

HB # 4508

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# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1994



# ENROLLED

*Com. Sub. for*  
HOUSE BILL No. 4508

(By Delegate *Mr. Speake, Mr. Chambliss,*  
*and Delegates Douglas, Gallagher,*  
*Trump and Kessel*)

Passed March 12, 1994

In Effect 90 Day from Passage

**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR

**H. B. 4508**

(By MR. SPEAKER, MR. CHAMBERS, AND DELEGATES DOUGLAS,  
GALLAGHER, TRUMP AND KESSEL)

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[Passed March 12, 1994; in effect ninety days from passage.]

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AN ACT to repeal article eleven, chapter twenty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal article ten-a, chapter forty-four of said code; and to further amend said code by adding thereto a new chapter, designated chapter forty-four-a, relating to the appointment of guardians and conservators for persons in need of protection.

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

That article eleven, chapter twenty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that article ten-a, chapter forty-four of said code be repealed; and that said code be further amended by adding thereto a new chapter, designated chapter forty-four-a, to read as follows:

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

**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  
5 the 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  
10 circuit courts. The Legislature further finds and  
11 declares that the use of the word “all” does not require  
12 an interpretation that the Legislature must place every  
13 aspect of such matters with circuit courts, but, that  
14 because of the discretionary authority given, the  
15 Legislature may transfer, from time to time, only those  
16 matters which it believes would be better served under  
17 the jurisdiction of circuit courts.

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

**§44A-1-2. Determinations and appointments under prior  
law.**

1 (a) Any person determined to be “mentally incompe-  
2 tent”, “mentally retarded” or “mentally handicapped”  
3 and for such reason deemed to be in need of a guardian  
4 or committee pursuant to any order entered and in  
5 effect prior to the effective date of this chapter is  
6 deemed to be a “protected person” within the meaning  
7 of this chapter, from and after its effective date, unless  
8 any such determination be revoked or otherwise  
9 modified.

10 (b) Any person heretofore appointed to serve as a  
11 committee for an incompetent person and any person  
12 appointed to serve as a guardian for a mentally retarded  
13 or for a mentally handicapped person, is, as of the  
14 effective date of this chapter, deemed to be: (1) A  
15 guardian, within the meaning of this chapter, if the

16 order appointing such person provides that the person  
17 so appointed has responsibility only for the personal  
18 affairs of a mentally incompetent, mentally retarded or  
19 mentally handicapped person; (2) a conservator, within  
20 the meaning of this chapter, if the order appointing such  
21 person provides that the person so appointed had  
22 responsibility only for managing the estate and financial  
23 affairs of a mentally incompetent, mentally retarded or  
24 mentally handicapped person; or (3) a guardian and a  
25 conservator, within the meaning of this chapter, if the  
26 order appointing such person does not set forth limita-  
27 tions of responsibility for both the personal affairs and  
28 the financial affairs of mentally incompetent, mentally  
29 retarded or mentally handicapped person.

30 (c) From and after the effective date of this chapter,  
31 the circuit courts shall have exclusive jurisdiction of all  
32 matters involving determinations of mental incompe-  
33 tency, mental retardation or mental handicap, including  
34 the jurisdiction of any proceedings pending as of such  
35 effective date. All orders entered prior to the effective  
36 date of this chapter in such cases shall remain in full  
37 force and effect until terminated, revoked or modified  
38 as provided herein.

39 (d) All persons heretofore appointed to serve as a  
40 committee or as a guardian shall retain their authority,  
41 powers and duties in such capacity, except to the extent  
42 that their authority, powers and duties as such guardian  
43 or conservator under the provisions of this chapter are  
44 more specifically enumerated, in which event such  
45 committee or guardian shall have the authority, powers  
46 and duties so enumerated.

47 Wherever in the constitution, the code of West  
48 Virginia, acts of the Legislature or elsewhere in law a  
49 reference is made to a committee for an incompetent  
50 person, such reference shall be read, construed and  
51 understood to mean guardian and/or conservator as  
52 defined in this chapter.

53 (e) The provisions of this chapter providing for the  
54 presentation of reports by guardians and the presenta-  
55 tion of accountings by conservators shall not be retro-

56 actively applied, and applicable law in effect prior to the  
57 effective date of this chapter shall control as to any  
58 reports or accountings to be made or filed for any period  
59 prior to the effective date of this chapter.

60 (f) As used in this section, “prior law” refers to article  
61 eleven, chapter twenty-seven of this code, relating to the  
62 appointment of committees for mentally incompetent  
63 persons, and to article ten-a, chapter forty-four, relating  
64 to the appointment of guardians for mentally retarded  
65 and mentally handicapped persons, as such articles were  
66 in effect prior to the effective date of this chapter.

**§44A-1-3. Advance directives.**

1 The existence of an advance directive such as a living  
2 will, medical power of attorney or durable power of  
3 attorney, duly executed by a person alleged to be a  
4 “protected person”, as defined in section four of this  
5 article, or the prior appointment of a surrogate decision-  
6 maker for the protected person may eliminate, limit or  
7 supersede the need for the assistance or protection of a  
8 guardian or conservator, and any person so appointed  
9 shall be the first preferred nominee for guardian or  
10 conservator, as set forth in section eight, article two of  
11 this chapter.

**§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  
12 term “guardian” shall mean or include a “limited  
13 guardian” or a “temporary guardian.”

14 (3) “Protected person” means an adult individual,

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

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

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

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

46 (7) "Person" means, generally, a natural person, any  
47 corporation, association, partnership or other business  
48 entity, any political subdivision or other public agency,  
49 or any estate, trust or other collection of properties to  
50 which the law attributes the capacity of having rights  
51 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) "Surrogate decision-maker" means an individual  
60 identified as such by an attending physician in accor-  
61 dance with the provisions of section seven, article thirty-  
62 b, chapter sixteen of this code.

**§44A-1-5. Rules of civil procedure.**

1 The West Virginia "Rules of Civil Procedure for Trial  
2 Courts of Record" shall apply to all proceedings  
3 instituted under the provisions of this chapter except as  
4 is otherwise specifically provided.

**§44A-1-6. Relationship to other laws.**

1 Nothing in this section may be construed to supersede  
2 the provisions of the Uniform Veterans' Guardianship  
3 Act, article fifteen, chapter forty-four of this code, nor  
4 any provisions of this code regarding testamentary  
5 guardianships or appointments of guardians for minors.

**§44A-1-7. Transfer of venue following appointment.**

1 Following the appointment of a full or limited  
2 guardian or conservator, the court with jurisdiction over  
3 the proceeding may, upon petition, order the transfer of  
4 jurisdiction to another circuit court in this state or to  
5 an appropriate tribunal in another state if it appears to  
6 the court that the interests of the protected person will  
7 be best served by such transfer.

**§44A-1-8. Persons and entities qualified to serve as  
guardian or conservator.**

1 (a) Any adult individual may be appointed to serve as  
2 a guardian, a conservator, or both, upon determination  
3 by the court that the individual is capable of providing  
4 an active and suitable program of guardianship or  
5 conservatorship for the protected person: *Provided*, That  
6 such individual is not employed by or affiliated with any  
7 public agency, entity or facility which is providing  
8 substantial services or financial assistance to the  
9 protected person.

10 (b) Any nonprofit corporation chartered in this state  
11 and licensed as set forth in subsection (c) of this section  
12 or a public agency that is not a provider of health care  
13 services to the protected person may be appointed to  
14 serve as a guardian, a conservator, or both: *Provided,*  
15 That such entity is capable of providing an active and  
16 suitable program of guardianship or conservatorship for  
17 the protected person and is not otherwise providing  
18 substantial services or financial assistance to the  
19 protected person.

