

SB 736  
(veto)

FILED

2008 MAR 14 AM 11:04

**WEST VIRGINIA LEGISLATURE**  
**SEVENTY-EIGHTH LEGISLATURE**  
**REGULAR SESSION, 2008**

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COMMITTEE SUBSTITUTE  
FOR

**ENROLLED**

**Senate Bill No. 736**

(SENATOR CARUTH, *original sponsor*)

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[Passed March 8, 2008; in effect ninety days from passage.]

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OFFICE OF THE CLERK  
SECRETARY OF STATE

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AN ACT to amend and reenact §37-1-3 of the Code of West Virginia, 1931, as amended; to amend and reenact §44A-1-8 of said code; and to amend and reenact §44A-3-5 of said code, all relating generally to persons under legal disability, including protected persons; clarifying the sale of real estate for persons under legal disability, including protected persons; clarifying when a conservator appointment is exempted; and making technical corrections.

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

That §37-1-3 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §44A-1-8 of said code be amended and reenacted; and that §44A-3-5 of said code be amended and reenacted, all to read as follows:

**CHAPTER 37. REAL PROPERTY.**

**ARTICLE 1. LANDS OF PERSONS WITH LEGAL DISABILITY, AND LANDS HELD IN TRUST.**

**37-1-3. Guardian ad litem.**

1 A guardian ad litem shall be appointed for minors  
2 under the age of eighteen, inmates and protected  
3 persons subject to the requirements of section five,  
4 article three, chapter forty-four-a of this code. The  
5 guardian ad litem shall answer the petition under oath,  
6 be present at any summary proceeding or hearing and  
7 inform the court whether the sale of property is in the  
8 best interests of the minor, inmate or protected person.  
9 Minors over the age of fourteen may answer in person as  
10 well.

**CHAPTER 44A. WEST VIRGINIA GUARDIANSHIP AND CONSERVATORSHIP ACT.**

**ARTICLE 1. DEFINITIONS AND GENERAL PROVISIONS.**

**§44A-1-8. Persons and entities qualified to serve as guardian and conservator; default guardian and conservator; exemptions from conservator appointment.**

1 (a) Any adult individual may be appointed to serve as  
2 a guardian, a conservator or both upon a showing by the

3 individual of the necessary education, ability and  
4 background to perform the duties of guardian or  
5 conservator and upon a determination by the court that  
6 the individual is capable of providing an active and  
7 suitable program of guardianship or conservatorship for  
8 the protected person. The individual may not be  
9 employed by or affiliated with any public agency, entity  
10 or facility that is providing substantial services or  
11 financial assistance to the protected person.

12 (b) The court may, after first determining it to be in  
13 the best interest of the protected person, appoint  
14 coguardians, coconservators or both.

15 (c) Any person being considered by a court for  
16 appointment as a guardian or conservator shall provide  
17 information regarding any crime, other than traffic  
18 offenses, of which he or she was convicted and the court  
19 or mental hygiene commissioner may order a  
20 background check to be conducted by the state police or  
21 county sheriff. The court shall consider this  
22 information in determining the person's fitness to be  
23 appointed a guardian or conservator.

24 (d) Any nonprofit corporation chartered in this state  
25 and licensed as set forth in subsection (e) of this section  
26 or a public agency that is not a provider of health care  
27 services to the protected person may be appointed to  
28 serve as a guardian, a conservator or both: *Provided,*  
29 That the entity is capable of providing an active and  
30 suitable program of guardianship or conservatorship for  
31 the protected person and is not otherwise providing  
32 substantial services or financial assistance to the  
33 protected person.

