

# WEST VIRGINIA GUARDIANSHIP AND CONSERVATORSHIP FOR MENTAL HYGIENE COMMISSIONERS

W.VA. CODE §44A-1-1, *ET SEQ.*

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*2018 (rev. 2019 and 2021)*



# Who Are the Parties?

- Petitioner(s)
- Potential Guardian(s) and/or Conservator(s)
- Alleged Protected Persons (“APP”)/Protected Persons (“PP”)
- Counsel for APP/PP
- Persons properly named in the Petition, who are entitled to service of Notice



# Petitioner



- Is any appropriate adult(s).
- May be the person seeking protection for him/herself.
- Is the person offering him/herself as an appointee or nominating others as appointees.
- Is generally *pro se*, as are the other parties.
- Is not entitled to appointed counsel.
- May often be the DHHR, which will be represented by local Prosecutor's office or the Attorney General.

# Potential Guardians/Conservators



- Petitioner can nominate him/herself or another.
- In response to a Petition, someone can nominate him/herself (“competing Petitioner”).
- Potential appointee may be a “presumptive nominee” by virtue of POA, LW/MPOA, Healthcare surrogate, or competent evidence, such as Executor in Will or durable POA.
- G/C can nominate successor in Will. *W.Va. Code §44A-2-8*
- Nominees move to the front of the line among potential appointees.

# Who is an Alleged Protected Person?

- Only an adult believed to be mentally-impaired by virtue of mental illness or insanity and/or other causes, which has compromised his or her ability to manage affairs of daily living (needs Guardianship) or financial affairs (needs Conservatorship).

*W.Va. Code §44A-1-4(13)*

- **Exceptions:**

- Children/Teens
- Veterans
- Adults in State's custody – abuse and neglect



# Statutory Definition for APP:

*W.Va. Code §44A-1-4(13)*

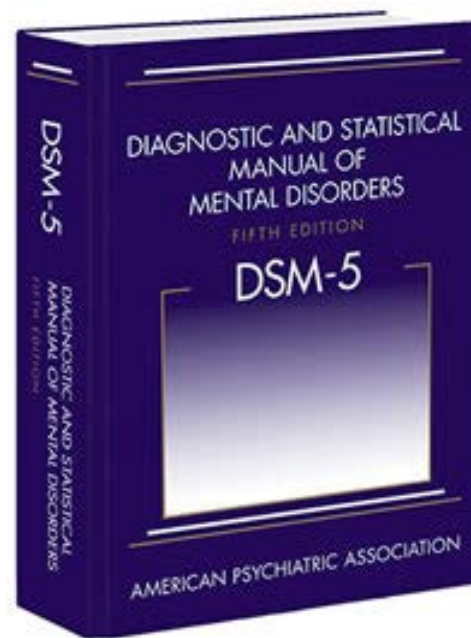
Because of mental impairment, he or she is unable:

- (a) To receive and evaluate information effectively; **OR**
- (b) To respond to people, events, and environments to such an extent that he or she lacks the capacity to ***either***:
  - (i) To meet the essential requirements for his or her health, care, safety, habitation, or therapeutic needs without the assistance or protection of a **guardian**, **OR**
  - (ii) To manage property or financial affairs or provide for his or her support or for the support of legal dependents without the assistance or protection of a **conservator**.

**DISPLAYS OF POOR JUDGMENT ALONE AREN'T SUFFICIENT EVIDENCE OF MENTAL IMPAIRMENT.**

# “Mental Impairment,” “Mental Illness or Insanity,” and “Other Causes”

“Mental illness or insanity” is a diagnosis based on definitions set forth in the DSM-5 (“Diagnostic and Statistical Manual of Mental Disorders”). “Mental impairment” is defined in W.Va. Code §44A-1-4(13). “Other causes” has not been defined by statute. See *also* ICD-10.





# Applying the Terminology

If APP has dementia or Alzheimer's, or has the lifetime effects of cerebral palsy, for example, he/she may be completely mentally impaired, requiring protection. If he/she she doesn't have a diagnosed "mental illness," the mental impairment is the result of "other causes."