20 (c) A nonprofit corporation chartered in this state may  
21 be appointed to serve as a guardian or conservator or  
22 as a limited or temporary guardian or conservator for  
23 a protected person if it is licensed to do so by the  
24 secretary of health and human resources. The secretary  
25 shall propose legislative rules, for promulgation in  
26 accordance with the provisions of chapter twenty-nine-  
27 a of this code, for the licensure of such nonprofit  
28 corporations and shall provide for the review of such  
29 licenses. The rules shall, at a minimum, establish  
30 standards to assure that any corporation licensed for  
31 such guardianship or conservatorship:

32 (1) Has sufficient fiscal and administrative resources  
33 to perform the fiduciary duties and make the reports  
34 and accountings required by this chapter;

35 (2) Will respect and maintain the dignity and privacy  
36 of the protected person;

37 (3) Will protect and advocate the legal human rights  
38 of the protected person;

39 (4) Will assure that the protected person is receiving  
40 appropriate educational, vocational, residential and  
41 medical services in the setting least restrictive of the  
42 individual's personal liberty;

43 (5) Will encourage the protected person to participate  
44 to the maximum extent of his or her abilities in all  
45 decisions affecting him or her and to act in his or her  
46 own behalf on all matters in which he or she is able to  
47 do so;

48 (6) Does not provide educational vocational, residential



49 or medical services to the protected person; and

50 (7) Has written provisions in effect for the distribution  
51 of assets and for the appointment of temporary  
52 guardians and conservators for any protected persons it  
53 serves in the event the corporation ceases to be licensed  
54 by the department of health and human resources or  
55 otherwise becomes unable to serve as guardian.

56 (d) A duly licensed nonprofit corporation that has been  
57 appointed to serve as a guardian or as a conservator  
58 pursuant to the provisions of this article is entitled to  
59 compensation in accordance with the provisions of  
60 section thirteen of this article.

61 (e) Except as provided in section thirteen of this  
62 article, no guardian or conservator nor any officer,  
63 agent, director, servant or employee of any such  
64 guardian or conservator shall do business with or in any  
65 way profit, either directly or indirectly, from the estate  
66 or income of any protected person for whom services are  
67 being performed by such guardian or conservator.

68 (f) Any bank or trust company authorized to exercise  
69 trust powers or to engage in trust business in this state  
70 may be appointed as a conservator if the court deter-  
71 mines it is capable of providing suitable conservatorship  
72 for the protected person.

73 (g) The department of adult protective services or a  
74 department designated by the secretary of health and  
75 human resources may be appointed to serve as a  
76 guardian, a conservator, or both, for individuals under  
77 its care or to whom it is providing services or financial  
78 assistance, but such appointment may only be made if  
79 there is no other individual, nonprofit corporation, bank  
80 or trust company, or other public agency that is equally  
81 or better qualified and willing to serve.

82 (h) The sheriff of the county in which a court has  
83 assumed jurisdiction may be appointed as a guardian,  
84 a conservator, or both.

85 (i) Other than a bank or trust company authorized to  
86 exercise trust powers or to engage in trust business in  
87 this state, a person who has an interest as a creditor of

88 a protected person shall not be eligible for appointment  
89 as either a guardian or conservator of the protected  
90 person.

**§44A-1-9. Posting of bonds; actions on bond.**

1 (a) The court shall have the discretion to determine  
2 whether the posting of a bond by a guardian, once  
3 appointed, is necessary.

4 (b) The court shall require the posting of a bond by  
5 a conservator upon appointment except where the  
6 conservator is excused from posting bond under the  
7 provisions of section eighteen, article four of chapter  
8 thirty-one-a of this code. In determining the amount or  
9 type of a conservator's bond, the court shall consider:

10 (1) The value of the personal estate and annual gross  
11 income and other receipts within the conservator's  
12 control;

13 (2) The extent to which the estate has been deposited  
14 under an arrangement requiring an order of court for  
15 its removal;

16 (3) Whether an order has been entered waiving the  
17 requirement that accountings be filed and presented or  
18 permitting accountings to be presented less frequently  
19 than annually;

20 (4) The extent to which the income and receipts are  
21 payable directly to a facility responsible for or which  
22 has assumed responsibility for the care or custody of the  
23 protected person;

24 (5) The extent to which the income and receipts are  
25 derived from state or federal programs that require  
26 periodic accountings;

27 (6) Whether a guardian has been appointed, and if so,  
28 whether the guardian has presented reports as required;  
29 and

30 (7) Whether the conservator was appointed pursuant  
31 to a nomination which requested that bond be waived.

32 (c) Any required bond shall be with such surety and  
33 in such amount and form as the court may order, and

34 the court may order additional bond or reduce the bond  
35 whenever the court finds that such modification is in the  
36 best interests of the protected person or of the estate.  
37 The court may allow a property bond in lieu of a cash  
38 bond.

39 (d) In case of a breach of any condition placed on the  
40 bond of any guardian or conservator, an action may be  
41 instituted by any interested person for the use and  
42 benefit of the protected person, for the estate of the  
43 protected person or for the beneficiaries of such estate.

44 (e) The following requirements and provisions apply  
45 to any bond which the court may require under this  
46 section:

47 (1) Unless otherwise provided by the terms of the  
48 approved bond, sureties are jointly and severally liable  
49 with the guardian/conservator and with each other.

50 (2) By executing an approved bond of a guardian or  
51 conservator, the surety consents to the jurisdiction of the  
52 court in any proceeding pertaining to the fiduciary  
53 duties of the conservator and naming the surety as a  
54 party respondent. Notice of any proceeding must be  
55 delivered to the surety or mailed by registered or  
56 certified mail to the address of the surety listed with the  
57 court in which the bond is filed. If the party initiating  
58 a proceeding possesses information regarding the  
59 address of a surety which would appear to be more  
60 current than the address listed with the court, notice  
61 shall also be mailed by registered or certified mail to  
62 the last address of the surety known to the party  
63 initiating the proceeding.

64 (3) On petition of a successor guardian or conservator  
65 or any interested person, a proceeding may be initiated  
66 against a surety for breach of the obligation of the bond  
67 of the preceding guardian or conservator.

68 (4) The bond of the guardian or conservator is not void  
69 after any recovery but may be proceeded against from  
70 time to time until the whole penalty is exhausted.

71 (f) No proceeding may be commenced against the  
72 surety on any matter as to which an action or proceeding

73 against the guardian or conservator is barred by  
74 adjudication or limitation.

**§44A-1-10. Mandatory education.**

1 (a) Any individual appointed to serve as a guardian  
2 or conservator shall receive educational material or  
3 complete mandated educational training, unless other-  
4 wise directed by the court.

5 (b) Upon a determination that the individual who is  
6 the subject of proceedings under this chapter is a  
7 protected person, as defined in section four of this  
8 article, the required educational training shall be  
9 completed within thirty days of the court's determina-  
10 tion. Upon completion, the appointed guardian or  
11 conservator shall provide an affidavit to the court,  
12 certifying that such educational training has been  
13 completed, and the court shall forthwith issue the order  
14 of appointment in accordance with the provisions of  
15 section thirteen, article two of this chapter.

16 (c) The secretary of health and human resources, no  
17 later than one year after the effective date of this act,  
18 shall develop and implement an educational program  
19 for guardians and conservators. The secretary shall also  
20 propose legislative rules for promulgation, in accor-  
21 dance with the provisions of chapter twenty-nine-a of  
22 this code, regarding mandatory educational training for  
23 guardians and conservators. Such educational training  
24 may include the following:

25 (1) Written materials;

26 (2) Recorded information, whether audio, visual or  
27 both; or

28 (3) A combination of the above.

