

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 2885**

4 (By Delegates Ellem, D. Campbell, Perdue, Poore,  
5 Barill, Fleischauer, Border, Moore,  
6 Hatfield and Rodighiero)

7 (Originating in the Committee on the Judiciary)

8 [February 14, 2011]

9  
10 A BILL to amend and reenact §44A-1-8 of the Code of West Virginia,  
11 1931, as amended; and to amend said code by adding thereto a  
12 new section, designated §44A-1-15, all relating to the  
13 eligibility of guardians or conservators to be hired to  
14 provide care to a protected person through employment with a  
15 behavioral health provider in certain circumstances.

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

17 That §44A-1-8 of the Code of West Virginia, 1931, as amended,  
18 be amended and reenacted; and that said code be amended by adding  
19 thereto a new section, designated §44A-1-15, all to read as  
20 follows:

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

22 **§44A-1-8. Persons and entities qualified to serve as guardian and**  
23 **conservator; default guardian and conservator;**  
24 **exemptions from conservator appointment.**

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

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

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

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

20 (d) Any nonprofit corporation chartered in this state and  
21 licensed as set forth in subsection (e) of this section or a public  
22 agency that is not a provider of health care services to the  
23 protected person may be appointed to serve as a guardian, a  
24 conservator or both ~~Provided, That~~ so long as the entity is  
25 capable of providing an active and suitable program of guardianship  
26 or conservatorship for the protected person and is not otherwise

1 providing substantial services or financial assistance to the  
2 protected person.

3 (e) A nonprofit corporation chartered in this state may be  
4 appointed to serve as a guardian or conservator or as a limited or  
5 temporary guardian or conservator for a protected person if it is  
6 licensed to do so by the Secretary of Health and Human Resources.  
7 The secretary shall propose legislative rules for promulgation in  
8 accordance with the provisions of chapter twenty-nine-a of this  
9 code, for the licensure of nonprofit corporations and shall provide  
10 for the review of the licenses. The rules shall, at a minimum,  
11 establish standards to assure that any corporation licensed for  
12 guardianship or conservatorship:

13 (1) Has sufficient fiscal and administrative resources to  
14 perform the fiduciary duties and make the reports and accountings  
15 required by this chapter;

16 (2) Will respect and maintain the dignity and privacy of the  
17 protected person;

18 (3) Will protect and advocate the legal human rights of the  
19 protected person;

20 (4) Will assure that the protected person is receiving  
21 appropriate educational, vocational, residential and medical  
22 services in the setting least restrictive of the individual's  
23 personal liberty;

24 (5) Will encourage the protected person to participate to the  
25 maximum extent of his or her abilities in all decisions affecting  
26 him or her and to act in his or her own behalf on all matters in

1 which he or she is able to do so;

2 (6) Does not provide educational, vocational, residential or  
3 medical services to the protected person; and

4 (7) Has written provisions in effect for the distribution of  
5 assets and for the appointment of temporary guardians and  
6 conservators for any protected persons it serves in the event the  
7 corporation ceases to be licensed by the Department of Health and  
8 Human Resources or otherwise becomes unable to serve as guardian.

9 (f) A duly licensed nonprofit corporation that has been  
10 appointed to serve as a guardian or as a conservator pursuant to  
11 the provisions of this article is entitled to compensation in  
12 accordance with the provisions of section thirteen of this article.

13 (g) Except as provided in ~~section~~ sections thirteen and  
14 fifteen of this article, no guardian or conservator nor any  
15 officer, agent, director, servant or employee of any guardian or  
16 conservator may do business with or in any way profit, either  
17 directly or indirectly, from the estate or income of any protected  
18 person for whom services are being performed by the guardian or  
19 conservator.

20 (h) A person who has an interest as a creditor of a protected  
21 person is not eligible for appointment as either a guardian or  
22 conservator of the protected person except that a bank or trust  
23 company authorized to exercise trust powers or to engage in trust  
24 business in this state may be appointed as a conservator if the  
25 court determines it is capable of providing suitable  
26 conservatorship for the protected person.

1 (i) The Secretary of the Department of Health and Human  
2 Resources shall designate the adult protective services division of  
3 the county of appointment, or another agency under his or her  
4 jurisdiction, to be appointed as guardian when there is no other  
5 individual, nonprofit corporation or other public agency that is  
6 equally or better qualified and willing to serve. The department  
7 may not refuse to accept the guardianship appointment when ordered  
8 by the court but may not be appointed as conservator.

9 (j) The sheriff of the county in which a court has  
10 jurisdiction shall be appointed as conservator when there is no  
11 other individual, nonprofit corporation or other public agency that  
12 is equally or better qualified and willing to serve. The sheriff  
13 may not refuse to accept the conservatorship appointment when  
14 ordered by the court but may not be appointed as guardian.

15 (k) A conservator shall not be appointed when the alleged  
16 protected person's total assets are worth less than \$2,000 or the  
17 alleged protected person's income is:

18 (1) From the Social Security Administration and a  
19 representative payee has been appointed to act in the best interest  
20 of the individual;

21 (2) From Medicaid and the only income distributed to the  
22 individual is the personal account allotment; or

23 (3) Less than \$50 per month or \$600 per year. In these  
24 instances, the guardian, representative payee or health care  
25 facility, if there is no other person or entity, shall manage the  
26 personal care account or assets.

1 **§44A-1-15. Eligibility of guardians or conservators employed**  
2 **pursuant to a Department of Health and Human Resources waiver**  
3 **program.**

4 (a) A person employed pursuant to a written contract or other  
5 employment arrangement with a licensed provider of behavioral  
6 health services for the purpose of providing services to a  
7 protected person, may be appointed by a court as the guardian or  
8 conservator of the protected person if:

9 (1) payment for services provided under the contract or  
10 employment agreement is made pursuant to a waiver program;

11 (2) the person is related to the protected person by blood,  
12 marriage or adoption;

13 (3) the contract or arrangement is disclosed in writing to the  
14 court, and

15 (4) the court finds that the appointment is in the best  
16 interests of the protected person.

17 (b) Without the prior approval of a court, a guardian or  
18 conservator may not enter into a written contract or other  
19 employment arrangement with a licensed provider of behavioral  
20 health services in which the guardian or conservator will receive  
21 compensation pursuant to a waiver program.

22 (c) For the purposes of this section:

23 (1) "Behavioral health services" means services provided for  
24 the care and treatment of persons with mental illness, intellectual  
25 disability, developmental disabilities or alcohol or drug abuse

1 problems in an inpatient, residential or outpatient setting,  
2 including, but not limited to, habilitative or rehabilitative  
3 interventions or services and cooking, cleaning, laundry and  
4 personal hygiene services provided for such care; and

5 (2) "Waiver program" means a West Virginia Department of  
6 Health and Human Resource administered waiver program, including,  
7 but not limited to, the "MR/DD" or "Intellectual and Developmental  
8 Disabilities" waiver program authorized by section 1915(c) of the  
9 Social Security Act.

10 (d) A person appointed to serve as a guardian or conservator  
11 prior to the effective date of this section, enacted during the  
12 2011 Regular Session of the Legislature, who meets the requirements  
13 contained in subsection (a), shall retain his or her authority,  
14 powers and duties in that capacity under the provisions of this  
15 section, *Provided*, That the guardian or conservator informs the  
16 court, in writing, that he or she is employed pursuant to a written  
17 contract or other employment arrangement with a licensed provider  
18 of behavioral health services under the waiver program.