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SECTION 1

INTRODUCTION

1.1 Introduction and Overview

There may be times when legal intervention becomes necessary in order to successfully intervene in a vulnerable adult's life (i.e., issuance of an order of attachment or appointment of a guardian or a temporary/emergency guardianship). When legal intervention is required, the least intrusive type of intervention that is appropriate to meet the individual's needs is to be used.

In addition to legal remedies that are available, there are administrative remedies that may be useful in assisting clients to make decisions about their personal, medical, and/or financial affairs. The following sections describe the components of the legal systems and some of the administrative tools that are available to Adult Services.

1.2 Definitions

1.2.1 Terms Defined for Casework Purposes

Adult: A person who is eighteen (18) years of age or older or a legally emancipated minor.

Advance Directives: Mechanisms used by individuals to make health care decisions prior to their potential incapacity. State law recognizes living wills, medical powers of attorney and durable powers of attorney that include provisions for making medical decisions as advance directives.

See [WV Code §16-30-4](#).

Note: DHHR Departmental and Adult Services staff is prohibited to assist with the completion of Advance Directives.

Advanced Nurse Practitioner: A registered nurse with substantial theoretical knowledge in a specialized area of nursing practice.

Agent: A person granted authority to act for a principal under a power of attorney. The term includes an original agent, co-agent, successor agent and a person to which an agent's authority is delegated.

Attending Physician: The licensed physician who currently has the primary responsibility for providing the treatment and care of the patient. If more than one (1) physician shares that responsibility, any of those physicians may act as the attending physician.

Change of Venue: The transfer of the legal jurisdiction of a guardianship case from one county or judicial district to another.

Close Friend: Any person eighteen (18) years of age or older who has exhibited special care and concern for the person and who, to the reasonable satisfaction of the attending physician, is willing

and able to become involved in the person's health care and has maintained such regular contact with the person as to be familiar with the person's activities, health and religious and moral beliefs.

Conservator: A person appointed by the court who is responsible for managing the estate and financial affairs of a protected person, and, where the context plainly indicates, the term "conservator" shall mean or include a "limited conservator" or "temporary conservator". See [WV Code §44A-1-4](#).

Death: The cessation of all vital functions of the body including the heartbeat, brain activity (including the brain stem), and breathing.

Do Not Resuscitate Order: A written signed directive by a capacitated individual directing the health care provider not to administer cardiopulmonary resuscitation or any mechanical means to prolong or continue life.

e-Directive Registry: An electronic registry that will house and make available to treating health care providers West Virginian's advance directive forms, Physicians Orders for Scope of Treatment forms and do not resuscitate cards. The purpose of e-Directive Registry will make accurate, relevant information available in a medical crisis.

Emancipated Minor: A child over the age of sixteen (16) who has been emancipated by: 1) Order of the court based on a determination that the child can provide for his/her physical well being and has the ability to make decisions for himself or 2) marriage of the child. An emancipated minor has all the privileges, rights and duties of an adult including the right to contract. See [WV Code §49-7-27](#).

Fiduciary Duty: A special relationship of trust, confidence or responsibility exists. The duty legally obligates one entity/individual to act in the best interest of the other. A guardian and a conservator have a fiduciary responsibility to a protected person.

Guardian: A person appointed by the circuit court who is responsible for the personal affairs of a protected person.

Guardian Ad Litem: A guardian appointed by a court to protect the interest of an incapacitated adult in a particular matter. State employees are prohibited from serving as Guardian Ad Litem.

Health Care Decision: A decision to give, withhold, or withdraw informed consent to any type of health care, including, but not limited to, medical and surgical treatments, including life-prolonging interventions, psychiatric treatment, nursing care, hospitalization, treatment in a nursing home or other facility, home health care, and organ or tissue donation.

Health Care Facility: A facility including but not limited to hospitals, psychiatric hospitals, medical centers, ambulatory health care facilities, physician's offices and clinics, extended care facilities, nursing homes, rehabilitation centers, hospice, home health care and other facilities established to administer health care in its ordinary course of business practice.

Health Care Provider: Any licensed physician, dentist, nurse, nurse practitioner, paramedic, psychologist or other person providing medical dental or nursing, psychological or other health care services of any kind.