**§44A-1-11. Guardian or conservator who resides out-of-  
state to designate resident agent.**

1 A guardian or conservator who is or who later  
2 becomes a nonresident of this state shall file with the  
3 clerk of the circuit court in the county in which the  
4 proceeding is pending or where he or she was appointed  
5 guardian/conservator a designation of an agent residing

6 in this state to accept service of process. Such filing shall  
7 be made promptly following the change of residence.

**§44A-1-12. Appointment of guardian or conservator  
acting in another state.**

1 (a) A guardian, conservator or like fiduciary ap-  
2 pointed in another state may be appointed to serve as  
3 a guardian or conservator in this state upon presentation  
4 of a petition therefor, proof of appointment, and a  
5 certified copy of such portion of the court record in the  
6 other state as the court in this state may require.

7 (b) Upon proper notice of hearing to all persons  
8 entitled to such notice under section six, article two of  
9 this chapter, a hearing shall be held, at which the court  
10 may, in its discretion, determine that the appointment  
11 in another state has sufficiently fulfilled the require-  
12 ments of this chapter. Upon such determination,  
13 appointment will be ordered forthwith, and the  
14 guardian/conservator shall immediately assume all  
15 responsibilities and duties required under the provisions  
16 of this chapter.

**§44A-1-13. Compensation.**

1 (a) Any guardian or conservator, whether full,  
2 temporary, or limited, is entitled to reasonable compen-  
3 sation as allowed by the court from the estate, including  
4 reimbursement for costs advanced. The frequency and  
5 amount of all compensation must be approved by the  
6 court.

7 (b) No guardian or conservator may use funds out of  
8 the estate in defense of an allegation of wrongdoing  
9 made on behalf of the protected person against the  
10 guardian or conservator.

11 (c) Attorneys appointed to represent individuals under  
12 this article shall be paid a reasonable rate of compen-  
13 sation from the estate, as approved by the circuit court,  
14 or, in the event the court determines that the estate is  
15 devoid of funds available for the payment of such fees,  
16 the attorney shall be paid at a rate prescribed by and  
17 from funds allocated by the supreme court of appeals.

**ARTICLE 2. PROCEDURE FOR APPOINTMENT OF GUARDIANS  
AND CONSERVATORS FOR PROTECTED  
PERSONS.**

**§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  
3 court in the county in which the alleged protected  
4 person resides or, if the alleged protected person has  
5 been admitted to a health care or correctional facility,  
6 in the county in which that facility is located.

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

12 (c) The fee for filing a petition shall be seventy dollars,  
13 payable upon filing to the circuit clerk, all of which shall  
14 be retained by the circuit clerk. The person bringing the  
15 petition shall be responsible for fees for filings of the  
16 petition and other papers, for service of process, and for  
17 copies of court documents and transcripts. In the event  
18 that a guardian and/or conservator is appointed by the  
19 court, such fees shall be reimbursed to the individual  
20 who filed the petition from the protected person's estate,  
21 if funds are available. Any person who is pecuniarily  
22 unable to pay such fees and costs as set forth in article  
23 one, chapter fifty-nine of this code, and article two,  
24 chapter fifty-one of this code, will not be required to pay  
25 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  
6 care to the individual, by the person that the individual  
7 has nominated as guardian or conservator, or by any  
8 other 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,  
12 place of residence, post office address, and relationship  
13 to the alleged protected person, and shall, to the extent  
14 known as 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  
19 order:

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

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

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

27 Once a relative or several relatives have been identi-  
28 fied in one of the aforementioned categories, relatives in  
29 a lower category do not have to be listed in the petition.

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

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

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

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

46 (7) The proposed guardian or conservator's name, post

47 office address and, if the proposed guardian or conser-  
48 vator is an individual, the individual's age, occupation  
49 and relationship to the alleged protected person;

50 (8) The name and post office address of a guardian  
51 nominated by the alleged protected person if different  
52 from the proposed guardian or conservator, and, if the  
53 person nominated as a guardian or conservator is an  
54 individual, the individual's age, occupation and relation-  
55 ship to the alleged protected person;

56 (9) The name and post office address of any guardian  
57 or conservator currently acting, whether in this state or  
58 elsewhere;

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

62 (11) If the appointment of a limited conservator is  
63 requested, the specific areas of management and  
64 assistance to be included in the order of appointment.

**§44A-2-3. Evaluation report.**

1 The petition shall include a report by a licensed  
2 physician or psychologist evaluating the condition of the  
3 alleged protected person which shall contain, to the best  
4 information and belief of its signatory or signatories:

5 (1) A description of the nature, type and extent of the  
6 person's incapacity, including the person's specific  
7 cognitive and functional limitations;

8 (2) Evaluations of the person's mental and physical  
9 condition and, where appropriate, educational condition,  
10 adaptive behavior and social skills;

11 (3) If the appointment of a guardian is requested, a  
12 description of the services, if any, currently being  
13 provided for the person's health, care, safety, habilita-  
14 tion, or therapeutic needs, and a recommendation as to  
15 the most suitable living arrangement and, where  
16 appropriate, treatment or habilitation plan and the  
17 reasons therefore;

18 (4) An opinion as to whether the appointment of a



19 guardian or conservator is necessary, the type and scope  
20 of the guardianship or conservatorship needed, and the  
21 reasons therefor;

22 (5) If the petition states that the incapacity of the  
23 alleged protected person will prevent attendance at the  
24 hearing, an opinion as to whether such attendance would  
25 be detrimental to the person's health, care, or safety;

26 (6) If the alleged protected person will attend the  
27 hearing, a statement as to whether the individual is on  
28 any medications that may affect the person's actions,  
29 demeanor and participation at the hearing;

30 (7) The signature of the evaluating physician or  
31 psychologist, and the signatures of any other individuals  
32 who performed, supervised or reviewed the assessments  
33 or examinations upon which the report is based or who  
34 made substantial contributions toward the report's  
35 preparation; and

36 (8) The date or dates of the assessments and exami-  
37 nations upon which the report is based.

38 The court, for good cause shown, may grant leave to  
39 file the petition without an evaluation report. If such  
40 leave is granted, the court shall order the appropriate  
41 assessments or examinations and shall order that a  
42 report be prepared and filed with the court.

**§44A-2-4. Statement of financial resources.**

1 Prior to a hearing for a conservatorship, the petitioner  
2 shall file a statement of the financial resources of the  
3 alleged protected person which shall, to the extent  
4 known, list the person's social security number, the  
5 approximate value of the person's real and personal  
6 property, and the person's anticipated annual gross  
7 income and other receipts.

**§44A-2-5. Confidentiality.**

1 Upon filing of a petition requesting appointment of a  
2 guardian or conservator, all pleadings, exhibits and  
3 other documents contained in the court file shall be  
4 considered confidential and not open for public inspect-  
5 ion, either during the pendency of the case or after the

6 case is closed. However, the contents of the court file  
7 shall be open to inspection and copying by the parties,  
8 their designees, and their attorneys.

**§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  
4 within 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  
13 before the hearing to all individuals seven years of age  
14 or older and to all entities whose names and post office  
15 addresses appear in the petition. A copy of certified mail  
16 return receipts shall be filed in the office of the circuit  
17 clerk on or before the date of hearing.

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

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

25  
26  
*ok*  
*5/20/17*  
27 At the hearing you may <sup>lose</sup>lose many of your rights. A  
28 guardian may be appointed to make personal decisions  
29 for you. A conservator may be appointed to make  
30 decisions concerning your property and finances. The  
31 appointment may affect control of how you spend your  
32 money, how your property is managed and controlled,  
33 who makes your medical decisions, where you live,  
34 whether you are allowed to vote and other important  
35 rights.

