

OVERVIEW OF THE WEST VIRGINIA GUARDIANSHIP  
AND CONSERVATORSHIP ACT  
W.VA. CODE 44A-1-1, ET SEQ.

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This article will give a detailed outline of the Guardianship and Conservatorship Act (“the Act”), set forth in West Virginia Code Section 44A-1-1 et seq. In this Act, the Legislature recognized that legal proceedings requiring a tribunal to determine whether persons should be appointed to manage the personal or financial affairs of individuals deemed mentally incompetent, mentally retarded or mentally handicapped involve considerations of constitutionally protected rights which can best be resolved within the circuit courts of this state. § 44A-1-1. The Act thus sets forth in detail the procedures to be followed in these legal proceedings. Forms encompassing all documents to be utilized throughout such legal proceedings are available at the local Circuit Clerk’s office for a minimal fee.

The Act provides the basis by which a person can be judicially declared incompetent. At the outset, the legal proceeding set forth in the Act should be distinguished from a W.V.R.C.P. 17(c) finding of incompetency by the Court. A rule 17(c) finding of incompetency is solely for the purpose of ongoing litigation, while a finding of incompetency under the W.Va. Guardianship Act is more permanent in nature and requires a more detailed investigation by the Court. See e.g. State of West Virginia ex rel McMahan v. Hamilton, 198 W.Va. 575, 482 S.E. 2d 192 (1996).

In general, the Guardianship and Conservatorship Act allows for the appointment of a guardian or conservator for any person determined to be mentally incompetent, mentally retarded, or mentally handicapped. Some of the definitions in the Act should be reviewed. For instance, it is important to distinguish between the terms of conservator and guardian. A "conservator", as defined in Section 44A-1-4, means a person appointed by the court who is responsible for managing the estate and financial affairs of a protected person. A "guardian",

also defined in Section 44A-1-4 means a person appointed by the court who is responsible for the personal affairs of a protected person. A "protected person" is:

any adult individual eighteen years or older who has been found by a court because of mental impairment to be unable to receive and evaluate information effectively or to respond to people, events and environments to such an extent that the individual lacks the capacity: (A) to meet the essential requirements for his or her healthcare, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependants without the assistance or protection of a conservator.

The definition of protected person also states that finding that the individual displays poor judgment, alone, will not be considered sufficient evidence that the individual is a protected person within the meaning of the statute. Section 44A-1-4 also defines "interested person" which means:

- (A) an individual who is the subject of a guardianship or conservatorship proceeding,
- (B) a guardian or conservator of a protected person, and
- (C) any other person with an actual and substantial interest in the proceeding, either generally or as to a particular matter, as distinguished from a person who has only a nominal, formal or technical interest in or connection with the proceeding.

It should also be noted that the West Virginia Guardian and Conservatorship Act also applies to "missing persons", which is defined in Section 44A-1-4(11) as any adult, eighteen years of age or older who has been absent from his residence in the state and whose whereabouts are unknown for a period of six months or more. However, the Act's applicability to missing persons is beyond the scope of this article.

Either an individual or a non-profit corporation is qualified to serve as a guardian or conservator. Section 44A-1-8 sets forth the requirements for each of them. Subsection (a) sets

forth the qualifications for individuals, which requires a determination by a court that the individual is capable of providing an active and suitable program of guardianship or conservatorship for the protected person. Additionally, the individual may not be employed by or affiliated with any public agency, entity or facility which is providing substantial services or financial assistance to the protected person. Subsection (c) sets forth the qualifications for non-profit corporations, which included being chartered in this state and being licensed to serve as a guardian or conservator by the Secretary of Health and Human Resources.

Section 44A-1-9 addresses the posting of bonds by an appointed guardian or conservator. Subsection (a) states that, "the Court has the discretion to determine whether the posting of a bond by a guardian, once appointed, is necessary." Subsection (b) states that, "the Court shall require the posting of a bond by a conservator upon appointment except where the conservator is excused from posting bond under the provisions of Section 31A-4-18. Based on the clear language of the two sections, while there is discretion by a court to determine whether or not a bond is required for a guardian, it is mandatory with the appointment of a conservator. The difference might be due in part to the fact that the conservator has the ability to handle the protected person's finances. The remainder of Section 44A-1-9 sets forth the considerations a court should look at to determine the amount of bond for a conservator. This section also addresses actions on such a bond.