If same APP with the chronic organic condition also has paranoid schizophrenia contributing to his/her impairment, he/she has mental impairment due to "mental illness or insanity" **and** "other causes," and protection is appropriate.

APP with only a diagnosed mental illness or insanity, who is also mentally-impaired due to that diagnosed condition, requires protection because of mental impairment due to mental illness.

If APP doesn't demonstrate mental impairment as the statute prescribes, even if he/she is mentally ill or insane and/or suffers other causes, no protection is necessary.



# Why Is the Difference Important?



If APP is diagnosed as “mentally ill” and is adjudicated as needing protection (or hospitalization), he or she can no longer own or possess firearms, and the finding of mental illness must be reported to the NCIC index. When APP is only “mentally impaired” from “other causes”, appointment will not be reported, although it may be unwise to allow ownership or possession of firearms.

# How Does MHC Apply the Terms?

The Physician or Psychologist will provide medical diagnosis of mental illness or insanity in the Evaluation Report (*Form GC 04*) and further opine as to an APP's condition, whether impaired or not and why. MHC makes legal finding.

3. IS THE PERSON UNABLE TO HANDLE HIS OR HER OWN AFFAIRS DUE TO MENTAL ILLNESS OF INSANITY? [*initial appropriate response*] \_\_\_\_\_ YES  
\_\_\_\_\_ NO

If "Yes", what is the mental illness or insanity diagnosis?

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In the Findings and Recommendations of Mental Hygiene Commissioner (*Form GC 10*), you are asked to define the APP, choosing between these terms.

2. The individual alleged to be a protected person [*Initial one of the following*]:

\_\_\_\_\_ is a "protected person" and meets the definition

\_\_\_\_\_ is NOT a "protected person" and does NOT meet the definition

Of a "protected person" as the same is defined under *West Virginia Code* Section 44A-1-4 because of mental impairment due to [*initial applicable choice*] \_\_\_\_\_ mental illness or insanity, \_\_\_\_\_ mental illness or insanity and other causes, or \_\_\_\_\_ causes other than mental illness or insanity.

# Exception: Children/Teens as APP

Only a child within 2 months of his/her 18<sup>th</sup> birthday (17 years, 10 months) can become an APP.

*W.Va. Code §44A-2-1A*

Such cases usually involve children with developmental or congenital issues or injuries, and the parent(s) or legal guardian(s) have been life-long caregivers.



Other statutory forms of child guardianship apply for different circumstances:

Standby Guardianship (§44A-5-1, *et seq.*);

Child Welfare (§49-1-1, *et seq.*);

Settlement proceedings (§44-10-14, *et seq.*).

# Exception: Veterans

If the APP is a Veteran:

- Apply the Uniform Veterans Guardianship Act  
*W.Va. Code §44-15-1*; and
- A representative of the USA must be a party to the proceeding if benefits are part of (or to be part of) the Conservatorship estate.



# Exception: Adult Abuse and Neglect

The State, through the DHHR, can take custody of an adult, who is believed to be abused and/or neglected.

*W.Va. Code §44C-1-1, et seq.  
(Uniform Adult Guardianship and  
Protective Proceedings Jurisdiction Act).*



Petitioner is most often DHHR and will probably seek a Temporary Guardianship and/or Temporary Conservatorship in Sheriff. Each will strive to find others to take the responsibilities.



# What Does Counsel for APP Do?

Counsel has a dual responsibility:

Representation of APP and reporting on APP's best interests, unless the two are in conflict.

*W.Va. Code §44A-2-7.*

In a conflict, a Guardian *ad Litem* may be appointed to address “best interests,” but counsel remains as counsel for the APP.

APP may hire and pay for own counsel.

Counsel may be needed for post-appointment proceedings.



# How is the G/C process started?



Petitioner files complete Petition for Appointment of Guardian and/or Conservator with Circuit Clerk (*Form GC 01*), with \$200.00 fee.

- In county of residence or where admitted to healthcare or correctional facility
- File closed to the public but is open to the APP and counsel; other parties must petition the Court for access.

Court assigns case to MHC or Circuit Judge.

MHC should get paperwork from Clerk or Petitioner. Use CourtPlus!



