

COMMITTEE SUBSTITUTE

FOR

H. B. 2885

(BY DELEGATES ELLEM, D. CAMPBELL, PERDUE, POORE,
BARILL, FLEISCHAUER, BORDER, MOORE, HATFIELD
AND RODIGHIERO)

(Originating in the Committee on the Judiciary)
[February 14, 2011]

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

Be it enacted by the Legislature of West Virginia:

That §44A-1-8 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended

by adding thereto a new section, designated §44A-1-15, all to read as follows:

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.

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

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

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

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

32 (e) A nonprofit corporation chartered in this state may be
33 appointed to serve as a guardian or conservator or as a

34 limited or temporary guardian or conservator for a protected
35 person if it is licensed to do so by the Secretary of Health and
36 Human Resources. The secretary shall propose legislative
37 rules for promulgation in accordance with the provisions of
38 chapter twenty-nine-a of this code, for the licensure of
39 nonprofit corporations and shall provide for the review of the
40 licenses. The rules shall, at a minimum, establish standards
41 to assure that any corporation licensed for guardianship or
42 conservatorship:

43 (1) Has sufficient fiscal and administrative resources to
44 perform the fiduciary duties and make the reports and
45 accountings required by this chapter;

46 (2) Will respect and maintain the dignity and privacy of
47 the protected person;

48 (3) Will protect and advocate the legal human rights of
49 the protected person;

50 (4) Will assure that the protected person is receiving
51 appropriate educational, vocational, residential and medical

52 services in the setting least restrictive of the individual's
53 personal liberty;

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

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

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

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

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

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

85 (i) The Secretary of the Department of Health and Human
86 Resources shall designate the adult protective services
87 division of the county of appointment, or another agency
88 under his or her jurisdiction, to be appointed as guardian
89 when there is no other individual, nonprofit corporation or

90 other public agency that is equally or better qualified and
91 willing to serve. The department may not refuse to accept the
92 guardianship appointment when ordered by the court but may
93 not be appointed as conservator.

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

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

104 (1) From the Social Security Administration and a
105 representative payee has been appointed to act in the best
106 interest of the individual;

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

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

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

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

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

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

11 (3) the contract or arrangement is disclosed in writing to
12 the court, and

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

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

21 (c) For the purposes of this section:

22 (1) “Behavioral health services” means services provided
23 for the care and treatment of persons with mental illness,
24 intellectual disability, developmental disabilities or alcohol
25 or drug abuse problems in an inpatient, residential or
26 outpatient setting, including, but not limited to, habilitative or
27 rehabilitative interventions or services and cooking, cleaning,
28 laundry and personal hygiene services provided for such
29 care; and

30 (2) “Waiver program” means a West Virginia
31 Department of Health and Human Resource administered
32 waiver program, including, but not limited to, the “MR/DD”
33 or “Intellectual and Developmental Disabilities” waiver

34 program authorized by section 1915(c) of the Social Security
35 Act.

36 (d) A person appointed to serve as a guardian or
37 conservator prior to the effective date of this section, enacted
38 during the 2011 Regular Session of the Legislature, who
39 meets the requirements contained in subsection (a), shall
40 retain his or her authority, powers and duties in that capacity
41 under the provisions of this section, *Provided*, That the
42 guardian or conservator informs the court, in writing, that he
43 or she is employed pursuant to a written contract or other
44 employment arrangement with a licensed provider of
45 behavioral health services under the waiver program.