Section 44A-1-10 sets forth a requirement for mandatory education for a guardian and/or conservator. Mandatory education can be waived by the court if the appointed individual has completed the mandated educational training within the last three (3) years. An appointed guardian or conservator must undergo educational training within thirty (30) days of the court's determination of eligibility. Upon completion, the appointed guardian or conservator must

provide an affidavit to the court, certifying that such education and training has been completed, and at that time, the court will issue the Order of Appointment.

Article 2 of Chapter 44A sets forth the procedures for appointment. W.Va. Code 44A-2-1 addresses the filing of a petition, jurisdiction, and fees. The petition for the appointment of a guardian or conservator is filed with the circuit clerk for the county in which the protected person resides or has been admitted to a healthcare or correctional facility. The circuit court of that county has exclusive jurisdiction unless the court determines that a transfer of venue would be in the best interests of the protected person. The fee for filing a petition is \$90.00. This amount has been modified from the original \$70.00 filing fee.

Section 44A-2-2 sets forth who may file a petition and the required contents of that petition. A petition may be filed by the protected person, the person who is responsible for or has assumed responsibility for the protected persons care and/or custody, by the facility providing care to the individual, by the person that the individual has nominated as guardian or conservator previously, by any other interested person, as defined in Section 44A-1-4. Some of the requirements that must be in the petition are as follows:

1. The petitioner's name.
2. The residence of the petitioner.
3. Post office address of the petitioner.
4. Relationship of the petitioner to the alleged protected person.
5. The protected person's name.
6. The protected person's date of birth.
7. The protected person's place of residence.
8. The protected person's post office address.

9. Names and post office addresses of the protected person's nearest relatives, in the following order:
  - a. Spouse and children.
  - b. Parents, brothers and sisters.
  - c. Nearest known relatives entitled to a share of the protected person's estate as determined by intestate succession.

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

10. The name, place, residence and office address of the individual or facility responsible for the care and/or custody of the protected person.
11. The name, place of residence, post office address of any "surrogate decision maker", representatives under any durable power of attorney, medical power of attorney, or living will, with a copy of such documents attached to the petition.
12. The name, post office address and phone number of the attorney representing the petitioner in the petitioner and appointment proceedings.
13. The petition must state whether the person's incapacity will prevent attendance at the hearing and the reason therefore.
14. The petition must identify the type of guardianship and/or conservatorship requested and reasons for such request. The guardianship or conservatorship can be a full guardianship or conservatorship one, or can be limited to specific powers.
15. The petition must contain the proposed guardian or conservator's name, post office address, age, occupation, and relationship to the protected person.
16. The name and post office address of a guardian nominated by the alleged protected person if different from the proposed guardian or conservator and if an individual, the individual's age, occupation criminal history and relationship to the protected person.
17. The petition must also state the name and post office address of any guardian and/or conservator who is currently acting on behalf of the protected person.
18. If the appointment is for a limited purpose, the specific areas to be included in the appointment.

Attached to the petition, there must also be an evaluation report by a licensed physician or psychologist. Section 44A-2-3 sets forth the requirements of the evaluation report. It must contain the following:

1. Description of the nature, type and extent of incapacity including cognitive and functional limitations.
2. Evaluations of the person's mental and physical condition, and where appropriate, the educational condition, adaptive behavior and social skills.
3. If the appointment of a guardian is being requested, a description of the services, if any, currently being provided for the person's healthcare, safety, habilitation or therapeutic needs and a recommendation as to the suitable living arrangement and, where appropriate, treatment or habilitation plan and the reasons therefore.
4. An opinion as to whether the appointment of a guardian or conservator is necessary, the type and scope of the guardianship or conservatorship needed, and the reasons therefore.
5. If the petition states that the incapacity of the alleged protected person will prevent attendance at the hearing, an opinion as to whether such attendance would be detrimental to the person's health, care, or safety.
6. If the alleged protective person will attend the hearing, a statement as to whether the individual is on any medications that may effect the person's action, demeanor, and participation at the hearing.
7. The evaluation report must contain the signature of the evaluating physician or psychologist, and the signature of any other individuals who performed, supervised or reviewed the assessment or examinations upon which the report is based or who made substantial contributions toward the reports preparation.
8. The evaluation report must also contain the date or dates of the assessments and examinations upon which the report is based.

Section 44A-2-4 requires that, prior to a hearing for a conservatorship, the petitioner must file a statement of the financial resources of the alleged protected person which shall, to the extent known, list the person's social security number the approximate value of the person's real and personal property, and the person's anticipated annual gross income and other receipts.