Health Care Surrogate: An individual eighteen (18) years of age or older or an authorized entity appointed or selected by an attending physician or advanced nurse practitioner to make medical decisions on behalf of an incapacitated individual.

Incapacity: The inability because of physical or mental impairment to appreciate the nature and implications of a health care decision, to make an informed choice regarding the alternatives presented and to communicate that choice in an unambiguous manner.

Interested Person: An individual with an actual or substantial interest in the proceeding, either generally or as to a particular matter, as distinguished from a person who has only nominal, formal, or technical interest in or connection with a proceeding.

Life-Prolonging Intervention: Any medical procedure or intervention that when applied to a person, would serve to artificially prolong the dying process or to maintain the person in a persistent vegetative state. Includes, among others nutrition and hydration administered intravenously or through a feeding tube. Does not include administration of medication or performance of other medical procedure deemed necessary to provide comfort or alleviate pain.

Limited Conservator: A person appointed by the court who has only those responsibilities for managing the estate and financial affairs of a protected person, as specified in the order of appointment.

Limited Guardian: A guardian appointed by the court who has only those responsibilities for the personal affairs of a protected person, as specified in the order of appointment.

Living Will: A written, witnessed advanced directive governing the withholding or withdrawing of life-prolonging intervention, voluntarily executed by a person in accordance with the requirements set forth in state statutes.

Medical Power of Attorney: A written, witnessed advanced directive that authorizes an individual that is at least eighteen (18) years of age to make medical decisions on behalf of another individual. A medical power of attorney must be duly executed prior to the individual becoming incapacitated and duly executed in accordance with the provisions of [Article 30, Chapter 16 of the West Virginia Code](#) or existing and executed in accordance with the laws of another state.

Missing Person: An adult individual, eighteen (18) years of age or older, who is absent from his/her usual place of residence in the state and whose whereabouts are unknown for a period of six (6) months or more.

Persistent Vegetative State: An irreversible state as diagnosed by the attending physician or a qualified physician in which the person has intact brain stem function but no higher cortical function and has neither self-awareness or awareness of the surroundings in a learned manner.

Person: An individual, a corporation, a business trust, a trust, a partnership, an association, a government, a governmental subdivision or agency, or any other legal entity.

Petition: A mechanism by which the court is asked to take an action.

Physician: A person licensed and authorized to practice medicine.

POST Form: The Physician Orders for Scope of Treatment (POST) is a form developed for the purpose of documenting orders for medical treatment and directives concerning provision of CPR, code/no code, level of intervention, etc., [WV Code §16-30-25](#).

Principal: A person who grants authority to an agent to execute an advanced directive.

Protected Person: An adult individual, eighteen (18) years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity to: (A) meet the essential requirements for his/her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his/her support or for the support of legal dependents without the assistance or protection of a conservator. A "protected person" is also defined as a person whom the court has determined is a missing person.

Qualified Physician: A physician licensed to practice medicine who has personally examined the person.

Qualified Psychologist: A psychologist licensed to practice psychology who has personally examined the person.

Representative Payee: An individual appointed by the funding source to handle that individual's benefits.

Service of Process: The serving of a written notification on the required parties advising them of a scheduled hearing.

Surrogate Decision-Maker: An adult individual eighteen years of age or older who is reasonably available, is willing to make health care decisions on behalf of an incapacitated person, who possesses the capacity to make health care decisions and is identified or selected by the attending physician or advanced nurse practitioner in accordance with state statute.

Terminal Condition: An incurable or irreversible condition as diagnosed by the attending physician or a qualified physician for which the administration of life-prolonging intervention will serve only to prolong the dying process.

Temporary Conservator: A person appointed by the circuit court who has only those responsibilities for managing the estate and financial affairs of a protected person, as specified in the order of appointment. A Temporary Conservator is time limited to six (6) months unless terminated or extended by the circuit upon good cause following a hearing.

