consent; or (iii) a certificate of death.

(e) The notice provisions of subsection (c), section three of this article shall apply to a petition filed pursuant to this section. The circuit court shall enter in an order approving the designated guardian upon finding that:

(1) The person was duly designated as standby guardian pursuant to the section and the designation has not been revoked;

(2) A determination of incompetence was made; a determination of debilitation was made and the parent consented to commencement of the standby guardian's authority; or the parent has died;

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(3) The best interests of the child will be served by approval of the standby guardian; and

(4) If the petition is by an alternate, that the designated standby guardian is unwilling or unable to serve.

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**§44A-5-6. Further proceedings to determine permanent guardianship.**

(a) If the triggering event was death of the qualified parent, the standby guardian shall within ninety days of such death, petition for appointment of a guardian for the child as otherwise provided by law or may initiate proceedings to determine legal and physical custody of the child pursuant to article four, chapter forty-eight, or both.

(b) In all other cases a standby guardian shall promptly after occurrence of the triggering event initiate such proceedings to determine guardianship and custody, absent objection by the qualified parent.

(c) The petition shall be accompanied by:

(1) The circuit court’s order approving the standby guardian or the qualified parent's written designation of the standby guardian; and

(2) (i) The attending physician's written determination of incompetence or debilitation; or (ii) certificate of death.

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## §44A-5-7. Revocation, refusal and termination of standby guardianship.

(a) The authority of a standby guardian approved by the circuit court may be revoked by the qualified parent by his or her filing a notice of revocation with the circuit court. The notice of revocation shall identify the standby guardian or alternate standby guardian to which the revocation will apply. A copy of the revocation shall also be delivered to the standby guardian whose authority is revoked and any alternate standby guardian who may then be authorized to act. At any time following his or her approval by the circuit court, a standby guardian may decline to serve by filing a written statement of refusal with the court and having the statement personally served on the qualified parent and any alternate standby guardian who may then be authorized to act.

(b) When a written designation has been executed, but is not yet effective because the triggering event has not yet occurred, the parent may revoke or the prospective standby guardian may refuse the designation by notifying the other party in writing. A written designation may also be revoked by the subsequent execution of an inconsistent designation.

(c) When a standby guardian's authority is effective upon debilitation or incompetence of the qualified parent, the standby guardian's authority to act on behalf of the parent continues after the parent is restored to health unless the qualified parent notifies the guardian and, if appropriate, the county commission, in writing, that the standby guardian's authority is revoked. If at any time the circuit court finds that the parent no longer meets the definition of “qualified parent”, it shall rescind its approval of the standby guardian.

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## §44A-5-8. Review of standby guardianship.

A child's parent, stepparent, functional parent, adult sibling or any adult related to the child by blood or marriage may petition the circuit court that approved the standby guardian at any time following such approval for review of whether continuation of the standby guardianship is in the best interest of the child. Notice of the filing of a petition for review shall promptly be given to the standby guardian, the child if the child is fourteen or more years of age, and each parent of the child whose identity and whereabouts are known or could reasonably be ascertained.

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## §44A-5-9. Petition and other records pertaining to standby guardianship confidential.

Upon the filing of a petition requesting the approval of a standby guardian, all pleadings, exhibits and other documents contained in the court file are considered confidential and not open for public inspection, either during the pendency of the case or after the case is closed. The contents of the court file are open to inspection and copying by the parties, their designees and their attorneys.

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