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WEST VIRGINIA LEGISLATURE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1997



## ENROLLED

*COMMITTEE SUBSTITUTE FOR*  
SENATE BILL NO. 100

(By Senator *OLIVERIO, ET AL*)



PASSED *APRIL 11,* 1997

In Effect *NINETY DAYS FROM* Passage

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SENATE OF WEST VIRGINIA

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COMMITTEE SUBSTITUTE  
FOR

**Senate Bill No. 100**

(SENATORS OLIVERIO, ANDERSON, BUCKALEW AND DEEM,  
*original sponsors*)

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[Passed April 11, 1997; in effect ninety days from passage.]

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AN ACT to amend and reenact sections eight and nine, article one, chapter forty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section fourteen; and to amend and reenact sections two and six, article two of said chapter, all relating generally to the guardianship and conservator appointment process; permitting judges to appoint coguardians and/or coconservators; altering guardianship and conservatorship appointment eligibility for sheriffs and the department of health and human resources;

providing that bond is not required upon appointment of sheriffs and the department of health and human services; requiring proof of bonding to be submitted to the appointing court; modifying appointment petition; allowing the appointing court authority to protect the alleged protected persons assets during the petition process; and providing for notice and opportunity for hearing before a person is appointed guardian or conservator.

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

That sections eight and nine, article one, chapter forty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section fourteen; and that sections two and six, article two of said chapter be amended and reenacted, all to read as follows:

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

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

1 (a) Any adult individual may be appointed to serve as a  
2 guardian, a conservator, or both, upon determination by  
3 the court that the individual is capable of providing an  
4 active and suitable program of guardianship or conserva-  
5 torship for the protected person: *Provided*, That the court  
6 may, after first determining it to be in the best interest of  
7 the protected person, appoint coguardians and/or  
8 coconservators: *Provided, however*, That such individual  
9 is not employed by or affiliated with any public agency,  
10 entity or facility which is providing substantial services or  
11 financial assistance to the protected person.

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

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

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

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

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

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

44 (5) Will encourage the protected person to participate to  
45 the maximum extent of his or her abilities in all decisions  
46 affecting him or her and to act in his or her own behalf on  
47 all matters in which he or she is able to 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 guardians  
52 and conservators for any protected persons it serves in the  
53 event the corporation ceases to be licensed by the depart-  
54 ment of health and human resources or otherwise becomes  
55 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 section  
60 thirteen of this article.

61 (e) Except as provided in section thirteen of this article,  
62 no guardian or conservator nor any officer, agent, direc-  
63 tor, servant or employee of any such guardian or conserva-  
64 tor shall do business with or in any way profit, either  
65 directly or indirectly, from the estate or income of any  
66 protected person for whom services are being performed  
67 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 determines  
71 it is capable of providing suitable conservatorship for the  
72 protected person.

73 (g) The secretary of the department of health and human  
74 resources shall designate a division or agency under his or  
75 her jurisdiction which may be appointed to serve as a  
76 guardian, but such appointment may only be made if there  
77 is no other individual, nonprofit corporation, or other  
78 public agency that is equally or better qualified and  
79 willing to serve: *Provided*, That when any sheriff was  
80 initially appointed as guardian for the person, the depart-  
81 ment may not refuse to accept the guardianship appoint-  
82 ment. If the department has been appointed as conserva-  
83 tor, it may petition the circuit court to be released as  
84 conservator.

85 (h) The sheriff of the county in which a court has  
86 assumed jurisdiction may be appointed as a conservator  
87 but such appointment may only be made if there is no  
88 other individual, nonprofit corporation or other public  
89 agency that is equally or better qualified and willing to  
90 serve: *Provided*, That when the department of health and  
91 human resources was initially appointed as conservator  
92 for the person, the sheriff may not refuse to accept the  
93 conservatorship appointment. If the sheriff has been  
94 appointed as guardian, he or she may petition the circuit  
95 court to be released as guardian.

96 (i) Other than a bank or trust company authorized to  
97 exercise trust powers or to engage in trust business in this

98 state, a person who has an interest as a creditor of a  
99 protected person shall not be eligible for appointment as  
100 either a guardian or conservator of the protected 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 ap-  
3 pointed, is necessary. No bond is required of any sheriff or  
4 representative of the department of health and human  
5 resources appointed as conservator or guardian.