**§44A-2-7. Appointment of counsel.**

1 (a) The court shall appoint legal counsel for the  
2 alleged protected person. In appointing legal counsel,  
3 the court shall consider any known preferences of the  
4 alleged protected person.

5 (b) Legal counsel shall have the following major areas  
6 of concern: (1) Whether or not a guardian is needed; (2)  
7 limitation of the role of the guardian to the protected  
8 person's specific needs — e.g., personal supervisor,  
9 business affairs, medical consent only; (3) if needed,  
10 assure that the person or entity with the greatest  
11 interest in the protected person is appointed; (4) if  
12 needed, assure the adequacy of the bond; and (5) if  
13 needed, assure consideration of proper placement.

14 (c) In responsibly pursuing the major areas of concern  
15 set forth in subsection (b) of this section, counsel may  
16 perform any or all of the following: (1) Promptly notify  
17 the individual and any caretaker of the appointment of  
18 counsel; (2) contact any caretaker, review the file and  
19 all other relevant information; (3) maintain contact with  
20 the client throughout the case and assure that the client  
21 is receiving services as are appropriate to the client's  
22 needs; (4) contact persons who have or may have  
23 knowledge of the client; (5) interview all possible  
24 witnesses; (6) pursue discovery of evidence, formal and  
25 informal; (7) file appropriate motions; (8) obtain  
26 independent psychological examinations, medical exam-  
27 inations, home studies, as needed; (9) advise the client  
28 on the ramifications of the proceeding and inquire into  
29 the specific interests and desires of the individual; (10)  
30 subpoena witnesses to the hearing; (11) prepare testi-  
31 mony for cross-examination of witnesses to assure  
32 relevant material is introduced; (12) review all medical  
33 reports; (13) apprise the decision maker of the individ-  
34 ual's desires; (14) produce evidence on all relevant  
35 issues; (15) interpose objections to inadmissible testi-  
36 mony and otherwise zealously represent the interests  
37 and desires of the client; (16) raise appropriate questions  
38 to all nominations for guardian and the adequacy of the  
39 bond; (17) take all steps to limit the scope of guardian-  
40 ship to the individual's actual needs, and make all

41 arguments to limit the amount of the intervention; (18)  
42 ensure that the court considers all issues as to the  
43 propriety of the individual's current or intended  
44 placement and that the limitations are set forth in the  
45 order; (19) inform the client of the right to appeal, and  
46 file an appeal to an order when appropriate; and (20)  
47 file a motion for modification of an order or a petition  
48 for a writ of habeas corpus if a change of circumstances  
49 occurs which warrants a modification or termination.

50 (d) The protected person shall have the right to an  
51 independent expert of his or her choice to perform an  
52 evaluation and present evidence.

**§44A-2-8. Nomination of guardian or conservator of  
alleged protected person; preferences.**

1 Any person who has sufficient capacity to form a  
2 preference may at any time nominate any individual or  
3 entity to serve as his or her guardian or conservator. The  
4 nomination may be made in writing, by an oral request  
5 to the court, or may be proved by any other competent  
6 evidence. The designation of a representative under a  
7 valid medical power of attorney, a living will or of a  
8 surrogate decision-maker shall constitute competent  
9 evidence of the nomination of a guardian, and the  
10 designation of an attorney under a valid durable power  
11 of attorney shall constitute competent evidence of the  
12 nomination of a conservator. The court shall appoint the  
13 one so nominated if the nominee is otherwise eligible to  
14 act and would serve in the best interests of the alleged  
15 protected person.

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

1 (a) The court may hear the petition for the appoint-  
2 ment of a guardian or conservator or may designate the  
3 mental hygiene commissioner in the circuit to serve as  
4 the trier of fact at the hearing on the petition. If a  
5 mental hygiene commissioner is appointed, a mental  
6 hygiene commitment proceeding may not be held  
7 simultaneously with a proceeding for the appointment  
8 of a guardian or conservator. The designated mental  
9 hygiene commissioner shall submit written findings of  
10 fact and recommendations to the court upon conclusion

11 of the hearing. The court may accept or reject the  
12 recommendations of the mental hygiene commissioner.  
13 Only the court may enter an order appointing a  
14 guardian or conservator.

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

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

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

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

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

**§44A-2-10. Factors to be considered by court.**

1 (a) The court alone shall determine whether a  
2 guardian or conservator should be appointed, the type  
3 thereof, and the specific areas of protection, manage-  
4 ment and assistance to be granted. Any determination  
5 that the individual is a protected person shall contain  
6 a specific finding that the person meets the definition  
7 set forth in section four, article one of this chapter. In  
8 making the determination, the court shall consider the  
9 suitability of the proposed guardian or conservator, the  
10 limitations of the alleged protected person, the develop-  
11 ment of the person's maximum self-reliance and  
12 independence, the availability of less restrictive alterna-  
13 tives including advance directives, and the extent to  
14 which it is necessary to protect the person from neglect,  
15 exploitation, or abuse.

16 (b) Except as provided in section eight of this article,  
17 the selection of the guardian or conservator shall be in  
18 the discretion of the court. The court shall select the  
19 individual or entity best qualified to act in the best  
20 interest of the protected person, after consideration of  
21 the proposed guardian's or conservator's geographic  
22 location, familial or other relationship with such person,  
23 ability to carry out the powers and duties of the office,  
24 commitment to promoting such person's welfare, any  
25 potential conflicts of interest, and the recommendations  
26 of the spouse, the parents, children or other interested  
27 relatives, whether made by will or otherwise. The court  
28 may only appoint one guardian and one conservator and  
29 it need not appoint the same individual or entity to serve  
30 as both guardian and conservator.

31 (c) A guardianship or conservatorship appointed  
32 under this article shall be the least restrictive possible,  
33 and the powers shall not extend beyond what is  
34 absolutely necessary for the protection of the individual.

**§44A-2-11. Limited guardianships.**

1 (a) A limited guardian may be appointed for an  
2 individual who is deemed to be a protected person in  
3 need of a guardian within the meaning of section four,  
4 article one of this chapter, but is capable of addressing

5 some of the essential requirements for his or her health,  
6 care, safety, habilitation, or therapeutic needs.

7 (b) A limited guardian may be appointed for an  
8 individual who otherwise is deemed to be a protected  
9 person within the meaning of this chapter, and who  
10 resides in a supervised setting such that the individual's  
11 health, care, safety, habilitation and therapeutic needs  
12 are being attended to without interference, but whose  
13 impairment warrants the appointment of a substitute  
14 decision-maker for purposes of the ultimate decisions of  
15 the location of residence and major medical decisions,  
16 and the like.

17 (c) A limited guardian may be appointed for the sole  
18 purpose of providing for an individual who otherwise is  
19 deemed to be a protected person within the meaning of  
20 this chapter, and whose health, care, safety, habilitation  
21 and therapeutic needs are being attended to in a  
22 supervised residence, but whose only need is for a  
23 substituted decision-maker in the event of a major  
24 medical decision.

**§44A-2-12. Limited conservatorships.**

1 (a) A limited conservator may be appointed for an  
2 individual deemed to be a protected person in need of  
3 a conservator within the meaning of section four, article  
4 one of this chapter, but whose property or financial  
5 affairs are so limited that there is only one or more  
6 designated contexts for which a limitation of the  
7 individual's legal rights is warranted.

8 (b) No conservator shall be appointed for a person  
9 whose only source or major source of income and  
10 property is from the Social Security Administration and  
11 who has a representative payee functioning in the best  
12 interest of the individual, or for such other person whose  
13 opportunity for regular expenditure of resources is so  
14 limited that the only practical effect of the appointment  
15 of a conservator would be to deprive the individual of  
16 the right of daily decisions involving minor personal  
17 matters.