# Petition for Appointment of a G/C

## *(Form GC 01)*

Petition can seek a Full, Limited, or Temporary Guardianship and/or Conservatorship.

*W.Va. Code §44A-1-8(a) & (b)*

Petition can seek appointment of Co-Guardians or Co-Conservators.

Petition can seek appointment of a Successor G/C *(additional filing)*.

*W.Va. Code §44A-2-10*



# What does MHC Do After Receiving Paperwork?

- Review the Petition for relief sought; contact Circuit Judge if request goes beyond authority of MHC to hear. Decide if you need to undertake any special pre-hearing procedures.
- MHC prepares Order of Appointment of Counsel for the APP (Form GC 08) and Notice of Hearing (Form GC 07).
  - MHC can't appoint counsel; Judge must enter.  
*State ex rel. Barret v. Dahley* (2015).
  - Clerk issues Notice of Hearing.
- MHC delivers Notice and Order appointing counsel for APP to Petitioner for service (or confirms receipt in e-file counties).

# What Issues Can Only Be Heard By Circuit Judge?



1. Motion for Leave to File Petition Without Evaluation Report.  
*W.Va. Code §44A-2-3; Form GC 2*
2. Petition for Appointment of a Temporary Guardian and/or Temporary Conservator.  
*W.Va. Code §44A-2-14; using Form GC 01*

# Several Pre-Hearing Procedures are Available to MHC

- MHC can Order a background check on any Petitioner or G/C nominee. *W.Va. Code §44A-1-8* (Form GC 07B)
- MHC (or Judge) can enter a Temporary Order of Protection on own Motion. Petitioner and counsel can also request it. *See also: §55-7J-1 (2019), supra.*

*W.Va. Code §§44A-1-14 and 44A-2-7.*

- MHC can enter this particular Order (no form available).
- Allows freezing of assets/production of documents pending appointment of G/C.
- It can be issued with or without a Hearing.
- It may also result in a report to APS.

# What makes a Petition complete?

Evaluation Report of Licensed Physician/ Psychologist must be attached to Petition (*Form GC 04*).

*This is where you learn whether the APP has been medically diagnosed with a mental illness or not.*

\* Other potential Evaluators available?

## What if Petitioner doesn't have Evaluation Report?

Petition may be filed without report ***if, and only if***, a Motion for Leave to File Petition Without Evaluation Report (*Form GC 02*) accompanies the filed Petition.



The Evaluator may also file an Affidavit of Physician consistent with the Report indicating the APP cannot attend the hearing. (*Form GC 05*).

If a Conservatorship is sought, Petitioner must file a Statement of Financial Resources (*Form GC 06*) must be filed before the Hearing.

# Motion for Leave to File Petition Without the Evaluation Report *W.Va. Code §44A-2-3* (Form GC 02)

- MHC cannot hear this Motion.
- Notice of Hearing issued for Hearing before Circuit Judge.
- After taking evidence, the Judge will enter an Order directing an evaluation to occur or not.
- The Judge will not appoint a physician.
- If no evaluation is to take place, Judge will dismiss the Petition.

# Petition Seeks a Temporary G/C:

## *W.Va. Code §44A-2-14*

MHC cannot hear this Motion.

Notice of Hearing will be issued for Hearing with Circuit Judge.

Circuit Judge can grant upon evidence of:

- a. Immediate need;
- b. Following procedure may be harmful to the APP's Estate;  
or
- c. No one else can act or is acting for the APP.

A temporary appointment expires within 6 months and can be extended for another 6 months.

The PP may seek substitution of any G/C temporarily appointed.



# Important Timeframes for Hearings

- The process should be completed, start to finish, within 60 days.
  - This deadline is sometimes impossible to meet.



- When the APP is a minor (17 yrs., 10 mos.), the hearing cannot occur sooner than 14 days before the 18<sup>th</sup> birthday.
- Petitioner must personally serve the APP at least 14 days before the hearing.

# Who Does Petitioner Need to Serve?

## What Documents?

APP is entitled to PERSONAL SERVICE.

- **JURISDICTIONAL** – it cannot be waived.
- Documents:
  - Notice of Hearing, Petition, Evaluation Report.
  - I include Order of Appointment for Counsel (*Form GC 8*)



What happens without personal service?