Temporary Guardian: A person appointed by the circuit court who has only those responsibilities for the personal affairs of a protected person, as specified in the order of appointment. A Temporary Guardian may be appointed upon finding that an immediate need exists, that adherence to the procedures otherwise set forth in [Chapter 44A](#) for the appointment of a guardian may result in significant harm to the person that no other individual or entity appears to have the authority to act on behalf of the person, or that the individual or entity with authority to act is unwilling, unable or has ineffectively or improperly exercised the authority. A Temporary Guardian is time limited to six (6) months unless terminated or extended by the circuit court upon good cause following a hearing.

1.3 Roles of the Prosecuting Attorney and Attorney General

[WV Code §9-6-5](#) provides, “The Attorney General of the State and his assistants, and the prosecuting attorneys of the various counties shall render to the Commissioner...such legal services as he shall require of them in the discharge of his duties”. Their primary functions of the above legal counsel, as they relate to Adult Protective Services, include, but are not limited to:

- Review all substantiated APS cases involving a perpetrator to determine if legal intervention is needed;
- Prepare and submit applicable legal documents, such as petitions, to the court;
- Represent the department in legal proceedings; and,
- Provide legal consultation regarding APS cases.

It is essential that local Department staff develop and maintain a good working relationship with legal counsel. The protocols and procedures for interaction between the Department and their legal counsel should be developed. These mutually agreed upon procedures should then guide the cooperative efforts between the parties (see also [WV Code §9-6-3](#)). Having these agreed upon procedures in place in advance will facilitate access by the Adult Services staff to the legal system when this becomes necessary.

1.4 Reporting Requirements to the Prosecuting Attorney

Referrals that are received regarding a mentally and/or physically incapacitated adult or facility resident who is the victim of a violent crime, such as aggravated assault, sexual assault, attempted murder, domestic violence, etc., must be referred by DHHR to the appropriate law enforcement agency for investigation.

Notification to the prosecuting attorney is to be prepared at the end of the investigation phase of the APS process in cases where abuse/neglect or financial exploitation has been substantiated and there is an identified perpetrator.

SECTION 2

OVERVIEW

2.1 Non-Voluntary Legal Procedures

The following procedures are civil actions that may be appropriate for some Adult Protective Services cases. Each, in varying degrees, limit the rights of the individual and should not be considered until all other less invasive options have been ruled out. When legal action is necessary, the least restrictive action which meets the client's needs is the appropriate action to pursue. The reason(s) for pursuing legal action must be clearly documented in the case record and must be approved by the supervisor prior to initiating such action. The legal options that may be considered are listed below and are described in detail in the sections that follow:

- Order of Attachment;
- Guardian/Conservator;
- Veteran's Guardian;
- Involuntary Commitment;
- Injunctive Relief; and,
- Writ of Mandamus/Prohibition.

In all civil actions the rules of evidence and civil procedure apply. The testimony of an eye-witness is considered direct evidence. Hearsay statements are not usually admissible as evidence. Care must be taken to ensure that all parties have actually witnessed the client's behavior that is being characterized (i.e., the mental hygiene petitioner must have witnessed the behavior as the client being a danger to themselves or others).

2.2 Order of Attachment

2.2.1 Purpose

An order of attachment is a legal remedy available through the circuit court. Its use permits the removal of an incapacitated adult from an emergency situation and movement of the adult to a location where their safety can be assured, such as a hospital or other safe place besides a jail. The purpose of this action is to alleviate the emergency situation that was found to exist, to provide necessary treatment, and to reduce or avoid the risk of death or serious injury to the incapacitated adult. It is generally short-term, lasting only until the emergency is abated or until appropriate relief is granted by the court. Even so, it has a very significant impact on the individual.

Note: At no time is it appropriate for the Adult Services staff to seek custody of an adult when requesting an Order of Attachment. Adult Services staff should object during the court hearing if DHHR has been granted custody of the adult.

2.2.2 Statutory Basis

A petition for an Order of Attachment is a legal remedy available through the circuit court. State statute [§9-6-5](#) sets forth the circumstances under which an Order of Attachment may be granted by

the court. Specifically, an Order of Attachment may be used when there is probable cause to believe that an incapacitated adult is in an emergency situation and that the person(s) responsible for their care refuses to take the necessary steps to alleviate the emergency situation or the incapacitated adult is without a responsible person to provide for their care.

