

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 736

(Senator Caruth, original sponsor)

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[Passed March 16, 2008; in effect ninety days from passage.]

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AN ACT to amend and reenact §37-1-3 of the Code of West Virginia, 1931, as amended ; to amend and reenact §44A-1-8 of said code; and to amend and reenact §44A-3-5 of said code, all relating generally to appointment of guardians and conservators for persons under legal disability, including protected persons ; clarifying the sale of real estate for persons under legal disability, including protected persons ; authorizing background checks for persons seeking appointment as guardian or conservator; clarifying who may not be appointed guardian or conservator; clarifying when a conservator appointment is exempted; and making technical corrections.

Be it enacted by the Legislature of West Virginia:

That § 37-1-3 of the Code of West Virginia, 1931, as amended , be amended and reenacted; that §44A-1-8 of said code be amended and reenacted; and that §44A-3-5 of said code be amended and reenacted , all to read as follows:

CHAPTER 37. REAL PROPERTY.

ARTICLE 1. LANDS OF PERSONS WITH LEGAL DISABILITY, AND LANDS HELD IN TRUST.

§37-1-3. Guardian ad litem.

A guardian ad litem shall be appointed for minors under the age of eighteen, inmates and protected persons subject to the requirements of section five, article three, chapter forty-four-a of this code. The guardian ad litem shall answer the petition under oath, be present at any summary proceeding or hearing and inform the court whether the sale of property is in the best interests of the minor, inmate or protected person. Minors over the age of fourteen may answer in person as well.

CHAPTER 44A. WEST VIRGINIA GUARDIANSHIP AND  
CONSERVATORSHIP ACT.

ARTICLE 1. DEFINITIONS AND GENERAL PROVISIONS.

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

(a) Any adult individual may be appointed to serve as a guardian, a conservator or both upon a showing by the individual of the necessary education, ability and background to perform the duties of guardian or conservator and upon a determination by the court that the individual is capable of providing an active and suitable program of guardianship or conservatorship for the protected person. The individual may not be employed by or affiliated with any public agency, entity or facility that is providing substantial services or financial assistance to the protected person.

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

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

(d) Any nonprofit corporation chartered in this state and licensed as set forth in subsection (e) of this section or a public agency that is not a provider of health care services to the protected person may be appointed to serve as a guardian, a conservator or both: Provided, That the entity is capable of providing an active and suitable program of guardianship or conservatorship for the protected person and is not otherwise providing substantial services or financial assistance to the protected person.

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

- (1) Has sufficient fiscal and administrative resources to perform the fiduciary duties and make the reports and accountings required by this chapter;
- (2) Will respect and maintain the dignity and privacy of the protected person;
- (3) Will protect and advocate the legal human rights of the protected person;
- (4) Will assure that the protected person is receiving appropriate educational, vocational, residential and medical services in the setting least restrictive of the individual's personal liberty;

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

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

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

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

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

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

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

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

(k) A conservator shall not be appointed when the alleged protected person's total assets are worth less than two thousand dollars or the alleged protected person's income is: (1) From the Social Security Administration and a representative payee has been appointed to act in the best interest of the individual; (2) from Medicaid and the only income distributed to the individual is the personal account allotment; or (3) less than fifty dollars per month or six hundred dollars per year. In these instances, the guardian, representative payee or health care facility, if there is no other person or entity, shall manage the personal care account or assets.

### ARTICLE 3. GUARDIANSHIP AND CONSERVATORSHIP ADMINISTRATION.

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

(a) A conservator shall not sell real estate and shall not be authorized to mortgage any real estate without approval of the court.

(b) Following a petition by the conservator for the sale or mortgage of real property, the court or mental hygiene commissioner shall appoint a guardian ad litem and set a hearing on the petition. The conservator shall personally serve the protected person and serve by certified mail all persons entitled to notice pursuant to the original petition at least thirty days prior to the hearing.