Hearing is continued (*Form GC 09*) until it can be achieved.

Petitioner must serve all other interested persons (age 7 or over) by certified mail and file evidence of service (green cards).

- Documents:
  - Notice of Hearing and Petition – do not send the Evaluation Report.
  - **NOTE: No one gets Statement of Financial Resources.**

Publication?

# Who Must Attend the Hearing?

1. All proposed Guardians and Conservators unless good cause is shown.
2. APP, unless “Affidavit of Physician” (*Form GC 05*) filed with Evaluation Report, expert testimony, or evidence APP refused to attend.



# Where Can a Hearing Occur?

About anywhere, because we have portable equipment, provided by the Supreme Court

- Office, Courthouse, hospitals, jails, and nursing homes.

All training and materials provided by the Supreme Court.

All G/C hearings must be recorded.

Hearings are closed, except if allowing certain persons to attend is in best interests of APP.

Interpreters are available through Supreme Court for sign language, foreign languages, etc.



# What Does MHC Do In the Hearing?

- Advise the APP of proceeding, if APP present.
- Take evidence from Petitioner(s), prospective G/C, Evaluator (Evaluation Report), Witnesses, and Counsel. *Pro se* parties require questioning by MHC.
- Evidence taken and analyzed about allegations in the Petition, assessing whether the APP needs protection and the suitability of proposed G/C.
- MHC makes his/her findings and recommendations for Circuit Judge (*Form G/C 10*) and prepares proposed Order of Appointment on computer.



# What Factors Must MHC Evaluate?

- Nature and extent of any alleged mental impairments and cause, the need for protection, and the **best interests of APP**;
  - If the requirements for appointment aren't met, the Petition must be dismissed. (*Form GC 17*).
  - The evidentiary standard is “clear and convincing.”
- Least restrictive alternatives;
- Suitability of proposed G/C;
- Assets/liabilities of APP on Statement of Financial Resources;
- Need for and amount of bond (*Form GC 10EB*);
- Ability of Estate to pay appointed attorney – is Estate devoid?  
(*Forms GC 08A and 08B, 33 and 34*); and
- Compensation/reimbursement for G/C, if sought (*Form GC 36*).

# What are Less Restrictive Alternatives?

- Availability of presumptive nominees may mean G/C not necessary.
- Conservator may not be needed based on income.

## *W. Va. Code §44A-1-8(k)*

- Social security is only income and a payee has been appointed (other federal benefit programs and nursing homes may qualify);
- Income of APP is <\$600/yr. or <\$50/mo.; and
- Medicaid personal allotment is only income.
- If no G/C is necessary due to less restrictive alternatives, prepare Findings/Recommendations of MHC (Form GC10), as well as an Order Dismissing Petition for Judge to enter (*Form GC 17*).



# What Determines Suitability of G/C?

- Education, ability, background, conflicts of interest;
- Willingness to visit no less than once every 6 months;
- Meeting reporting obligations;
- Criminal history (inc. CPS/APS);
- Understanding fiduciary duties;
- Ineligibility – Appalachian Benefits Corp.;
- Ability to be bonded;
- Failure to provide requested documents; and
- Completion of Mandated Education.



The DHHR is always suited to be Guardian, and the Sheriff is always suited as Conservator, but they are appointees of last resort and will strive to find others to assume the responsibilities.

# In Re: R.M., Alleged Protected Person

2017 WL 383780, *unpublished* (January 27, 2017)

Circuit Court of Jefferson County

In anticipation of Daughter turning 18, Mother filed Petition to be appointed Guardian. Daughter has Down's syndrome. Husband/Father appealed.



The Supreme Court holds:

“Moreover, we find that it was the fact that divorce proceedings were imminent—not the parties' long estrangement—that compelled the circuit court to find that it was in R.M.'s best interests not to have both parents serve as co-guardians. The circuit court explained that it did not want the operation of the guardianship to become entangled with “the domestic relations aspect of it.” Thus, we find that the circuit court both evaluated the record and provided a reason for its rejection of the mental hygiene commissioner's recommendation that petitioner be appointed as co-guardian. The parties' divorce proceedings are no longer imminent, but are now underway. Therefore, under the facts and circumstances of this case, we cannot say that the circuit court abused its discretion in appointing respondent as R.M.'s sole guardian.”