When an emergency situation exists but an Order of Attachment has not yet been granted removal of the adult may only occur if the individual is willing to be removed. Once an Order of Attachment is granted, the incapacitated adult may be removed from the home by law enforcement with or without the client's consent and delivered to a safe place. Upon the request of law enforcement, an employee of the Department may assist with removal.

A. Advantages

The advantage of an Order of Attachment is that it can be obtained quickly. The law does not require that a hearing be held prior to the issuance of the order. A hearing, however, must be held within one (1) judicial day following the issuance of the Order of Attachment.

B. Disadvantages

This procedure has serious shortcomings in regard to protection of the individual's right to self-determination. It is often difficult to judge a person's functional decision-making capacity in an emergency situation. The risk that you may infringe upon a competent person's right to refuse services does exist. The decision to seek an Order of Attachment should be made only after the social worker has consulted with their supervisor. An involuntary movement of the client places serious limits on the client's civil rights and generally results in significant stress for the client. The benefits of involuntary removal of the client from their home must be weighed against the likely negative results of such an action.

2.2.3 Removal When Order of Attachment Has Been Granted

In most instances, removal of the incapacitated adult is not to occur until after the Order of Attachment is granted by the court. After the Order of Attachment has been granted, a law enforcement officer is permitted to enter the client's home and remove the incapacitated adult. The adult is then to be transported to a hospital or other safe place (i.e., assisted living home, nursing home, etc.). State statute specifically excludes jail from consideration as a safe place. When the removal is initiated by a law enforcement officer, they may request that the Adult Services worker accompany them to the home and assist with the removal.

2.2.4 Removal When Order of Attachment Has NOT Been Granted

In rare situations, when an incapacitated adult is found to be in an emergency situation and without an immediate remedy to the emergency, it may be necessary to remove the adult prior to obtaining the Order of Attachment. Emergency removal shall only be considered when this action is necessary in order to reduce or avoid the risk of serious injury or death to the incapacitated adult.

If an employee or officer of the Department shall by direct observation of an incapacitated adult not in the immediate care, custody or control of another have reasonable cause to believe that such incapacitated person is then and there in an emergency situation, then such officer or employee may

offer transportation to a hospital or other safe place, other than a jail, to such incapacitated adult for immediate remedial treatment to reduce or avoid the risk of death, or serious injury. Emergency removal of an adult prior to obtaining an Order of Attachment must be voluntary on the part of the adult. Removal under these circumstances is to be initiated by a law enforcement officer or the Adult Services worker. When it is necessary for the Adult Service worker to initiate the removal, they must discuss the situation with their supervisor and obtain approval for the removal prior to removing the adult from their home.

Note: In rare instances it may be appropriate to file a petition requesting an Order of Attachment following an emergency removal. The individual who initiated the removal may apply to the circuit court for the Order of Attachment.

2.2.5 Time Frames

If an Order of Attachment is granted by the court and the incapacitated adult has been removed from their home, the court must set and hold a subsequent hearing to determine if remedial treatment out of the home is to continue or not. This hearing must be convened not more than one (1) judicial day following the granting of the Order of Attachment. The following outcomes are available to the court regarding disposition of the matter:

- The court decides that the incapacitated adult continues to require remedial treatment and is to continue in the current placement;
- The court decides that the incapacitated adult continues to require remedial treatment and an alternative placement is to be arranged to meet their needs; or,
- The court decides that the incapacitated adult does not continue to require remedial treatment and is to be released.

2.2.6 Appointment of Guardian Ad Litem

Whenever an Order of Attachment has been granted and, as a result, an incapacitated adult has been removed from their home, a Guardian Ad Litem must be appointed by the court. The role of the Guardian Ad Litem is to represent the interests of the adult during the hearing where the court is considering whether or not remedial treatment and placement is to continue. A Guardian Ad Litem may not be an employee of the State, an interested party or an individual selected or employed by an interested party.

2.2.7 Service of Process

When an Order of Attachment has been requested, certain individuals are to be notified of the action being taken and of the hearing date, time and location. A copy of the Order of Attachment and notice of the hearing, scheduled for the purpose of determining whether or not the incapacitated adult is to continue receiving remedial treatment, are to be served on any person in whose actual care, custody, and control the incapacitated adult is found. The service of process is to be arranged by the circuit clerk. The Adult Service worker may verbally advise the client and the caregiver of the hearing date and time if they are aware of this information but Adult Service staff is not to arrange or serve a formal service of process.