**§44A-2-13. Order of appointment; notice.**

1 (a) An order appointing a guardian or conservator  
2 may only be issued by the court upon the following:

3 (1) The guardian or conservator has subscribed to and  
4 filed an oath promising to faithfully perform the duties  
5 of the office in accordance with all provisions of this  
6 chapter;

7 (2) Posting of any bond, if required; and

8 (3) The completion of mandatory education, as  
9 required under the provisions of section ten, article one  
10 of this chapter, unless waived by the court.

11 (b) In addition to the findings of fact and conclusions  
12 of law required in section nine of this article, the order  
13 shall include the specific areas of protection or assist-  
14 ance granted in the case of a guardian and the specific  
15 areas of management and assistance granted in the case  
16 of a conservator.

17 (c) Within fourteen days following the entry of an  
18 order of appointment, the guardian or conservator shall  
19 mail a copy of the order of appointment, together with  
20 a brief statement in large print of rights to seek an  
21 appeal for modification or termination, to the protected  
22 person and to all individuals and entities given notice  
23 of the petition.

**§44A-2-14. Temporary guardians and conservators.**

1 (a) The court may appoint a temporary guardian or  
2 temporary conservator, or both, under this section upon  
3 a finding that an immediate need exists, that adherence  
4 to the procedures otherwise set forth in this chapter for  
5 the appointment of a guardian or conservator may result  
6 in significant harm to a person or the estate, and that  
7 no other individual or entity appears to have authority  
8 to act on behalf of the person, or that the individual or  
9 entity with authority to act is unwilling, or has  
10 ineffectively or improperly exercised the authority.

11 (b) A temporary guardian or temporary conservator  
12 shall have only those powers and duties which are  
13 specifically set forth in the order of appointment. The  
14 appointment of a temporary guardian or temporary



15 conservator shall expire within forty-five days unless  
16 extended by the court for an additional forty-five days  
17 for good cause shown.

18 (c) An appointment of a temporary guardian or  
19 temporary conservator shall be made upon timely and  
20 adequate notice to the protected person after appoint-  
21 ment of counsel and after all other protections have been  
22 afforded, in accordance with due process of law,  
23 including any other conditions as the court may order.  
24 The protected person may petition the court for a  
25 substitution of a temporary guardian or temporary  
26 conservator at any time.

27 (d) Within five days following the entry of an order  
28 of appointment, a temporary guardian or temporary  
29 conservator shall mail a copy of the order of appoint-  
30 ment, together with a brief statement in large print of  
31 rights to seek an appeal for modification or termination,  
32 to the person for whom the appointment was made and  
33 to all individuals and entities that would be entitled to  
34 notice of hearing on a petition for appointment as set  
35 forth in section six of this article.

**§44A-2-15. Notice of hearing on petitions subsequent to  
the appointment of a guardian or  
conservator.**

1 Except as otherwise provided herein or as ordered by  
2 the court for good cause shown, notice of hearing on a  
3 petition for an order subsequent to the appointment of  
4 a guardian or conservator shall be personally served  
5 upon the protected person and mailed to all attorneys  
6 of record, to those individuals who would be entitled to  
7 notice of the filing of an original petition to appoint, to  
8 any facility that is responsible for the care or custody  
9 of the protected person, to the guardian or conservator,  
10 if the guardian or conservator is not the petitioner, and  
11 to such other individuals or entities as the court may  
12 order. Unless otherwise ordered by the court, the notice  
13 shall be personally served upon the protected person or  
14 mailed by the petitioner by certified mail return receipt  
15 requested to other parties entitled to notice at least  
16 fourteen days prior to the hearing and shall be accom-

17 panied by a copy of the petition and other relevant  
18 documents. A copy of the certified mail return receipts  
19 shall be filed in the office of the circuit clerk on or  
20 before the date of the hearing. If deceased, notice to a  
21 protected person shall be sent to his or her last known  
22 address or to his or her successors in interest, if known.

**ARTICLE 3. ADMINISTRATION OF GUARDIANSHIPS AND  
CONSERVATORSHIPS.**

**§44A-3-1. Duties of guardian of protected person.**

1 A guardian of a protected person shall be responsible  
2 for obtaining provision for and making decisions with  
3 respect to the protected person's support, care, health,  
4 habilitation, education, therapeutic treatment, and, if  
5 not inconsistent with an order of commitment or  
6 custody, to determine the protected person's residence.  
7 A guardian shall maintain sufficient contact with the  
8 protected person to know of the protected person's  
9 capabilities, limitations, needs, and opportunities, and  
10 such contact shall not be less frequent than one visit  
11 every six months. A guardian shall be required to seek  
12 prior court authorization to change the protected  
13 person's residence to another state, to terminate or  
14 consent to a termination of the protected person's  
15 parental rights, to initiate a change in the protected  
16 person's marital status, to deviate from a protected  
17 person's living will or medical power of attorney, or to  
18 revoke or amend a durable power of attorney executed  
19 by the protected person.

20 A guardian shall exercise authority only to the extent  
21 necessitated by the protected person's limitations, and,  
22 where feasible, shall encourage the protected person to  
23 participate in decisions, to act on his or her own behalf,  
24 and to develop or regain the capacity to manage  
25 personal affairs. A guardian shall, to the extent known,  
26 consider the express desires and personal values of the  
27 protected person when making decisions, and shall  
28 otherwise act in the protected person's best interests and  
29 exercise reasonable care, diligence, and prudence.

**§44A-3-2. Reports by guardian of protected person.**

1 Any guardian appointed pursuant to the provisions of

2 this chapter shall file periodic reports, in accordance  
3 with section eleven of this article.

4 (a) The guardian's report shall include:

5 (1) A description of the current mental, physical, and  
6 social condition of the protected person;

7 (2) A description of the protected person's living  
8 arrangements during the reported period;

9 (3) The medical, educational, vocational, and other  
10 professional services provided to the protected person  
11 and the guardian's opinion as to the adequacy of the  
12 protected person's care;

13 (4) A summary of the guardian's visits with and  
14 activities on behalf of the protected person;

15 (5) A statement of whether the guardian agrees with  
16 the current treatment or habilitation plan;

17 (6) A recommendation as to the need for continued  
18 guardianship and any recommended changes in the  
19 scope of the guardianship;

20 (7) Any other information requested by the court or  
21 useful in the opinion of the guardian;

22 (8) The compensation requested and the reasonable  
23 and necessary expenses incurred by the guardian; and

24 (9) A verification signed by the guardian stating that  
25 all of the information contained in the report is true and  
26 correct to the best of his or her knowledge.

27 (b) The court may order the guardian to attend a  
28 hearing on the report by motion of the court, or upon  
29 the petition of any interested person. A report of the  
30 guardian may be incorporated into and made a part of  
31 the accounting of the conservator.

**§44A-3-3. Distributive duties and powers of the conserva-  
tor of a protected person.**

1 (a) A conservator of a protected person, without the  
2 necessity of seeking prior court authorization, shall  
3 apply the income and principal of the estate as needed  
4 for the protected person's support, care, health, and if

5 applicable, habilitation, education or therapeutic needs.  
6 A conservator shall also apply the income and principal  
7 as needed for the support of any legal dependents who  
8 are unable to support themselves and who are in need  
9 of support.

10 (b) A conservator, when making distributions, shall  
11 exercise authority only to the extent necessitated by the  
12 protected person's limitations, and shall, where feasible,  
13 encourage the protected person to participate in  
14 decisions, to act on his or her own behalf, and to develop  
15 or regain the capacity to manage the estate and his or  
16 her financial affairs. A conservator shall also consider  
17 the size of the estate, the probable duration of the  
18 conservatorship, the protected person's accustomed  
19 manner of living, other resources known to the conser-  
20 vator to be available, and the recommendations of the  
21 guardian.