# Who Needs to be Bonded and Why?

- A prospective Guardian appointee can be bonded, but it can be waived.
- A prospective Conservator must be bonded; **mandatory** and cannot be waived.
- The DHHR and Sheriff cannot be bonded.
- Order to Post Bond and Complete Education (*Form GC 10EB*) must be entered within 14 days of the hearing; it must be posted within 30 days of the hearing.
- MHC may sign a bond Order but may consult the Judge first. Can have the Judge sign the Order to evidence consultation.

# How Is Amount of Bond Determined?



- All assets to be considered, including real estate. The statute does not exclude it.
  - Judges disagree on inclusion of real estate, because it creates arguably-unreasonable bonds and since real estate can't be sold without Court approval.
- Are any assets, like SS, protected by a representative payee?
- The bond premium may be paid from Conservatorship estate.
  - The statute is silent, but Judges disinclined to penalize Conservator when assets adequate.
- Evidence of bond posting filed (*Form GC 18*).

# Payment of Appointed Counsel:

- Supposed to be initiated by counsel at the outset of the case, by submitting *Form GC 08A* seeking approval of requested fee.
  - *Form GC 08B* is the resulting Order. It may be entered by the MHC.
- Consider going rate, complexity, amount of work involved with review of attorney voucher: *Form GC 35*.
- Payment by Conservatorship Estate or State?  
(*Forms GC 33 and 34*)

- MHC must consider adequacy of assets.

Form GC 33 entered by MHC;

Form GC 34 entered by Judge.

The image shows a check form with the following details:

- Amount:** 2400
- Pay to the order of:** \_\_\_\_\_
- FOR:** \_\_\_\_\_
- Routing Number:** 1222105278
- Account Number:** 6724301068
- Check Number:** 2400
- Other numbers:** 91-548/1221

# Compensation for G/C:

- Consider going rate for caregivers in local area, complexity, amount of anticipated work involved.
- Some folks receive compensation for providing “family caregiver” services through Medicaid Waiver Program. If so, and an appointment of a recipient as G/C is to be made in the best interests of the APP, you must receive:
  - Documentation showing approval for the waiver program and to provide services and receive payment; and
  - Proof of relationship to the APP by blood, marriage or adoption.
- Order Approving Compensation (*Form GC 43*) must be entered.
- Petition for Compensation (*Form GC 36*) can be filed after appointment of G/C.

# 2019 Update on Compensation:

Not all waiver programs are alike.

- After State audit, Guardian told to resign to get paid as approved family caregiver under waiver program.
- Two kinds of waiver programs: IDD and ADW
  - Under IDD: Guardian can be both caregiver and compensated Guardian at the same time, under W.Va. Code §44A-1-15;
  - Under ADW: Compensated caregiver cannot also be Guardian.
- Guardians told they must resign, but caregivers are not legal representatives. How maintain proper care?
- **Per DHHR, other forms of “legal representation” may co-exist with ADW, including, but not limited to, Medical POA, POA, and Healthcare Surrogate.**
- If surrogacy possible, it is less-restrictive alternative.
- Statute is not clear.



# Can Petitioner be Reimbursed for Attorney's Fees and Expenses?

- Petitioner may not recover pre-appointment attorney's fees. Only a G/C may receive reimbursements of costs advanced.

*W.Va. Code §44A-1-13*

- Some reimbursements of pre-appointment expenses (filing fees) are allowable.

*W.Va. Code §44A-2-1*

- *Knotts v. Nelson*, Sept. 27, 2021 (No. 20-0749)

Supreme Court refused to reverse Circuit Court's Order denying Petitioner's request that Estate pay her legal fees defending will contest, because fees were paid to a lawyer and firm that represented her interests and not those of the Estate.



