

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990



# ENROLLED

Com. Sub. for  
HOUSE BILL No. 4102

(By ~~the~~ Delegates Pettit & Munensky)



Passed March 10, 1990

In Effect from Passage

**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR  
**H. B. 4102**  
(By DELEGATES PETTIT AND MURENSKY)

[Passed March 10, 1990; in effect from passage.]

AN ACT to amend and reenact section one, article eleven, chapter twenty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to removing the requirement that a duly licensed physician treating a person subject to a competency hearing be licensed in West Virginia and providing that no person may be adjudged incompetent upon a mere written certification of incompetency if the person is denied the opportunity to cross-examine the physician making such certification.

*Be it enacted by the Legislature of West Virginia:*

That section one, article eleven, chapter twenty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 11. COMMITTEE; DISPOSITION OF PROPERTY.**

**§27-11-1. Appointment of committees; hearing; appointment of guardian ad litem; certification of incompetency; appeal; habeas corpus.**

- 1 (a) The county commission of a person's residence
- 2 may appoint a committee for a person found to be
- 3 incompetent. Any finding of incompetency under this

4 article shall be made separately and at a different  
5 proceeding from any finding of mental illness, mental  
6 retardation or addiction under article four or five of this  
7 chapter.

8 (b) Proceedings for the appointment of a committee  
9 for an alleged incompetent may be commenced by the  
10 filing of a verified petition of a person setting forth the  
11 facts showing the incompetency of an individual with  
12 the county commission. Upon receipt of a petition, the  
13 clerk of the county commission shall give notice of the  
14 hearing thereon to the individual and to the individual's  
15 spouse, or if the individual does not have a spouse, to  
16 the individual's adult next of kin: *Provided*, That the  
17 aforesaid clerk is not required to give notice of the  
18 hearing to the spouse or adult next of kin if he or she  
19 is the petitioner: *Provided, however*, That the individual  
20 shall be served with notice of the hearing by delivering  
21 to him or her, in person, written notice with a true copy  
22 of the verified petition. The notice shall be served upon  
23 the individual alleged to be incompetent at least ten  
24 days before the time of the hearing.

25 An individual alleged to be incompetent shall be  
26 accorded the right to subpoena witnesses, to be con-  
27 fronted with witnesses and the right to cross-examine  
28 witnesses which may be offered against him or her, and  
29 the county commission on or before the commencement  
30 of the hearing shall appoint a competent attorney  
31 practicing before the bar of the circuit court of the  
32 county wherein the hearing is to be held as guardian ad  
33 litem for the purpose of representing the interest of the  
34 individual throughout the proceedings under this  
35 section. Notwithstanding any requirement hereof to the  
36 contrary, the hearing may proceed without the presence  
37 of the individual alleged to be incompetent if (1) proper  
38 notice has been served upon the individual alleged to be  
39 incompetent as required herein, and (2) a duly licensed  
40 physician certifies in writing and upon affidavit that he  
41 or she has examined the individual and that the  
42 individual is physically unable to appear at the hearing  
43 or that an appearance would likely impair or endanger  
44 the health of the individual, or (3) the individual refuses

45 to appear, and (4) upon the specific written findings by  
46 the commission of facts as will justify a hearing without  
47 the presence of the individual as provided in this  
48 subsection.

49 (c) A record shall be made of all proceedings either  
50 by the court reporter for the circuit court of that county  
51 or some other person employed by the county commis-  
52 sion for the purpose. A transcript shall be made  
53 available to the individual or his or her counsel within  
54 thirty days if requested for purposes of appeal. In any  
55 case wherein an indigent person whose incompetency is  
56 alleged pursuant to the provisions of this section seeks  
57 an appeal, the circuit court shall by order entered of  
58 record authorize and direct the person making the  
59 record of the proceeding to furnish a transcript of the  
60 hearing, and the cost shall be paid by the county  
61 commission from funds appropriated for this purpose.

62 (d) Upon completion of the hearing and upon the  
63 evidence presented therein, the county commission may  
64 find that (1) the individual is unable to manage his or  
65 her business affairs, or (2) the individual is unable to  
66 care for his or her physical well-being, or (3) both, and  
67 is therefore incompetent, or (4) that the individual is  
68 competent. Evidence of mere poor judgment or of  
69 different life style shall not be competent evidence upon  
70 which to base a finding of incompetency.