2.2.8 Payment for Care under Order of Attachment

[WV Code §9-6-6](#), specifies that any benefits that are paid to or for an incapacitated adult's care must actually be used for their care. Consequently, if the client has a resource or combination of resources either the client or their representative, if applicable, is expected to pay for the cost of care specified in the Order of Attachment. During the hearing, the Adult Service worker must request that the court specify in the final order that the client's resources are to be used to pay for the services provided.

2.2.9 Sample Order of Attachment Forms

In situations where the Department is requesting that the court issue an Order of Attachment, it may be necessary for the Adult Service worker to prepare or assist in the preparation of a petition for this purpose. Since there is some variation in procedures to be followed between judicial districts, preparation of a petition for an Order of Attachment is to be done in accordance with the local protocol established between the Department and the court. Sample forms have been included in the Appendix section of this policy to assist the Adult Services worker. These are [Appendix A](#) Order of Attachment; [Appendix B](#) Notarized Statement for Order; [Appendix C](#) Judges Order and [Appendix D](#) Flow Chart for Order of Attachment.

2.3 Guardianship

2.3.1 Purpose

Appointment of a guardian is a legal process whereby a person(s) is appointed for the purpose of managing the personal affairs of another individual who has been deemed mentally incompetent, intellectually disabled, mentally handicapped or a missing person. The appointment of a guardian is to be done through the circuit court in order to assure the protection of the constitutional rights of the protected person. The court also determines the type of guardianship needed and the specific areas of protection and assistance that are to be provided. Guardianship is usually a long-term arrangement.

2.3.2 Statutory Basis

The requirements related to the appointment of a guardian are contained in [Chapter 44A](#) of the WV Code also known as the West Virginia Guardianship and Conservatorship Act. For previous Committee appointments refer to [§44A-1-2](#).

A. Advantages

Appointment of a guardian is a mechanism for assuring the protection of incapacitated adults. State statute requires that the court select the appropriate individual or entity that is best qualified to act in the best interest of the protected person considering the client's wishes. A guardian appointed under the provisions of [§44A](#) must be the least restrictive possible and the powers granted shall not extend beyond what is absolutely necessary to assure the protection of the individual.

B. Disadvantages

Appointment of a guardian severely limits the rights of the protected person to act on their own behalf. A guardian has no authority to make financial decisions. A guardian has decision-making authority

but not enforcement authority. Once guardianship has been established by the court, it may be difficult to modify or terminate the appointment.

2.3.3 Types of Guardianship

A. Full Guardian

A guardian is a person or entity appointed by the circuit court responsible for managing the personal affairs of a protected person. Unless the powers and authority of the guardian are specifically limited in the order of appointment, the guardian has authority to manage the personal affairs of the protected person including, but not limited to, his/her health, care, safety, habilitation, therapeutic needs, relationships and social interactions, education and placement. A guardianship appointment lasts until further order of the court. For more information see [WV Code §44A](#).

B. Limited Guardianship

A limited guardian may be appointed for an individual who has been determined to be a “protected person” but is capable of addressing some of the essential requirements for his/her health, care, safety, habilitation, or therapeutic needs. This type of guardianship may also be appointed for a protected person residing in a supervised setting where their health, care, safety, habilitation, or therapeutic needs are being met but whose impairments are such that a substitute decision-maker is needed to make decisions related to the location of residence, major medical decisions, etc. The requirements related to the appointment of a limited guardian are contained in [§44A-2-11](#) of the WV Code.

C. Temporary Guardian

The court may appoint a temporary guardian when it is determined that an immediate need exists and without prompt action, significant harm to the alleged protected person or their estate may result. Appointment of this type of guardian may occur in situations where the individual is unable to act on their own behalf and:

- No other person or entity appears to have authority to act on the person’s behalf;
- The individual or entity authorized to act on the person’s behalf is unwilling to do so; or,
- The individual or entity authorized to act on the person’s behalf has ineffectively or improperly exercised their authority.

