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WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 1998



ENROLLED

Com. Sub. for House Bill No. 4118

(By Delegates Cann, Warner, Coleman,
Linch, Staton and Kumirar)



Passed March 14, 1998

In Effect Ninety Days from Passage



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COMMITTEE SUBSTITUTE

FOR

H. B. 4118

(BY DELEGATES CANN, WARNER, COLEMAN,
LINCH, STATON AND KOMINAR)

[Passed March 14, 1998; in effect ninety days from passage.]

AN ACT to amend and reenact sections one and four, article one, chapter forty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one, two, six and nine, article two of said chapter; and to amend and reenact section five, article four of said chapter, all relating generally to establishing conservatorship for missing persons; defining missing person; and providing petition, notice and hearing requirements for appointing conservators for missing persons.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 1. DEFINITIONS AND GENERAL PROVISIONS.

§44A-1-1. Short title and legislative findings.

1 This chapter shall be known and may be cited as the
2 "West Virginia Guardianship and Conservatorship Act."

3 The Legislature finds that section six, article eight of
4 the constitution of the state of West Virginia gives it the
5 discretionary authority to pass legislation which
6 "...provides that all matters of probate, the appointment
7 and qualification of personal representatives, guardians,
8 committees and curators, and the settlements of their
9 accounts..." be under the exclusive jurisdiction of circuit
10 courts. The Legislature further finds and declares that the
11 use of the word "all" does not require an interpretation that
12 the Legislature must place every aspect of such matters
13 with circuit courts, but, that because of the discretionary
14 authority given, the Legislature may transfer, from time to
15 time, only those matters which it believes would be better
16 served under the jurisdiction of circuit courts.

17 The Legislature hereby further finds and declares that
18 legal proceedings requiring a tribunal to determine
19 whether persons should be appointed to manage the
20 personal or financial affairs of individuals deemed
21 mentally incompetent, mentally retarded, mentally
22 handicapped or missing involve considerations of
23 constitutionally protected rights which can best be
24 resolved within the circuit courts of this state.

§44A-1-4. Definitions.

1 As used in this chapter, unless a different meaning is
2 clearly required by the context:

3 (1) "Conservator" means a person appointed by the
4 court who is responsible for managing the estate and
5 financial affairs of a protected person, and, where the
6 context plainly indicates, the term "conservator" shall
7 mean or include a "limited conservator" or a "temporary
8 conservator."

9 (2) "Guardian" means a person appointed by the court
10 who is responsible for the personal affairs of a protected
11 person, and, where the context plainly indicates, the term
12 "guardian" shall mean or include a "limited guardian" or a
13 "temporary guardian."

14 (3) "Protected person" means an adult individual,
15 eighteen years of age or older, who has been found by a
16 court, because of mental impairment, to be unable to
17 receive and evaluate information effectively or to respond
18 to people, events, and environments to such an extent that
19 the individual lacks the capacity: (A) To meet the
20 essential requirements for his or her health, care, safety,
21 habilitation, or therapeutic needs without the assistance or
22 protection of a guardian; or (B) to manage property or
23 financial affairs or to provide for his or her support or for
24 the support of legal dependents without the assistance or
25 protection of a conservator. A finding that the individual
26 displays poor judgment, alone, will not be considered
27 sufficient evidence that the individual is a protected person
28 within the meaning of this subsection. "Protected person"
29 also means a person whom a court has determined is a
30 missing person.

31 (4) "Interested person" means: (A) An individual who
32 is the subject of a guardianship or conservatorship
33 proceeding; (B) a guardian or conservator of a protected
34 person; and (C) any other person with an actual and
35 substantial interest in the proceeding, either generally or as
36 to a particular matter, as distinguished from a person who
37 has only a nominal, formal, or technical interest in or
38 connection with the proceeding.

39 (5) "Limited conservator" means a person appointed
40 by the court who has only those responsibilities for
41 managing the estate and financial affairs of a protected
42 person, as specified in the order of appointment.

43 (6) "Limited guardian" means one appointed by the
44 court who has only those responsibilities for the personal
45 affairs of a protected person, as specified in the order of
46 appointment.

47 (7) "Person" means, generally, a natural person, any
48 corporation, association, partnership or other business
49 entity, any political subdivision or other public agency, or
50 any estate, trust or other collection of properties to which
51 the law attributes the capacity of having rights or duties.

52 (8) "Living will" means a living will existing and duly
53 executed in accordance with the provisions of section
54 three, article thirty, chapter sixteen of this code.

55 (9) "Medical power of attorney" means a power of
56 attorney existing and duly executed in accordance with
57 the provisions of section six, article thirty-a, chapter
58 sixteen of this code.

59 (10) "Missing person" means an adult individual,
60 eighteen years of age or older, who is absent from his or
61 her usual place of residence in the state and whose
62 whereabouts are unknown for a period of six months or
63 more.

64 (11) "Surrogate decision-maker" means an individual
65 identified as such by an attending physician in accordance
66 with the provisions of section seven, article thirty-b,
67 chapter sixteen of this code.

ARTICLE 2. PROCEDURE FOR APPOINTMENT.

§44A-2-1. Filing of petition; jurisdiction; fees.

1 (a) A petition for the appointment of a guardian or
2 conservator shall be filed with the clerk of the circuit court
3 in the county in which the alleged protected person
4 resides, or, if an alleged protected person has been
5 admitted to a health care or correctional facility, in the
6 county in which that facility is located. A petition for the
7 appointment of a conservator for a missing person shall be
8 filed with the clerk of the circuit court in the county in
9 which the missing person last resided.