22 (c) A conservator shall, to the extent known, consider  
23 the express desires and personal values of the protected  
24 person when making decisions, and shall otherwise act  
25 in the protected person's best interests and exercise  
26 reasonable care, diligence, and prudence.

27 (d) A conservator may not revoke or amend a durable  
28 power of attorney which has been executed by the  
29 protected person without the prior approval of the court.

**§44A-3-4. Management powers and duties of conservator.**

1 A conservator, in managing the estate, shall act as a  
2 fiduciary and serve in the best interests of the protected  
3 person and shall, in addition, have the following powers  
4 which may be exercised without prior court authoriza-  
5 tion except as otherwise specifically provided:

6 (1) To invest and reinvest the funds of the estate in  
7 accordance with a standard of prudent investing;

8 (2) To collect, hold, and retain assets of the estate,  
9 including land in another state, and to receive additions  
10 to the estate;

11 (3) To continue or participate in the operation of any  
12 unincorporated business or other enterprise;

13 (4) To deposit estate funds in a state or federally  
14 insured financial institution, including one operated by  
15 the conservator;

16 (5) To manage, control and sell at public or private  
17 sale, for cash or for credit, the personal property of the  
18 estate;

19 (6) To perform a contract entered into by a protected  
20 person, including a contract to convey or purchase real  
21 or personal property;

22 (7) To renew a lease entered into by a protected person  
23 as lessor or lessee with or without an option to purchase,  
24 including leases for real and personal property and  
25 leases and other arrangements for exploration and  
26 removal of minerals or other natural resources notwith-  
27 standing that the lease or other arrangement may  
28 extend beyond the term of the conservatorship;

29 (8) To borrow money and to place, renew or extend  
30 an encumbrance upon any property, real or personal,  
31 including the power to borrow from a financial institu-  
32 tion operated by the conservator, subject to the provi-  
33 sions of section twelve of this article;

34 (9) To abandon property when, in the opinion of the  
35 conservator, it is valueless or is so encumbered or in  
36 such condition that it is of no benefit to the estate;

37 (10) To make ordinary or extraordinary repairs or  
38 alterations in buildings or other property and to grant  
39 easements for public or private use, or both, with or  
40 without consideration;

41 (11) To vote a security, in person or by general or  
42 limited proxy, and to consent to the reorganization,  
43 consolidation, merger, dissolution, or liquidation of a  
44 corporation or other enterprise;

45 (12) To sell or exercise stock subscription or conver-  
46 sion rights and to pay calls, assessments, and any other  
47 sums chargeable or accruing against or on account of  
48 securities;

49 (13) To hold a security in the name of a nominee or  
50 in other form without disclosure of the conservatorship,

51 so that title to the security may pass by delivery, but  
52 the conservator is liable for any act of the nominee in  
53 connection with a security so held;

54 (14) To insure the assets of the estate against damage  
55 or loss, and the guardian and conservator against  
56 liability with respect to third persons;

57 (15) To allow, pay, reject, contest or settle any claim  
58 by or against the estate or protected person by com-  
59 promise or otherwise, and to release, in whole or in part,  
60 any claim belonging to the estate to the extent it is  
61 uncollectible;

62 (16) To pay taxes, assessments and other expenses  
63 incurred in the collection, care and administration of the  
64 estate;

65 (17) To pay any sum distributable for the benefit of  
66 the protected person or for the benefit of a legal  
67 dependent by paying the sum directly to the distributee,  
68 to the provider of goods and services, to any individual  
69 or facility that is responsible for or has assumed  
70 responsibility for care and custody, to a distributee's  
71 custodian under a Uniform Gifts or Transfers Act of any  
72 applicable jurisdiction, or by paying the sum to the  
73 guardian of the protected person or, in the case of a  
74 dependent, to the dependent's guardian or conservator;

75 (18) To employ persons, including attorneys, account-  
76 ants, investment advisors, or agents; to act upon their  
77 recommendations without independent investigation; to  
78 delegate to them any power, whether ministerial or  
79 discretionary; and to pay them reasonable compensation;

80 (19) To maintain life, health, casualty and liability  
81 insurance for the benefit of the protected person, or  
82 legal dependents;

83 (20) To manage the estate following the termination  
84 of the conservatorship and until its delivery to the  
85 protected person, or successors in interest; and

86 (21) To execute and deliver all instruments and to take  
87 all other actions that will accomplish or facilitate the  
88 exercise of the powers conferred in accordance with the

89 provisions of this chapter.

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

1 A conservator shall not sell real estate and shall not  
2 be authorized to mortgage any real estate until thirty  
3 days after persons entitled to notice of hearing of the  
4 original petition are notified, and the court has consi-  
5 dered any objections and determined whether additional  
6 bond is required.

**§44A-3-6. Protective arrangements.**

1 Upon petition therefor, the court may authorize a  
2 conservator to enter into a protective arrangement, to  
3 disburse the estate of the protected person and to  
4 petition for termination of the conservatorship. "Protec-  
5 tive arrangements" include, but are not limited to, the  
6 payment, delivery, deposit, or retention of funds or  
7 property; the sale, mortgage, lease, or other transfer of  
8 property; the execution of an annuity contract, a  
9 contract for life care, a deposit contract, or a contract  
10 for training and education; and the addition to or  
11 establishment of a suitable trust.

**§44A-3-7. Estate planning.**

1 (a) Upon petition, the court may authorize a conser-  
2 vator to exercise the following powers over the estate or  
3 financial affairs of a protected person which the  
4 protected person could have exercised if he or she were  
5 not subject to conservatorship:

6 (1) To make gifts to charity or other donees and to  
7 convey interests in any property;

8 (2) To provide support for individuals who are not  
9 legal dependents;

10 (3) To amend or revoke trusts or to create or make  
11 additions to revocable or irrevocable trusts even though  
12 such trusts may extend beyond the life of the protected  
13 person;

14 (4) To disclaim, renounce, or release any interest or  
15 power, or to exercise any power;

16 (5) To exercise options or change the beneficiary on

17 or withdraw the cash value of any life insurance policy,  
18 annuity policy, or retirement plan;

19 (6) To elect against the estate of the protected person's  
20 spouse;

21 (7) To withdraw funds from multiple party bank  
22 accounts, to change the beneficiary on or dispose of any  
23 payable or transfer on death arrangement, or to dispose  
24 of any property specifically devised or bequeathed under  
25 the protected person's will.

26 (b) The court, in authorizing the conservator to  
27 exercise any of the above powers, shall primarily  
28 consider the decision which the protected person would  
29 have made, to the extent that the decision can be  
30 ascertained. The court shall also consider the financial  
31 needs of the protected person and the needs of legal  
32 dependents for support, possible reduction of income,  
33 estate, inheritance or other tax liabilities, eligibility for  
34 governmental assistance, the protected person's prior  
35 pattern of giving or level of support, the existing estate  
36 plan, the protected person's probable life expectancy,  
37 the probability that the conservatorship will terminate  
38 prior to the protected person's death, and any other  
39 factors which the court believes pertinent.

40 (c) No order may be entered under this section unless  
41 notice of hearing is first given to the protected person,  
42 to the beneficiaries of the protected person's estate plan  
43 and to the individuals who would succeed to the  
44 protected person's estate by intestate succession. No  
45 trust may be amended or revoked without prior notice  
46 of hearing to the trustee thereof.

47 (d) In making a determination under this section, the  
48 court shall be entitled to compel the production of  
49 documents, including the protected person's will.