A temporary guardianship is limited in scope. The powers and authority of a temporary guardian are limited to only those specifically set forth in the order of appointment.

A temporary guardianship is also time limited. Appointment of a temporary guardian is limited to six (6) months, at which time the appointment expires. An extension of an additional six (6) months may be granted by the court for good cause shown.

The requirements related to the appointment of a temporary guardian are contained in [§44A-2-14](#) of the West Virginia Code.

2.3.4 Filing a Petition

A petition for the appointment of a guardian must be filed with the clerk of the circuit court in the county in which the alleged protected person resides. If the alleged protected person has been placed in a health care or correctional facility, the petition is to be filed in the county where the facility is located. Upon filing of the petition and the evaluation report, the court is to set a hearing date. The hearing is to be held within sixty (60) days following the filing.

The following forms must be completed in order to petition for the appointment of a guardian:

- Petition for the Appointment of a Guardian/Conservator;
- Evaluation Report by Licensed Physician/Psychologist; and,
- Affidavit of Physician (if protected person is unable to attend hearing).

Note: The court, for good cause shown, may grant leave to file the petition without an evaluation report.

2.3.5 Court Fees

When the Department is the petitioner, the Department is responsible for paying the required filing fees. The social worker should encourage the court to enter into the guardianship order language which causes the client's estate to reimburse the Department the cost of filing fees if the estate is adequate to do so. See Guardianship Policy for detailed information.

2.3.6 Who May File

A petition for the appointment of a guardian may be filed by any of the following:

- The alleged protected person may file the petition on their own behalf;
- A person who is responsible for the individual's care/custody;
- The facility providing care to the individual;
- A person acting as de facto guardian or de facto conservator;
- Any other interested person; or,
- The Department of Health and Human Resources.

2.3.7 Contents of the Petition

See [Appendix F](#) Guardianship Petition.

2.3.8 Evaluation Report

The petition for the appointment of a guardian must be accompanied by an evaluation report completed by a licensed physician or psychologist who has examined the alleged protected person. In extenuating circumstances, when good cause can be shown, the court may permit the petition to be filed without an evaluation report. In this instance the court will order the completion of appropriate assessments and examinations and further order that a report be prepared and filed with the court. See [Appendix G](#) Evaluation Report.

2.3.9 Affidavit of Physician

If the petition states that the incapacity of the alleged protected person will prevent attendance at the hearing, an opinion as to whether such attendance would be detrimental to the person's health, care or safety must be provided on the Affidavit of Physician. See [Appendix H](#) Physician's Affidavit.

2.3.10 Statement of Financial Resources

If the petition requests the appointment of a conservator, a Statement of Financial Resources must be filed with the petition. See [Appendix I](#) Financial Resources.

2.3.11 Notice of Hearing

A Notice of Hearing must accompany the Guardian/Conservator petition. See [Appendix J](#) Hearing Notice.

2.3.12 Service of Process

The alleged protected person must be served in person with the hearing notice, a copy of the petition, and the evaluation report. This is to be done not less than fourteen (14) days prior to the scheduled hearing. The alleged protected person may not waive service.

In addition to the alleged protected person, a copy of the hearing notice and a copy of the petition shall be sent by certified mail at least fourteen (14) days prior to the scheduled hearing to all individuals seven (7) years of age or older and to all individuals and entities whose names and addresses appear in the petition. Refer to Guardianship Policy for further information.

Note: No person may be appointed guardian without first receiving proper notice and having the opportunity for a hearing.

2.3.13 Appointment of Counsel

The court shall appoint legal counsel for the alleged protected person. In doing so, the court is to consider any known preferences of the individual. The alleged protected person may hire and pay for an attorney of his/her choice.

2.3.14 Time Frame for Hearing

Upon filing of a petition for the appointment of a Guardian/Conservator and the evaluation report, the court is to set a hearing date, within sixty (60) days following the filing.

2.3.15 Who May Serve as Guardian

Any person who has the capacity to form a preference may at any time nominate any individual or entity to serve as their guardian. The nomination may be in writing, by verbal request to the court or may be proven by any other competent evidence. Designation of a representative under a valid medical power of attorney, living will, or of a surrogate decision-maker shall constitute competent evidence of the nomination of a guardian.

