
WEST VIRGINIA CODE CHAPTER 44a
ARTICLE 3

WV Legislature

§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.

§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.

§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.

§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;

- (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,

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.

§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.

§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.

§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.

§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.

§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.

§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

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.

§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.

§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.

§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.

§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.

§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.

§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 health 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.

(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.