50 (e) Nothing in this section shall be construed to create  
51 a duty on the part of a conservator to revise a protected  
52 person's estate plan.

**§44A-3-8. Conservator's inventory.**

1 (a) Within ninety days following entry of an order of



2 appointment, a conservator shall file with the court an  
3 inventory of the real and personal estate of the protected  
4 person which has come into the conservator's possession  
5 or knowledge. The inventory shall include, with reason-  
6 able detail, a listing of each item of the estate, its  
7 approximate fair market value and the type and amount  
8 of encumbrance to which it is subject. If any real or  
9 personal estate comes into the possession or knowledge  
10 of the conservator subsequent to the filing of the initial  
11 inventory, the conservator shall either amend the  
12 inventory or list the same in the next accounting  
13 required to be filed with the court, as described in  
14 section eight of this article.

15 (b) A conservator shall mail a copy of the inventory  
16 to the individuals and entities who received notice of  
17 hearing, as specified in section six, article two of this  
18 chapter, no later than fourteen days following its  
19 presentation of the inventory.

**§44A-3-9. Accountings by conservator.**

1 Any conservator appointed pursuant to the provisions  
2 of this chapter shall file periodic accountings as  
3 provided for under section eleven of this article.

4 (a) The accounting shall include:

5 (1) A listing of the receipts, disbursements and  
6 distributions from the estate under the conservator's  
7 control during the period covered by the accounting;

8 (2) A listing of the estate;

9 (3) The services being provided to the protected  
10 person;

11 (4) The significant actions taken by the conservator  
12 during the reporting period;

13 (5) A recommendation as to the continued need for  
14 conservatorship and any recommended change in the  
15 scope of the conservatorship.

16 (6) Any other information requested by the court or  
17 useful in the opinion of the conservator;

18 (7) The compensation requested and the reasonable

19 and necessary expenses incurred by the conservator; and

20 (8) A verification signed by the conservator stating  
21 that all of the information contained in the accounting  
22 is true and correct to the best of his or her knowledge.

23 (b) The court may order the conservator to attend a  
24 hearing on the accounting by motion of the court or upon  
25 the petition of any interested person. An accounting by  
26 a conservator may be incorporated into and made a part  
27 of the report of the guardian.

**§44A-3-10. Waiver of accountings.**

1 (a) The court, upon petition therefor, may waive the  
2 requirement that accountings be filed or may permit  
3 accountings to be filed less frequently than annually if  
4 it determines that the expense involved or burden  
5 placed on the conservator in preparing and presenting  
6 annual accountings outweighs the benefit and protection  
7 afforded thereby to the protected person.

8 (b) In determining whether accountings may be  
9 waived or filed less frequently than annually, the court  
10 shall consider:

11 (1) The relationship of the conservator to the protected  
12 person;

13 (2) The value of the estate and annual gross income  
14 and other receipts within the conservator's control;

15 (3) The amount of the bond;

16 (4) The extent to which the estate has been deposited  
17 under an arrangement requiring an order of court for  
18 its removal;

19 (5) The extent to which the income and receipts are  
20 payable directly to a facility responsible for the care or  
21 custody of the protected person;

22 (6) The extent to which the income and receipts are  
23 derived from state or federal programs that require  
24 periodic accountings;

25 (7) Whether a guardian has been appointed, and if so,  
26 whether the guardian has presented reports as required;

27 and

28 (8) Any other factors which the court deems approp-  
29 riate.

**§44A-3-11. Filing of reports and accountings.**

1 (a) Reports of guardians and accountings of conserva-  
2 tors, as described in this article shall be filed with the  
3 circuit clerk of the county in which appointed, within  
4 sixty days following the first anniversary of the  
5 appointment and:

6 (1) At least annually thereafter;

7 (2) When the court orders additional reports or  
8 accountings to be filed;

9 (3) When the guardian or conservator resigns or is  
10 removed; and

11 (4) When the appointment of the guardian or conser-  
12 vator is terminated, except that in the case of a  
13 guardian, the court may determine that there is no need  
14 for a report upon such termination; and in the case of  
15 a conservator, no accounting will be required if the  
16 persons entitled to the estate consent thereto.

17 (b) A guardian or conservator may elect to file a  
18 periodic report or accounting on a calendar-year basis;  
19 however, in no event may such a report or accounting  
20 cover a period of more than one year. A calendar-year  
21 report or accounting shall be filed with the circuit clerk  
22 no later than the fifteenth day of April of the succeeding  
23 year.

**§44A-3-12. Self-dealing and conflicts of interest.**

1 (a) Unless court approval is first obtained, or unless  
2 such relationship existed prior to the appointment and  
3 was disclosed in the petition for appointment, a conser-  
4 vator may not:

5 (1) Have any interest, financial or otherwise, directly  
6 or indirectly, in any business transaction or activity with  
7 the conservatorship;

8 (2) Acquire an ownership, <sup>possessory</sup> ~~possessors~~, security, or

*h*

9 other pecuniary interest adverse to the protected person,  
10 or to the estate, or an interest in an asset in which the  
11 protected person also owns an interest;

12 (3) Directly or indirectly purchase, lease, or sell any  
13 property from or to the protected person or from or to  
14 the estate;

15 (4) Borrow or loan funds to the protected person or  
16 to the estate, except for reasonable advances without  
17 interest for the protection of the estate;

18 (5) Compromise or otherwise modify a debt owed by  
19 the conservator to the protected person or to the estate;

20 (6) Employ individuals or entities who were associated  
21 with or employed by the conservator prior to the  
22 appointment; or

23 (7) Directly or indirectly purchase, lease or sell  
24 property or services from or to any entity in which the  
25 conservator or a relative of the conservator is an officer,  
26 director, shareholder or proprietor, or owns a significant  
27 financial interest.

28 (b) Any activity prohibited by this section is voidable  
29 by the court upon the petition of any interested person  
30 or upon a motion of the court. This section does not limit  
31 any other remedies which may be available for a breach  
32 by the conservator or others of their fiduciary duty to  
33 the protected person or to the estate.

**§44A-3-13. Personal liability of guardians.**

1 (a) A guardian shall have a fiduciary duty to the  
2 protected person for whom he or she was appointed  
3 guardian and may be held personally liable for a breach  
4 of that duty.

5 (b) A guardian shall not be liable for the acts of the  
6 protected person, unless the guardian is personally  
7 negligent, nor shall a guardian be required to expend  
8 personal funds on behalf of the protected person.

**§44A-3-14. Personal liability of conservators.**

1 (a) A conservator shall have a fiduciary duty to the  
2 protected person for whom he or she was appointed

3 conservator and may be held personally liable for a  
4 breach of that duty.

5 (b) Unless otherwise provided in the contract, a  
6 conservator is not personally liable on a contract entered  
7 into in a fiduciary capacity in the course of administra-  
8 tion of the estate unless the conservator fails to reveal  
9 the representative capacity or to identify the estate in  
10 the contract.

11 (c) A conservator is personally liable for obligations  
12 arising from ownership or control of property of the  
13 estate or for torts committed in the course of adminis-  
14 tration of the estate only if personally negligent.

15 (d) Claims based upon contracts entered into by a  
16 conservator in a fiduciary capacity, obligations arising  
17 from ownership or control of the estate, or torts  
18 committed in the course of administration of the estate,  
19 may be asserted against the estate by proceeding  
20 against the conservator in a fiduciary capacity, whether  
21 or not the conservator is personally liable therefor.

22 (e) A successor conservator is not personally liable for  
23 the contracts or actions of a predecessor. However, a  
24 successor conservator is not immunized from liability  
25 for a breach of fiduciary duty committed by a prede-  
26 cessor if the successor learns of the breach and fails to  
27 take reasonable corrective action.