A guardian whose appointment has not been terminated or who has not otherwise been removed from this capacity may nominate a successor guardian for consideration by the court. When doing so,

the nomination is to be in writing and shall include a brief statement as to the reason(s) for the nomination. If the one nominated is eligible and willing to serve, and this appointment would serve the best interest of the protected person, the court is to appoint them guardian.

2.3.16 Effect of Advance Directives

The presence of an advance directive such as a living will, medical power of attorney, power of attorney, or the prior appointment of a surrogate decision-maker may in some cases eliminate, limit, or supersede the need for the appointment of a guardian. If there is an advance directive in place and appointment of a guardian is needed, any person appointed in one of these capacities shall be the first preferred nominee for guardian.

2.3.17 Persons Who May Be Appointed Guardian

The following individuals and organizations may be appointed to serve as guardian for a protected person. The selection of a guardian must take a variety of factors into consideration. Primary among these is the potential guardian's ability to provide an active and suitable program of guardianship. Potential candidates who meet the criteria may come from one of the following categories:

- Any adult individual may be appointed to serve as a guardian, a conservator or both;
- A non-profit corporation chartered in this state and licensed;
- A public agency that is not a provider of health care services to the protected person;
- A non-profit corporation appropriately chartered and licensed in the state of West Virginia for the purpose of serving as guardian, limited guardian or temporary guardian of protected persons;
- The Department of Health and Human Resources may be appointed to serve as guardian only when it has been determined that there is no other individual, non-profit corporation or other public agency that is equally or better qualified and willing to serve; or,
- Persons employed pursuant to a written contract or other employment agreement with a licensed provider of behavioral health services for the purpose of providing services to a protected person:
 1. Where payment for services provided under the contract or agreement is pursuant to a waiver program;
 2. Where the person is related to the protected person by blood, marriage, or adoption;
 3. Where the contract or agreement is disclosed in writing to the court; and,
 4. The court finds the appointment is in the best interest of the protected person.

Note: When a sheriff has previously been appointed guardian, and guardianship is being transferred to the Department of Health and Human Resources in accordance with Senate Bill 100, enacted April 11, 1997, the Department may not refuse to accept the guardianship appointment.

Note: No person may be appointed guardian without first receiving proper notice and having the opportunity to attend the hearing.

Note: See [Appendix E](#) Survey Form.

2.3.18 Persons Who May NOT Be Appointed Guardian

The following persons or entities may not be appointed as guardian:

- Individuals who are employed by or affiliated with any public agency, entity, or facility which is providing substantial services or financial assistance to the protected person (i.e., Adult Family Care Providers cannot become guardian of any AFC clients in their home);
- Corporation, agency, or other entity, or any agent thereof doing business with or in any way profiting from the estate or income of the protected person for whom services are being performed by the guardian;
- Any person who has an interest as a creditor of a protected person, other than a bank or trust company authorized to exercise trust powers of engage in trust business in West Virginia; or,
- The Sheriff in the county in which a court has assumed jurisdiction.

Note: If the Sheriff has been appointed as guardian, he/she may petition the circuit court to be released as guardian.

2.3.19 Notification of Appointment

Following the hearing, an order of appointment is to be issued by the court setting forth the type, the scope, and the specific areas of protection and assistance where the authority has been granted.

A. Full Guardian/Limited Guardian

Within fourteen (14) days following the entry of an order of appointment a full guardian or limited guardian shall mail a copy of the order of appointment along with a brief statement in large print, of the individual's right to seek an appeal for modification or termination, to the protected person and to all individuals and entities given notice of the petition.

B. Temporary Guardian

Within five (5) days following the entry of an order of appointment of a temporary guardian shall mail a copy of the order of appointment along with a brief statement in large print, of the individual's right to seek an appeal for modification or termination, to the protected person and to all individuals and entities given notice of the petition.

Note: The order of appointment must name the West Virginia Department of Health and Human Resources as guardian, not an individual social worker. If a social worker is named, the court must be petitioned to modify the order.