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

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

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

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

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

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

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

32 (7) Whether the conservator was appointed pursuant to

33 a nomination which requested that bond be waived.

34 (c) Any required bond shall be with such surety and in  
35 such amount and form as the court may order, and the  
36 court may order additional bond or reduce the bond  
37 whenever the court finds that such modification is in the  
38 best interests of the protected person or of the estate. The  
39 court may allow a property bond in lieu of a cash bond.  
40 Proof of bonding must be submitted to the court within  
41 thirty days of appointment.

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

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

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

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

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

69 (4) The bond of the guardian or conservator is not void  
70 after any recovery but may be proceeded against from

71 time to time until the whole penalty is exhausted.

72 (f) No proceeding may be commenced against the surety  
73 on any matter as to which an action or proceeding against  
74 the guardian or conservator is barred by adjudication or  
75 limitation.

**§44A-1-14. Temporary protective order.**

1 The court may, at the request of a petitioner or upon its  
2 own motion, issue a temporary protective order prohibit-  
3 ing or limiting the expenditure, sale or other legal transfer  
4 of any assets of the alleged protected person until the  
5 appointment proceeding has been held.

**ARTICLE 2. PROCEDURE FOR APPOINTMENT.**

**§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 care  
6 to the individual, by the person that the individual has  
7 nominated as guardian or conservator, or by any other  
8 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 to  
13 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 entitled

24 to succeed to the person's estate by intestate succession as  
25 set forth in article one, chapter forty-two of this code.

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

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

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

41 (5) The name, post office address and phone number of  
42 the attorney representing the petitioner in the petition and  
43 appointment proceedings;

44 (6) Whether the person's incapacity will prevent atten-  
45 dance at the hearing and the reasons therefor;

46 (7) The type of guardianship or conservatorship re-  
47 quested and the reasons for the request;

48 (8) The proposed guardian or conservator's name, post  
49 office address and, if the proposed guardian or conserva-  
50 tor is an individual, the individual's age, occupation and  
51 relationship to the alleged protected person;

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

58 (10) The name and post office address of any guardian or  
59 conservator currently acting, whether in this state or  
60 elsewhere;

61 (11) If the appointment of a limited guardian is re-  
62 quested, the specific areas of protection and assistance to  
63 be included in the order of appointment; and

64 (12) If the appointment of a limited conservator is  
65 requested, the specific areas of management and assis-  
66 tance to be included in the order of appointment.

**§44A-2-6. Notice of hearing.**

1 (a) Upon the filing of the petition and evaluation report,  
2 the court shall promptly issue a notice fixing the date,  
3 hour and location for a hearing to take place within sixty  
4 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 before  
13 the hearing to all individuals seven years of age or older  
14 and to all entities whose names and post office addresses  
15 appear in the petition. A copy of certified mail return  
16 receipts shall be filed in the office of the circuit clerk on or  
17 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 the  
21 hearing, the right to an attorney and the right to object to  
22 the proposed appointment. Additionally, the notice shall  
23 include the following statement in large print:

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

26 At the hearing you may lose many of your rights. A  
27 guardian may be appointed to make personal decisions for  
28 you. A conservator may be appointed to make decisions  
29 concerning your property and finances. The appointment  
30 may affect control of how you spend your money, how

31 your property is managed and controlled, who makes your  
32 medical decisions, where you live, whether you are  
33 allowed to vote and other important rights.

34 (e) No person may be appointed a guardian or conserva-  
35 tor without first receiving proper notice and having the  
36 opportunity for a hearing.

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

*[Handwritten Signature]*  
.....  
Chairman Senate Committee

*[Handwritten Signature]*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*[Handwritten Signature]*  
.....  
Clerk of the Senate

*[Handwritten Signature]*  
.....  
Clerk of the House of Delegates

*[Handwritten Signature]*  
.....  
President of the Senate

*[Handwritten Signature]*  
.....  
Speaker House of Delegates

The within *is approved* this the *7<sup>th</sup>*.....  
day of *May*....., 1997.

*[Handwritten Signature]*  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

Date 4/21/97

Time 11:15 Am