# Reporting Obligations of G/C

## Inventory of Conservator (Form GC 32)

W.Va. Code §44A-3-8

- File with Court within 60 days of appointment.
  - Within 14 days later, Conservator must mail to each person getting notice of original Petition and to the Fiduciary Commissioner.
  - Conservator must amend if additional assets discovered or obtained.

## Accounting of Conservator (Form GC 30)

W.Va. Code §44A-3-9 and 11

- Initial: within first 6 mos. – I do by July 15<sup>th</sup>;
  - Annual: at end of first year by Jan. 31<sup>st</sup>; same date each subsequent year.
  - Must provide copy to Fiduciary Commissioner.
  - Court **or MHC** must serve copy to PP and all individuals given Notice of original Petition and all persons found to be interested in affairs of PP.
  - These persons all have standing to file exceptions to or falsify the accounting????? See § 44A-3-11(c)(2)
  - Put schedule in your F&R and in the Order of Appointment.

## Periodic Report of Guardian (Form GC 31)

W.Va. Code §44A-3-2 and 11

- Same terms as Accounting of Conservator.

Failure to file required reportings reportable to Prosecuting Attorney and may result in a misdemeanor and fine.

# Who Checks Whether Reportings are Properly and Timely Filed?

- Circuit Clerk, but the statute provides a backup. Problem invariably arises after the PP dies or some effort being made to change the G/C.
- Statute requires semi-annual review of Accountings and Reports by local Fiduciary Commissioner. *W.Va. Code §44A-2-1*
  - I have the FC review all reportings and refer in Order of Appointment.
  - G/C must send copies of the Inventory, Reports, and Accountings.
  - Can require G/C to answer questions or address discrepancies – show cause.
  - Set rate for service: \$100/report, up to \$300.
  - Code allows use of “other person,” but who?
- If old case didn't have FC, can do later, especially if trying to resolve case after death of PP.

# What must be done before Order of Appointment can be entered?

- Nonresident Guardians and/or Conservators:
  - Must designate resident agent (*Form GC 15*) for service of process. Who?
- Evidence of bond posting must be filed. (*Form GC 18*).
- Completion of Mandated Education:
  - Requires filing of Affidavit Certifying Completion of Mandated Education (*Form GC 11*)
  - If you have co-G/C, each must complete and file.
  - Even the DHHR and Sheriff should complete it – statute doesn't exempt them.
- Take Oath of Appointment before Circuit Clerk (*Form GC 14*).

# Formalizing the Appointment of G/C

- MHC completes “Findings and Recommendations of Mental Hygiene Commissioner” for Judge (*Form GC 10*).
- Within 7 days of the hearing, MHC prepares an Order of Appointment on the Court’s laptop (or Order of Dismissal at *Form GC 17*) and presents to the Judge with the Findings. Challenges exist with e-filing.
- The Judge can accept, modify, or reject Findings/Recommendations of the MHC, or the Court can issue its own Findings altogether.



# What happens after Judge enters Order of Appointment?

MHC uploads the Order of Appointment on the Court's laptop to the State registry/NCIC.

I send an attested copy of the Order of Appointment to the appointee and the counsel for the PP (even with e-filing), should the Clerk's office not get it out timely



The G/C is/are responsible for sending it to all folks who were entitled to service of the Petition.

# Post-Appointment Proceedings

- Petition Terminate, Modify, or Revoke G/C (*Form GC 23*)      *W.Va. Code §44A-4-1, et seq.*
- Petition of G/C to Resign
- Sale/mortgage of Real Estate (*Form GC 40*)      *W.Va. Code §44A-3-5*
- Estate Planning/Change Advance Directives      *W.Va. Code §44A-3-5*
- Bond Adjustments
- Compensation (*Form GC 43 – waiver program only*)
- Appointing of Successor G/C (*Form GC 07*)      *W.Va. Code §44A-4-2*  
After death of current G/C; can be done at outset.
- Change of Venue – Often occurs when DHHR is the Guardian
- Change Residence of PP
- Change in Parental Rights (where PP is a parent)
- Change in Marital Status      *W.Va. Code §44A-3-1*

**All require Petitioner to give Notice to all persons entitled to Notice of the original Petition, via the same method of service.**

Many have Findings/Recommendations and Order forms; some require MHC to craft forms.

