

1 **H. B. 2815**

2
3 (By Delegates Miley, Fleischauer, Skinner,
4 Shott and Barill)

5 (By Request of the Supreme Court of Appeals)

6 [Introduced March 5, 2013; referred to the
7 Committee on the Judiciary.]

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10 A Bill to amend and reenact §44-10-3 of the Code of West Virginia,
11 1931, as amended, relating generally to clarifying and
12 modifying the process of appointing and terminating guardians
13 for minors.

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

15 That §44-10-3 of the Code of West Virginia, 1931, as amended,
16 be amended and reenacted to read as follows:

17 **ARTICLE 10. GUARDIANS AND WARDS GENERALLY.**

18 **§44-10-3. Appointment and termination of guardian for a minor.**

19 (a) The circuit court and family court have concurrent
20 jurisdiction to appoint a guardian for a minor.

21 (b) Venue for a petition for appointment of guardianship is in
22 the county in which the minor has resided for the past six months
23 unless the court finds extraordinary circumstances for a sooner
24 filing. If the child is a nonresident of this state and only the

1 guardianship of the estate is sought the petition may be filed in
2 the county in which the child has an estate.

3 (c) Any responsible person with knowledge of the facts
4 regarding the welfare and best interests of a minor may petition
5 for an appointment of a guardian except a parent or other person
6 whose rights to the minor have been terminated. No guardianship
7 petition may be considered if the child who is the subject of the
8 petition is involved in another court proceeding relating to
9 custody or guardianship or if the petitioner is a parent seeking
10 custodial rights adverse to the other parent.

11 (d) Within five days of the filing of a petition for the
12 appointment of a guardian, the circuit clerk shall notify the
13 court. The court shall hold a hearing upon the petition for the
14 appointment of a guardian within ten days after the petition is
15 filed. If all persons entitled to service have not been served at
16 least five days prior to the hearing or have not waived service the
17 court shall continue the hearing but may appoint a temporary
18 guardian pursuant to subsection (f) below.

19 (e) The court may appoint a guardian for a minor if the court
20 finds by clear and convincing evidence that the appointment is in
21 the minor's best interest and:

22 (1) The parents consent;

23 (2) The parents' rights have been previously terminated;

24 (3) The parents are unwilling or unable to exercise their

1 parental rights;

2 (4) The parents have abandoned their rights by a material
3 failure to exercise them for a period of more than six months; or

4 (5) There are extraordinary circumstances that would, in all
5 reasonable likelihood, result in serious detriment to the child if
6 the petition is denied.

7 (f) Whether or not one or more of the conditions of subsection
8 (e) have been established, the court may appoint a temporary
9 guardian for a minor upon a showing that an immediate need exists
10 or that a period of transition into the custody of a parent is
11 needed so long as the appointment is in the best interest of the
12 minor. The temporary guardian has the authority of a guardian
13 appointed pursuant to subsection (e) but the duration of the
14 temporary guardianship may not exceed six months. A temporary
15 guardianship may be extended beyond six months upon further order
16 of the court finding continued need in the best interest of the
17 minor.

18 (g) Any suitable person may be appointed as the minor's
19 guardian. The father or mother shall receive priority subject only
20 to the provisions of subsections (c) and (e) above. However, in
21 every case the competency and fitness of the proposed guardian must
22 be established and a determination made that the appointment is in
23 the best interest of the child.

24 (h) The court, the guardian or the minor may revoke or

1 terminate the guardianship appointment when:

2 (1) The minor reaches the age of eighteen and executes a
3 release stating that the guardian's estate was properly
4 administered and that the minor has received the assets of the
5 estate from the guardian;

6 (2) The guardian or the minor dies;

7 (3) The guardian petitions the court to resign and the court
8 enters an order approving the resignation; or

9 (4) A petition is filed by the guardian, the minor, a parent
10 or an interested person or upon the motion of the court stating
11 that the minor is no longer in need of the assistance or protection
12 of a guardian due to changed circumstances and the termination of
13 the guardianship would be in the minor's best interest.

14 (I) For a petition to revoke or terminate a guardianship filed
15 by a parent, the burden of proof is on the moving party to show by
16 a preponderance of the evidence that there has been a material
17 change of circumstances and that a revocation or termination is in
18 the child's best interest.

19 (j) A guardianship may not be terminated by the court if there
20 are any assets in the estate due and payable to the minor. Another
21 guardian may be appointed upon the resignation of a guardian
22 whenever there are assets in the estate due and payable to the
23 minor.

24 (k) Other than court orders and case indexes, all other

1 records of a guardian proceeding involving a minor are confidential
2 and shall not be disclosed to anyone who is not a party to the
3 proceeding, counsel of record for the proceeding, the court
4 presiding over the proceeding or other family or circuit court
5 presiding over another proceeding involving the minor absent a
6 court order permitting examination of such records.

NOTE: This bill is recommended for passage by the Court Improvement Board of the Supreme Court of Appeals. It proposes a comprehensive overhaul of W.Va. Code §44-10-3, appointment and revocation of guardian by county commission. This section has been mostly unchanged since jurisdiction changed from county commissions to circuit and family courts in 2004. The new language is more consistent with W.Va. Code §48-9-101 et. seq. (custody of children) and recent case law, including In re Antonio R.A., 228 W.Va. 380, 719 S.E.2d 850 (2011). It elaborates on or makes clarification regarding who may file a petition, venue, interaction with other court cases, service requirements, circumstances that may warrant appointment of a guardian, who may be appointed as a guardian, standard of evidence for appointment (clear and convincing) and burden of proof for revocation or terminations of guardianship (preponderance of the evidence on moving party).

This section has been completely rewritten; therefore, it has been completely underscored.