

APPROVED AND SIGNED BY THE GOVERNOR

Date 4-29-81

Time _____

No: 421

WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1981



ENROLLED
Committee Substitute for
SENATE BILL NO. 421

(By Mr. Tonkovich)



PASSED April 11, 1981

In Effect ninety days from Passage



ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 421
(MR. TONKOVICH, *original sponsor*)

[Passed April 11, 1981; in effect ninety days from passage.]

AN ACT to amend and reenact section one, article ten-a, chapter forty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section one, article eleven, chapter twenty-seven of said code, relating to allowing county commissions to conduct competency proceedings for the purpose of appointing guardians for mentally retarded or mentally handicapped persons; requiring county commission to comply with the hearing procedures set forth in section one, article eleven, chapter twenty-seven of the code; relating to providing for service of notice of a competency hearing outside of the county of the hearing; providing for employment of a person to record all proceedings of a county commission concerning the appointment of a committee; permitting a certified statement of a physician to be introduced into evidence; and providing for a subpoena to be issued requiring a physician to testify.

Be it enacted by the Legislature of West Virginia:

That section one, article ten-a, chapter forty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section one, article eleven, chapter twenty-seven of said code be amended and reenacted, all to read as follows:

ARTICLE 10A. GUARDIANS OF MENTALLY RETARDED PERSONS AND MENTALLY HANDICAPPED PERSONS.

§44-10A-1. Guardianship of mentally retarded and mentally handicapped persons generally.

1 When it shall appear to the satisfaction of the county
2 commission that a person is a mentally retarded person
3 as defined in section three, article one, chapter twenty-
4 seven of this code, or is otherwise mentally handicapped,
5 that such condition is certified as being permanent in
6 nature by at least two physicians licensed to practice
7 medicine in this state or one such physician and one
8 licensed psychologist having qualifications to make such
9 certification, and that such person requires in his best
10 interests the appointment of a guardian, the county com-
11 mission is authorized, upon compliance with the proce-
12 dures described in section one, article eleven, chapter
13 twenty-seven of this code, to appoint a guardian and to
14 specify the powers and duties the guardian shall exercise
15 for the person of such person, the estate of such person,
16 and any moneys from any source as may be paid on be-
17 half of such person to the guardian or to another party.
18 For the purposes of this chapter, "mentally handicapped
19 person" shall mean any person with a condition medically
20 determined which results in a substantial mental impair-
21 ment of general intellectual functioning and which re-
22 sults in that person's inability to function normally in
23 society for his own best interests.

ARTICLE 11. COMMITTEE; DISPOSITION OF PROPERTY.

§27-11-1. Committees; appointment.

1 (a) The county commission of a person's residence may
2 appoint a committee for a person found to be incompetent.
3 Any finding of incompetency under this article shall be
4 made separately and at a different proceeding from any
5 finding of mental illness, mental retardation or addiction
6 under article four or five of this chapter.

7 (b) Proceedings for the appointment of a committee
8 for an alleged incompetent may be commenced by the
9 filing of a verified petition of a person setting forth the
10 facts showing the incompetency of an individual with the

11 county commission. Upon receipt of a petition, the clerk
12 of the county commission shall give notice of the hearing
13 thereon to the individual and to the individual's spouse,
14 or if the individual does not have a spouse, to the indi-
15 vidual's adult next of kin: *Provided*, That such person
16 shall not be the petitioner: *Provided, however*, That such
17 individual shall be served with notice of such hearing by
18 delivering unto such individual in person written notice
19 thereof together with a true copy of such verified petition,
20 which notice shall be served upon the individual alleged
21 to be incompetent at least ten days before the time of
22 such hearing.

23 Such individual alleged to be incompetent shall be ac-
24 corded the right to subpoena witnesses, to be confronted
25 with witnesses and the right to cross-examine witnesses
26 which may be offered against him, and the county com-
27 mission on or before the commencement of such hearing
28 shall appoint a competent attorney practicing before the
29 bar of the circuit court of the county wherein such hear-
30 ing is to be held as guardian ad litem for the purpose of
31 representing the interest of such individual throughout
32 such proceedings under this section. Notwithstanding any
33 requirement hereof to the contrary such hearing may
34 proceed without the presence of the individual alleged to
35 be incompetent if (1) proper notice has been served upon
36 the party alleged to be incompetent as required herein,
37 and (2) a duly licensed physician shall have certified in
38 writing and upon affidavit that he or she has examined
39 such individual and that such individual is physically
40 unable to appear at such hearing or that such an appear-
41 ance would likely impair or endanger the health of such
42 individual, or (3) such individual refuses to appear, and
43 (4) upon the specific written findings by such commission
44 of facts as will justify a hearing without the presence
45 of such individual as provided in this subsection.