# Petitions to Terminate, Modify, or Revoke, or Petition of G/C to Resign

*W.Va. Code §44A-4-1, et seq.*

*(Forms GC 19, 20, 23, 24, 25, 26, and 27)*



- G/C can petition to resign. If granted, Successor must be appointed.
- Anyone (including MHC/Court, on own Motion) can petition to remove a G/C or to terminate, modify, or revoke G/C. May require appointment of Temporary G/C or Successor.



# Death of the Protected Person

First word about the death from the G/C: annual bond renewal is due.  
G/C ends as a matter of law on date of death, but the case lives on.



- MHC gets status of required filings on docket (CourtPlus) or from FC.
- G/C required to file copy of Death Certificate, and final annual Accounting of Conservator and Report of Guardian.  
*W.Va. Code §44A-4-5.*
- Only when all reportings are complete and filed, with the death certificate, is it appropriate to dismiss the case from the docket.

# Examples and Real-World Scenarios

1. Is a Guardianship coming out of a child abuse & neglect proceeding handled under W.Va. Code §44A-1-1, *et seq.*?

***No – different purposes, child under 18 can't have Guardian under 44A.***

2. What if someone asserts he or she is a presumptive nominee only because of being the prospective Executor in a Will?

***W.Va. Code 44A-2-8 says this only matters with a Successorship appointment, but it can be a presumptive nomination. G/C can nominate in Will.***

3. How to best handle a squabble arising between competing Petitioners over an APP's capacity when a POA was signed?

*In addition to the Evaluation Report/Evaluator, you can take evidence from other sources, including medical records, witnesses, etc.*

4. Can counsel be appointed for any *pro se* Petitioner?

*No. A Petitioner can and probably should hire counsel from the outset, especially in a contested case, because the process is fairly complicated.*

5. A nominee for Co-Guardian stays home with the APP, and the other Co-Guardian nominee appears. Is that okay?

*Why are they absent? What are circumstances?*

6. When might the DHHR be a Petitioner?  
*With adult custody, investigations, change of venue.*
7. Can the DHHR appear other than as a Petitioner?  
*Yes, as a witness, as in exploitation cases.*
8. Can a Guardian *ad Litem* ever be appointed for an APP?  
*Yes, if counsel has a conflict between representing the APP and expressing the APP's best interests.*
9. When can or must a Circuit Judge hear Petitions?  
*Any Petition can be brought to Circuit Judge, but only a Petition for a Temporary G/C must be heard by a Judge. Judge must hear Motion for Leave to File Petition Without Evaluation Report.*

10. Does an Evaluator appear at Hearings?

***Not generally. You can get them on phone or continue Hearing if necessary.***

11. Must you absolutely accept the Evaluator's medical opinion as to whether an APP has a mental illness or insanity?

***No. It's another element of evidence to be assessed.***

12. Can you change what is sought in a Petition?

***Yes. You can recommend co-s, solos, successors.***

13. When are co-G/C good? When are they bad?

***On a case-by-case basis. No hard and fast rules. Disputes possible.***

14. How handle Hearing process not finished in 60 days?

*Can happen if party needs to obtain med. recs., multiple hearings, contested cases. Have first hearing within the 60 days, then issue Orders of Continuance to explain delays.*

15. Can personal service on APP ever be waived?

*No, it is the basis of jurisdiction over the person.*

16. Can any service be established by extrinsic evidence?

*Not conclusively. If return documents not available for Hearing (inc. green cards for certified mail), I take testimony about service efforts and proceed, unless no service had been attempted at all. I will not proceed with appointment until all service issues resolved.*

17. What happens if someone entitled to Notice can't be found or if the circumstances are unusual (e.g. sibling in the military overseas – APO addresses)?