**§44A-3-15. Protection for persons conducting business  
with guardians and conservators.**

1 Any individual or entity who, in good faith, conducts  
2 business with a guardian or conservator as to any  
3 matter or transaction is entitled to presume that the  
4 guardian or conservator is properly authorized to act.  
5 The fact that an individual or entity conducts business  
6 with a guardian or conservator with knowledge of the  
7 representative capacity does not alone require an  
8 inquiry into the authority of the guardian or conserva-  
9 tor, except that any such individual or entity shall be  
10 charged with knowledge of restrictions which may  
11 appear in an order appointing the guardian or conser-  
12 vator. No individual or entity shall be required to see

13 to the proper application of any funds or property paid  
14 to or delivered to a conservator.

**§44A-3-16. Court modification of powers and duties of guardian or conservator.**

1 Nothing in this chapter shall prohibit the court from  
2 limiting the powers which may otherwise be exercised  
3 by a guardian or conservator without prior court  
4 authorization, from authorizing transactions which  
5 might otherwise be prohibited, or from granting  
6 additional powers to a guardian or conservator. Nothing  
7 in this chapter shall prohibit a guardian or conservator  
8 from seeking court authorization, instructions or  
9 ratification for any actions, proposed actions, or  
10 omissions to act.

**ARTICLE 4. TERMINATION, REVOCATION AND MODIFICATION OF APPOINTMENTS.**

**§44A-4-1. Termination of appointment of guardian or conservator.**

1 The appointment of a guardian or conservator shall  
2 terminate upon the death, resignation, or removal of the  
3 guardian or conservator or upon the termination of the  
4 guardianship or conservatorship. A termination of an  
5 appointment does not affect the liability of a guardian  
6 or conservator for prior acts or the responsibility of a  
7 conservator to account for the estate of the protected  
8 person.

**§44A-4-2. Appointment of successor guardian or conservator.**

1 The court may appoint a successor guardian or  
2 conservator prior to or at the time of a termination. A  
3 successor guardian appointed prior to a termination  
4 shall be immediately empowered to assume the duties  
5 of office but shall be required to file the requisite oath,  
6 post any required bond, and complete mandatory  
7 education, if required by the court, within thirty days  
8 of the termination of the predecessor. A successor  
9 guardian or conservator shall succeed to the powers and  
10 duties of the predecessor unless otherwise ordered by  
11 the court.

**§44A-4-3. Resignation of guardian or conservator.**

1 A guardian or conservator shall petition the court for  
2 permission to resign at least sixty days prior to the  
3 effective date of resignation. The court shall grant the  
4 permission to resign, except for good cause, and,  
5 pursuant to the provisions of section two of this article,  
6 shall appoint a suitable successor who is willing to serve.

**§44A-4-4. Removal of guardian or conservator.**

1 Upon the petition of any interested person or upon the  
2 motion of the court, the court may remove a guardian  
3 or conservator or order other appropriate relief if the  
4 guardian or conservator:

5 (1) Is acting under an order entered pursuant to  
6 material misrepresentation or mistake, whether fraud-  
7 ulent or innocent;

8 (2) Has an incapacity or illness, including substance  
9 abuse, which affects his or her fitness to perform or is  
10 adjudged to be a protected person in this or in any other  
11 jurisdiction;

12 (3) Is convicted of a crime which reflects upon his or  
13 her fitness to perform;

14 (4) Wastes or mismanages the estate, unreasonably  
15 withholds distributions or makes distributions in a  
16 negligent or reckless manner or otherwise abuses  
17 powers or fails to discharge duties;

18 (5) Neglects the care and custody of the protected  
19 person or legal dependents;

20 (6) Has an interest adverse to the faithful performance  
21 of duties such that there is a substantial risk that the  
22 guardian or conservator will fail to properly perform  
23 those duties;

24 (7) Fails to file reports or accountings when required,  
25 or fails to comply with any court order;

26 (8) Fails to file sufficient bond after being ordered by  
27 the court to do so;

28 (9) Avoids service of process or notice;

29 (10) Becomes incapable of performing duties; or

30 (11) Is not acting in the best interests of the protected  
31 person or of the estate, with or without fault. The court  
32 may appoint a temporary guardian pending a determi-  
33 nation on a petition for removal of a guardian or  
34 conservator.

**§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  
4 state or if ordered by the court following a hearing on  
5 the petition of any interested person.

**§44A-4-6. Petition for termination, revocation or modification; standards.**

1 (a) Upon a petition filed pursuant to this section, or  
2 upon a petition for a writ of habeas corpus, duly filed,  
3 the court may terminate the appointment of a guardian  
4 or conservator.

5 (b) Upon petition by the protected person, by the  
6 guardian or conservator, by any other interested person,  
7 or upon the motion of the court, the court may terminate  
8 a guardianship, conservatorship, or both, or modify the  
9 type of appointment or the areas of protection, manage-  
10 ment or assistance previously granted. Such termin-  
11 ation, revocation or modification may be ordered if:

12 (1) The protected person is no longer in need of the  
13 assistance or protection of a guardian or conservator;

14 (2) The extent of protection, management or assistance  
15 previously granted is either excessive or insufficient  
16 considering the current need therefor;

17 (3) The protected person's understanding or capacity  
18 to manage the estate and financial affairs or to provide  
19 for his or her health, care or safety has so changed as  
20 to warrant such action;

21 (4) No suitable guardian or conservator can be secured  
22 who is willing to exercise the assigned duties; or



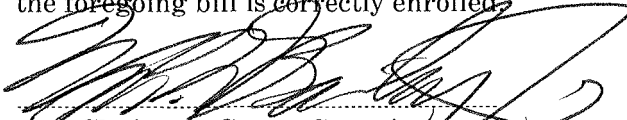
23 (5) It is otherwise in the best interest of the protected  
24 person.

25 (c) In making a determination under this section, the  
26 court shall appoint legal counsel for the protected person  
27 and may appoint such other persons whom it deems  
28 qualified to make such evaluations as it shall determine  
29 appropriate.

**§44A-4-7. Hearing on petition to terminate, revoke or  
modify.**

1 A hearing on a petition to terminate, revoke or modify  
2 shall be conducted with the same notice and in the same  
3 manner and the protected person shall have the same  
4 rights as the protected person would obtain at a hearing  
5 on a petition for the appointment of a guardian or  
6 conservator. The protected person and the guardian or  
7 conservator shall attend the hearing except for good  
8 cause shown.

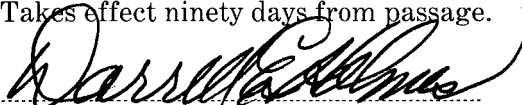
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

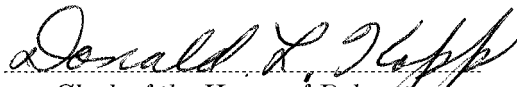
  
.....  
*Chairman Senate Committee*


  
.....  
*Ernest C. Moore*  
*Chairman House Committee*

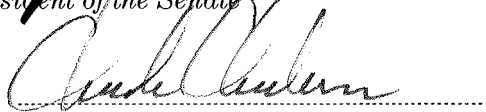
Originating in the House.

Takes effect ninety days from passage.

  
.....  
*Darrell Williams*  
*Clerk of the Senate*

  
.....  
*Donald L. Klapp*  
*Clerk of the House of Delegates*

  
.....  
*Kurt Boudette*  
*President of the Senate*

  
.....  
*Carl Albert*  
*Speaker of the House of Delegates*

The within *is approved* ..... this the *30<sup>th</sup>*  
day of *March* ..... 1994.

  
.....  
*Governor*

PRESENTED TO THE

GOVERNOR

Date 3/28/94

Time 9:31 am