71 “Unable to manage one’s business affairs” means the  
72 inability to know and appreciate the nature and effect  
73 of his or her business transactions, notwithstanding the  
74 fact that he or she may display poor judgment.

75 “Unable to care for one’s physical well-being” means  
76 the substantial risk of physical harm to himself or  
77 herself as evidenced by conduct demonstrating that he  
78 or she is dangerous to himself or herself, notwithstand-  
79 ing the fact that he or she may display poor judgment.

80 (e) If the county commission finds the person to be  
81 competent, the proceedings shall be dismissed. No  
82 appointment of a committee shall be made on evidence  
83 which is uncorroborated by the testimony of a medical  
84 expert or by a certified statement upon affidavit as

85 hereinafter provided. If the individual refuses to submit  
86 to an examination by a physician, the circuit court may  
87 upon petition issue a rule against the individual to show  
88 cause why the individual should not submit to an  
89 examination. A copy of the petition shall accompany  
90 service of the rule and such rule shall be returnable at  
91 a time to be fixed by the court. Any physician duly  
92 licensed to practice medicine in this state or any state  
93 contiguous to this state who is currently treating the  
94 individual alleged to be incompetent may file with the  
95 county commission his or her certified statement upon  
96 affidavit stating that he or she is currently treating the  
97 individual and setting forth his or her opinion of the  
98 individual's ability to manage his or her business affairs  
99 and care for his or her physical well-being, and stating  
100 in detail the grounds for the opinion. The statement may  
101 be considered by the county commission as evidence in  
102 the case: *Provided*, That the circuit court upon the  
103 petition of the attorney or guardian ad litem for the  
104 alleged incompetent shall issue a subpoena for the  
105 treating physician to appear as a witness at the  
106 proceeding: *Provided, however*, That a certified state-  
107 ment upon affidavit is not admissible as evidence of  
108 incompetency under this section where

109 (1) The guardian ad litem or attorney for the individ-  
110 ual makes a timely request of the commission for the  
111 opportunity to cross-examine the treating physician who  
112 filed the certified statement upon affidavit; and

113 (2) The commission requests such treating physician  
114 to appear for cross-examination; and

115 (3) Such treating physician fails to appear and answer  
116 questions under cross-examination.

117 (f) The extent of the committee's authority shall be  
118 specified in the order of the county commission. No  
119 authority of a committee shall extend beyond what is  
120 necessary for the protection of the individual. A finding  
121 of inability to care for one's physical well-being shall  
122 entitle the committee to custody of the individual, except  
123 when the individual is under a commitment order to a  
124 mental health facility, but only to the extent as is

125 necessary for the protection of the individual.

126 (g) An individual found incompetent pursuant to  
127 subsection (d) of this section shall have the right to an  
128 appeal and hearing thereon in the circuit court of the  
129 county. The judge shall hear the matter on appeal as  
130 provided in article three, chapter fifty-eight of this code  
131 or order a hearing de novo on the matter.

132 (h) The individual or any person may apply to the  
133 county commission in the manner provided by subsec-  
134 tion (b) of this section for termination of his or her  
135 committee at any time and appeal from a determination  
136 thereon in the manner provided by this section, or in the  
137 alternative, the individual may seek such termination by  
138 habeas corpus.

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

*Frederic Z. Parker*  
.....  
Chairman Senate Committee

*Bernard V. Kelly*  
.....  
Chairman House Committee

Originating in the House.

Takes effect from passage.

*Joseph E. Palma*  
.....  
Clerk of the Senate

*Donald G. Kopp*  
.....  
Clerk of the House of Delegates

*Heck Sundelle*  
.....  
President of the Senate

*Robert A. Anderson*  
.....  
Speaker of the House of Delegates

The within is approved ..... this the *18th*  
day of *March* ..... 1990.

*Justin Caperton*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/27/90

Time 4:45pm



RECEIVED

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OFFICE OF THE ASSISTANT  
SECRETARY OF DEFENSE