***Case-by-case situation again. I take evidence on the circumstances and discuss with counsel whether the problem can be resolved or if waiver is appropriate (doesn't apply to APP where service is jurisdictional. Consider publication.***

18. The Evaluation Report asks whether the APP can appear at the Hearing. Will that suffice if the Affidavit is missing?

***No. I have proceeded with taking evidence and conditioned appointment on Affidavit being filed.***

19. When might a Guardian be needed even with an MPOA or Surrogate?

*Occurs most often in young adults that participate in federal and state educational programs. Decisions are not essentially medical. I ask, “Is there anything you will need to do for APP that you can’t do with the MPOA or Surrogacy?” If the detailed answer is fundamentally “yes,” I appoint a Guardian.*

20. What if the only assets supporting a Conservatorship haven’t happened yet, such as a potential inheritance?

*Statute requires APP not be deprived of liberty if a less-restrictive alternative exists. Take evidence on timing of inheritance. Petition can always be renewed to seek Conservatorship when the time is imminent.*



21. Can counsel for the APP file for a Temporary Order of Protection?

***Yes. MHC can do it sua sponte too.***

22. Are MHC mandatory reporters?

***Yes, as to children. W.Va. Code §49-2-803. I think W.Va. Code §9-6-9 applies same obligation to MHC for incapacitated adults.***

23. Who questions a *pro se* Petitioner? Witnesses?

***MHC questions Petitioner. Others questioned by those calling them.***

24. Is a person being investigated by APS a suitable G/C?  
As party or witness, do they have special rights in a proceeding?

***Case-by-case. I've confirmed the person appears without counsel and wishes to proceed. Prior investigation may impact suitability evaluation.***

25. How can you keep a Hearing from becoming a mini-Trial of a proposed G/C on exploitation?

***Difficult situation. Consider MHC obligation and authority. You may file a report with APS if one has not been done already. You may enter Temporary Orders of Protection and discuss including restraining language with Judge. You can demand documentation be produced by any prospective nominee. See also: §55-7J-1, et. seq. (2019).***

26. Can a proposed G/C live out-of-state? What about moving the PP?

***Yes, must designate local agent. Change of residence must be brought to Court for approval.***

27. If a parent is a family caregiver, can he or she be Guardian?

***Yes. W.Va. Code §44A-1-15. If already approved, he or she needs to provide evidence in the Hearing, so the compensation can continue via the waiver program, if compensation awarded in the Order.***

28. When use personal recognizance for bond?

***Case-by-case analysis. It depends on the amount of assets and relationship of the nominee to the APP. Would also consider doing a background check.***

29. Does DHHR/Sheriff post bond? Mandated education?  
***No as to bond. They are not excused for education.***
30. For bond purposes, what if APP owns only  $\frac{1}{2}$  interest in real estate?  
***Calculate only  $\frac{1}{2}$  value of asset for bond.***
31. How do you determine “value” of real property?  
***Start with amount identified in Statement of Financial Resources. If it seems too high, you might ask for recent tax ticket and do the 60% calculation.***
32. What happens if proposed G/C doesn't file required bond?  
***Dismissal is justified, but are we obliged to provide protection for APP?***

33. What is the difference between termination, revocation, modification?

*W.Va. Code §44A-4-1 provides the best definition we have. Death of G/C or PP, or loss of jurisdiction, terminates G/C as a matter of law; may not always require a Hearing. A G/C can resign. Removal requires some wrongdoing on the part of G/C. Some requests are best considered “modifications.” If PP no longer needs protection, he/she or G/C can file Petition.*

34. Can a Conservator freely sell personal property?

**No. See W.Va. Code §44A-3-3(c)(5).**

35. Can a Conservator freely abandon property?

**No. See W.Va. Code §44A-3-3(c)(9).**

36. Does Guardian have to resign to be compensated as a family caregiver under a waiver program? How resolve with a Conservatorship?

*It depends on the kind of waiver program. If PP enrolled in the ADW program, is a lesser-restrictive alternative available? See Question #27 above.*

# Practice Hints and Hacks



Get to know your Circuit Judge(s). You are providing a great help to them, and they want to make it work. Many want to discuss cases, but others do not. Consulting, even if not required, may be a best practice (e.g., setting bond).

Keep copy of Ch. 44A handy. It isn't available on our laptops, and the system is frozen (except for SCA website and intranet), so we can't access Legislature's website.

Don't be afraid to ask questions. The statute isn't perfect, and you will find the holes (or they will find you). Not a lot of appellate cases on G/C. We have to ask each other and AO's office available.

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