34 (e) A nonprofit corporation chartered in this state may  
35 be appointed to serve as a guardian or conservator or as  
36 a limited or temporary guardian or conservator for a  
37 protected person if it is licensed to do so by the  
38 Secretary of Health and Human Resources. The  
39 secretary shall propose legislative rules, for  
40 promulgation in accordance with the provisions of  
41 chapter twenty-nine-a of this code, for the licensure of  
42 nonprofit corporations and shall provide for the review  
43 of the licenses. The rules shall, at a minimum, establish  
44 standards to assure that any corporation licensed for  
45 guardianship or conservatorship:

46 (1) Has sufficient fiscal and administrative resources  
47 to perform the fiduciary duties and make the reports  
48 and accountings required by this chapter;

49 (2) Will respect and maintain the dignity and privacy  
50 of the protected person;

51 (3) Will protect and advocate the legal human rights of  
52 the protected person;

53 (4) Will assure that the protected person is receiving  
54 appropriate educational, vocational, residential and  
55 medical services in the setting least restrictive of the  
56 individual's personal liberty;

57 (5) Will encourage the protected person to participate  
58 to the maximum extent of his or her abilities in all  
59 decisions affecting him or her and to act in his or her  
60 own behalf on all matters in which he or she is able to  
61 do so;

62 (6) Does not provide educational, vocational,

63 residential or medical services to the protected person;  
64 and

65 (7) Has written provisions in effect for the distribution  
66 of assets and for the appointment of temporary  
67 guardians and conservators for any protected persons it  
68 serves in the event the corporation ceases to be licensed  
69 by the department of health and human resources or  
70 otherwise becomes unable to serve as guardian.

71 (f) A duly licensed nonprofit corporation that has been  
72 appointed to serve as a guardian or as a conservator  
73 pursuant to the provisions of this article is entitled to  
74 compensation in accordance with the provisions of  
75 section thirteen of this article.

76 (g) Except as provided in section thirteen of this  
77 article, no guardian or conservator nor any officer,  
78 agent, director, servant or employee of any guardian or  
79 conservator may do business with or in any way profit,  
80 either directly or indirectly, from the estate or income of  
81 any protected person for whom services are being  
82 performed by the guardian or conservator.

83 (h) A person who has an interest as a creditor of a  
84 protected person is not eligible for appointment as  
85 either a guardian or conservator of the protected person,  
86 except that a bank or trust company authorized to  
87 exercise trust powers or to engage in trust business in  
88 this state may be appointed as a conservator if the court  
89 determines it is capable of providing suitable  
90 conservatorship for the protected person.

91 (i) The Secretary of the Department of Health and  
92 Human Resources shall designate the adult protective

93 services division of the county of appointment, or  
94 another agency under his or her jurisdiction, to be  
95 appointed as guardian when there is no other  
96 individual, nonprofit corporation or other public agency  
97 that is equally or better qualified and willing to serve.  
98 The department may not refuse to accept the  
99 guardianship appointment when ordered by the court,  
100 but may not be appointed as conservator.

101 (j) The sheriff of the county in which a court has  
102 jurisdiction shall be appointed as conservator when  
103 there is no other individual, nonprofit corporation or  
104 other public agency that is equally or better qualified  
105 and willing to serve . The sheriff may not refuse to  
106 accept the conservatorship appointment when ordered  
107 by the court, but may not be appointed as guardian.

108 (k) A conservator shall not be appointed when the  
109 alleged protected person's total assets are worth less  
110 than two thousand dollars or the alleged protected  
111 person's income is: (1) From the Social Security  
112 Administration and a representative payee has been  
113 appointed to act in the best interest of the individual; (2)  
114 from Medicaid and the only income distributed to the  
115 individual is the personal account allotment; or (3) less  
116 than fifty dollars per month or six hundred dollars per  
117 year. In these instances, the guardian, representative  
118 payee or health care facility, if there is no other person  
119 or entity, shall manage the personal care account or  
120 assets.

**ARTICLE 3. GUARDIANSHIP AND CONSERVATORSHIP ADMINISTRATION.**

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

1 (a) A conservator shall not sell real estate and shall not

2 be authorized to mortgage any real estate without  
3 approval of the court.

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

Enr. Com. Sub for S. B. No. 736] 8

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

*Shirley Love*  
.....  
Chairman Senate Committee

*Member*

*John*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Darrell Holmes*  
.....  
Clerk of the Senate

*Dugg H. Smith*  
.....  
Clerk of the House of Delegates

*Carl Ray Tomblin*  
.....  
President of the Senate

*B*  
.....  
Speaker House of Delegates

The within *is disapproved* ..... this  
the *13th* Day of *March* ....., 2008.

*Jeff Kashiwa*  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 13 2008

Time 5:00 pm  
5:00 pm