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

14 (c) The fee for filing a petition shall be seventy
15 dollars, payable upon filing to the circuit clerk, all of
16 which shall be retained by the circuit clerk. The person
17 bringing the petition shall be responsible for fees for
18 filings of the petition and other papers, for service of
19 process, and for copies of court documents and

20 transcripts. In the event that a guardian and/or conservator
21 is appointed by the court, such fees shall be reimbursed to
22 the individual who filed the petition from the protected
23 person's estate, if funds are available. Any person who is
24 pecuniarily unable to pay such fees and costs as set forth
25 in article one, chapter fifty-nine of this code, and article
26 two, chapter fifty-one of this code, will not be required to
27 pay said fees and costs.

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

1 (a) A petition for the appointment of a guardian, a
2 conservator, or both, may be filed by the individual
3 alleged to be a protected person, by a person who is
4 responsible for or has assumed responsibility for the
5 individual's care or custody, by the facility providing care
6 to the individual, by the person that the individual has
7 nominated as guardian or conservator, or by any other
8 interested person, including, but not limited to, the
9 department of health and human resources.

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

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

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

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

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

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

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

28 (3) The name, place of residence or location and post
29 office address of the individual or facility that is
30 responsible for or has assumed responsibility for the
31 person's care or custody;

32 (4) The name, place of residence or location and post
33 office address of any person designated as a surrogate
34 decision-maker for the alleged protected person, or of any
35 representative or representatives designated under a
36 durable power of attorney, medical power of attorney or
37 living will, of which the alleged protected person is the
38 principal, and the petitioner shall attach a copy of any
39 such documents, if available;

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

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

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

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

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

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

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

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

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

§44A-2-6. Notice of hearing.

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

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

10 (c) A copy of the notice, together with a copy of the
11 petition, shall be mailed by certified mail, return receipt
12 requested, by the petitioner, at least fourteen days before
13 the hearing to all individuals seven years of age or older
14 and to all entities whose names and post office addresses
15 appear in the petition. In the case of a missing person, a
16 copy of the petition for the appointment of a conservator
17 shall be mailed by certified mail, return receipt requested,
18 by the petitioner, at least fourteen days before the hearing
19 to the last known address of the missing person. A copy
20 of certified mail return receipts shall be filed in the office
21 of the circuit clerk on or before the date of hearing.

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

28 **POSSIBLE CONSEQUENCES OF A COURT**
29 **FINDING THAT YOU ARE INCAPACITATED**

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

39 (e) No person may be appointed a guardian or
40 conservator without first receiving proper notice and
41 having the opportunity for a hearing.

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

1 (a) The court may hear the petition for the
2 appointment of a guardian or conservator or may
3 designate the mental hygiene commissioner in the circuit
4 to serve as the trier of fact at the hearing on the petition:
5 *Provided*, That the court shall be the trier of fact at the
6 hearing on a petition for the appointment of a conservator
7 for a missing person. If a mental hygiene commissioner is
8 appointed, a mental hygiene commitment proceeding may
9 not be held simultaneously with a proceeding for the
10 appointment of a guardian or conservator. The
11 designated mental hygiene commissioner shall submit
12 written findings of fact and recommendations to the court
13 upon conclusion of the hearing. The court may accept or
14 reject the recommendations of the mental hygiene
15 commissioner. Only the court may enter an order
16 appointing a guardian or conservator.

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

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

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

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

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

53 (g) In the case of a hearing held on a petition for the
54 appointment of a conservator for a missing person, the
55 court must be satisfied by clear and convincing evidence
56 that the person has been missing and their whereabouts are
57 unknown for six months or more and the appointment of
58 a conservator is necessary to protect the interests of and to
59 manage the estate and the financial affairs of the missing
60 person. If the court finds there is no necessity to appoint
61 a full conservator, the court may appoint a limited
62 conservator to manage the estate and financial affairs of
63 the missing person. The court may, only as a last resort,
64 appoint a sheriff to serve as a conservator for a missing
65 person.

ARTICLE 4. TERMINATION, REVOCATION AND MODIFICATION OF APPOINTMENTS.

§44A-4-5. Termination of guardianship or conservatorship of protected person - When authorized.

1 A guardianship or conservatorship of a protected
2 person shall terminate upon the death of the protected
3 person, whenever jurisdiction is transferred to another state
4 or if ordered by the court following a hearing on the
5 petition of any interested person. In the case of a missing
6 person, a conservatorship shall terminate when the
7 person's death is established by the production of a
8 certified death certificate, the person is presumed dead
9 pursuant to the provisions of article nine, chapter forty-
10 four of this code, or the missing person is located.

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


Chairman Senate Committee

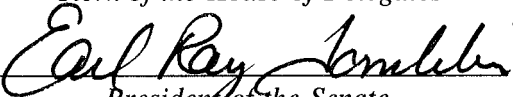

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

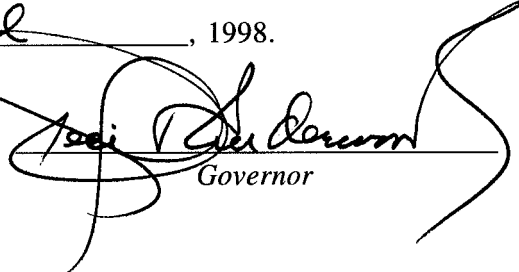

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within approved this the 21st
day of April, 1998.


Governor

PRESENTED TO THE

GOVERNOR

Date 3/31/98

Time 2:59 pm