Section 44A-2-5 states that a proceeding under this act is subject to confidentiality, and all pleadings, exhibits and other documents in the court file will be considered confidential and not open to public inspection.

Section 44A-2-6 sets forth the requirements of the Notice of Hearing. Upon the filing of the petition and evaluation report, the court will promptly issue a notice fixing the date, hour, and location for a hearing to take place within sixty (60) days. The alleged protected person must be personally served with the notice, a copy of the petition, and the evaluation report not less than fourteen (14) days before the hearing. This may not be waived. A copy of the notice, together with a copy of the petition, must also be mailed by certified mail return receipt requested, by the petitioner, at least fourteen (14) days before the hearing to all individuals seven years of age or older and to all entities whose names and post office addresses appear in the petition. A copy of the certified mail return receipts must be filed in the office of the circuit clerk on or before the date of hearing. The notice must include a brief statement in large print of the purpose of the proceedings and shall inform the alleged protected person of the right to appear at the hearing, the right to an attorney and the right to object to the proposed appointment. Additionally, the notice must include the following statement in large print:

**POSSIBLE CONSEQUENCES OF A COURT FINDING THAT YOU ARE INCAPACITATED.** At the hearing you may lose many of your rights. A guardian may be appointed to make personal decisions for you. A conservator may be appointed to make decisions concerning your property and finances. The appointment may affect control of how you spend your money, how your property is managed and controlled, who makes your medical decisions, where you live, whether you are allowed to vote, and other important rights.

No person may be appointed a guardian or conservator without first receiving proper notice and having the opportunity for a hearing.

Section 44A-2-7 states that a court will appoint legal counsel for the alleged protected

person. Legal counsel for the protected person acts basically in the same capacity as a guardian ad litem and must be concerned about whether or not a guardian or conservator is needed, limitations of the role of the guardian or conservator, ensuring that the appropriate person is appointed, assuring the adequacy of the bond if any and assure consideration of proper placement.

Section 44-A-2-8 states that a protected person may nominate any individual or entity to serve as his or her guardian or conservator if the protected person has sufficient capacity to do so. The nomination may be made in writing, by an oral request to the court, or may be proved by any other competent evidence. The designation of a representative under a valid medical power of attorney, a living will or of a surrogate decision maker shall constitute competent evidence of the nomination of the guardian, and the designation of an attorney under valid durable power of attorney shall constitute competent evidence of a nomination of a conservator.

Section 44A-2-9 addresses the hearing on the petition to appoint. The hearing may be held before the circuit judge or the mental hygiene commissioner. A mental hygiene commissioner may only submit written findings of fact and recommendations to the court. The court has the ability to accept or reject the recommendations of the mental hygiene commissioner. Only the court may enter an order appointing a guardian or conservator. The alleged protected person is entitled to attend the hearing, to oppose the petition, to be represented by an attorney, to present evidence, to compel the attendance of witnesses and to confront and cross-examine all witnesses.

The hearing shall not proceed if the alleged protective person is not present, unless there is an affidavit of a physician presented to the court, qualified expert testimony to warrant a finding that the presence of the individual is not possible due to a physical inability or that such

presence would significantly impair his or her health, or evidence that the person refuses to appear. The standard of proof to be applied in determining whether or not to appoint a guardian or conservator is determined by clear and convincing evidence.

Section 44A-2-13 addresses the order of appointment and notice. An order appointing a guardian or conservator may only be issued by the court upon the following:

1. The guardian or conservator has subscribed to and filed an oath promising to faithfully perform the duties of the office in accordance with all provisions of the Chapter;
2. The posting of any bond, if required, and;
3. The completion of mandatory education as required under Section 44A-1-10.

Within fourteen days following the entry of the order, the guardian or conservator must mail a copy of the Order of Appointment, together with a brief statement in large print of rights to seek an appeal for modification or termination, to the protected person and to all individuals and entities given notice of the petition.

West Virginia Code Section 44A-4-5 addresses when a guardianship or conservatorship is terminated. This termination occurs upon the death of the protected person, when jurisdiction is transferred to another state, or if ordered by the court following a hearing on the petition of any interested person.

Article 3 of Chapter 44A of the West Virginia Code addresses the administration by a guardian or conservator, including the powers and duties of each and the filing of reports and accountings. Additionally, Article 3 imposes a fiduciary duty on the guardian or conservator, and in some cases, imposes personal liability on the appointed person. However, the administration of a guardianship or conservatorship is beyond the scope of this article and should be reviewed once an appointment has been made.