46 (c) A record shall be made of all proceedings either by
47 the court reporter for the circuit court of that county or
48 some other person employed by the county commission
49 for the purpose. A transcript shall be made available to
50 the individual or his counsel within thirty days if the
51 same is requested for purposes of appeal. In any case

52 wherein an indigent person seeks an appeal, the circuit
53 court shall by order entered of record authorize and direct
54 the person making the record of the proceeding to fur-
55 nish a transcript of the hearing, and the cost of said trans-
56 cript shall be paid by the county commission from funds
57 appropriated for this purpose.

58 (d) Upon completion of the hearing and upon the evi-
59 dence presented therein the county commission may find
60 that (i) the individual is unable to manage his business
61 affairs, or (ii) the individual is unable to care for his phy-
62 sical well-being, or (iii) both, and is therefore incompe-
63 tent, or (iv) that the person is competent. Evidence of
64 mere poor judgment or of different life style shall not
65 be competent evidence upon which to base a finding of
66 incompetency.

67 (1) "Unable to manage one's business affairs" means
68 the inability to know and appreciate the nature and effect
69 of his business transactions, notwithstanding the fact that
70 he may display poor judgment.

71 (2) "Unable to care for one's physical well-being"
72 means the substantial risk of physical harm to himself as
73 evidenced by conduct demonstrating that he is dangerous
74 to himself, notwithstanding the fact that he may display
75 poor judgment.

76 If the county commission finds the person to be compe-
77 tent, the proceedings shall be dismissed. No appointment
78 of a committee shall be made on evidence which is un-
79 corroborated by the testimony of a medical expert or by
80 a certified statement upon affidavit as hereinafter pro-
81 vided. If the individual refuses to submit to an examina-
82 tion by a physician, the circuit court may upon petition,
83 issue a rule against the individual to show cause why the
84 individual should not submit to an examination. A copy of
85 the petition shall accompany service of the rule and such
86 rule shall be returnable at a time to be fixed by the court.
87 Any physician duly licensed to practice medicine in the
88 state who is currently treating the individual alleged to be
89 incompetent may file with the county commission his
90 certified statement upon affidavit stating that he is cur-
91 rently treating said individual and setting forth his

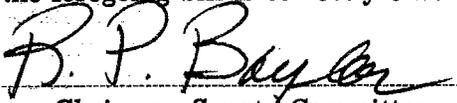
92 opinion of the individual's ability to (i) manage his busi-
93 ness affairs and (ii) care for his physical well-being, and
94 stating in detail the grounds for such opinion. Such state-
95 ment may be considered by the county commission as
96 evidence in the case: *Provided*, That the circuit court
97 upon the petition of the attorney or guardian ad litem for
98 the alleged incompetent shall issue a subpoena for the
99 treating physician as a witness at the proceeding.

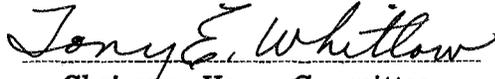
100 (e) The extent of the committee's authority shall be
101 specified in the order of the county commission. No au-
102 thority of a committee shall extend beyond what is neces-
103 sary for the protection of the individual. A finding of in-
104 ability to care for one's physical well-being shall entitle
105 the committee to custody of the individual, except when
106 the individual is under a commitment order to a mental
107 health facility, but only to the extent as is necessary for
108 the protection of the individual.

109 (f) An individual found incompetent pursuant to sub-
110 section (d) of this section shall have the right to an appeal
111 and hearing thereon in the circuit court of the county.
112 The judge shall hear the matter on appeal as provided in
113 article three, chapter fifty-eight of this code or order a
114 hearing de novo on the matter.

115 (g) The individual or any person may apply to the
116 county commission in the manner provided by subsection
117 (b) of this section for termination of his committee at
118 any time and appeal from a determination thereon in the
119 manner provided by this section or in the alternative, the
120 individual may seek such termination by habeas corpus.

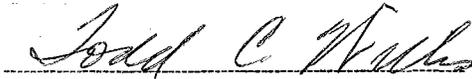
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

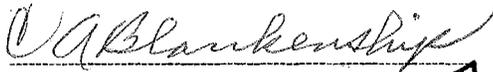

Chairman Senate Committee

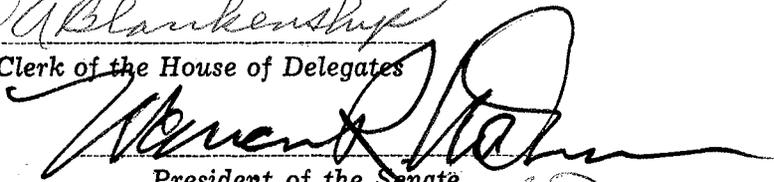

Chairman House Committee

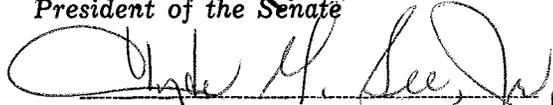
Originated in the Senate.

To take effect ninety days from passage.

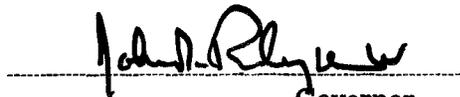

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker House of Delegates

The within is approved this the 29
day of April, 1981.


Governor



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