2.3.20 Confidentiality

The court file in guardianship proceedings is considered confidential and is not open for public inspection either during the court process or after the case is closed. This includes the petition filed, all pleadings, exhibits and other documents contained in the file. The court file is open only to inspection and copying by the parties to the petition, their designees, and their attorneys.

2.3.21 Transfer of Venue Following Appointment

Following the appointment of a full or limited guardian the court with jurisdiction over the proceeding may transfer the case to another circuit court within West Virginia or to an appropriate tribunal in another state. To do so, a petition must be filed requesting a change of venue, a hearing must be held, and an order issued by the circuit court authorizing the transfer. The decision to grant a change of venue is to be based on the best interest of the protected person. Transfer of jurisdiction to another state shall be in accordance with the provisions [of Chapter Forty-four-c of the WV Code](#).

Upon the transfer, the previously appointed guardian or conservator shall report to the county of transfer that is assuming jurisdiction. Any changes to the appointments shall be made by the court assuming jurisdiction.

2.3.22 Reports

Any person who has been appointed as guardian for a protected person is required to periodically file a report regarding the protected person. The guardian's report must include the following:

- Description of the protected person's current mental, physical, and social condition;
- Description of the protected person's living arrangements during the reporting period;
- Description of the medical, educational, vocational, and other professional services provided to the protected person and the guardian's opinion about the adequacy of the protected person's care;
- Summary of the guardian's visits with and activities on behalf of the protected person;
- Statement about whether the guardian agrees with the current treatment/habilitation plan;
- Recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship;
- Any other information specifically requested by the court or which the guardian believes to be useful;
- Compensation requested and the reasonable and necessary expenses incurred by the guardian on the behalf of the protected person; and,
- Verification, signed by the guardian, stating that all the information contained in the report is true and accurate to the best of his/her knowledge.

The court may order the guardian to attend a hearing about the report. This may be done either by order of the court or upon petition by any interested person. If both a guardian and conservator have been appointed to act on behalf of the protected person, the report of the guardian may be incorporated into and made a part of the conservator's report. See [Appendix M](#) Inventory Forms.

2.3.23 Filing Procedures for Reports

Reports of guardians and accountings of conservators, as described in this article shall be filled with the circuit clerk of the county in which appointed and also with the fiduciary commissioner of the county or other person if the court has made a referral in its order:

- Within six (6) months of being appointed;
- By December 31st of each year thereafter;

- When the court orders additional reports or accountings to be filed;
- When the guardian or conservator resigns or is removed; and,
- When the appointment is terminated, except in the case of a guardian, the court may determine there is no need for a report upon termination, and in the case of a conservator no accounting is required if all persons entitled to any proceeds of the estate consent thereto.

Note: See [Appendix K](#) Periodic Guardian Report.

2.3.24 Personal Liability

A guardian has a fiduciary duty to the protected person for whom they were appointed guardian and may be held personally liable for a breach of that duty. The guardian however, is not liable for the acts of the protected person, unless, the guardian has been personally negligent and the guardian is not required to expend their personal funds on behalf of the protected person.

2.3.25 Posting of Bond

The court has discretion to determine whether the posting of bond by a guardian is necessary. No bond is required of the Department of Health and Human Resources when appointed to serve as guardian.

2.3.26 Mandatory Education

Any individual who is appointed to serve as a guardian is required to receive educational materials or participate in mandated educational training unless directed otherwise by the court. When the court makes a determination that an individual is a “protected person” in accordance with state statutes ([§44A-1-4](#)), the proposed guardian must complete the required educational training within thirty (30) days of this determination. Upon completion of the training, the appointed guardian is to provide an affidavit to the court verifying completion of the required training. Upon receipt of this affidavit the court is to issue the order of appointment.

The [WV Supreme Court of Appeals](#) has been charged with the task of developing and implementing an educational program for guardians to meet the mandatory training requirement. In order to meet this mandate, a packet of training materials entitled “West Virginia Guardian and Conservator Handbook, A Guide for Court-Appointed Guardians and Conservators” was developed. This handbook may be copied as needed. An interactive educational training is available at the [WV Supreme Court of Appeals](#) website.

2.3.27 Termination, Revocation & Modification of Appointments

1. Appointment of Successor Guardian

The court may appoint a successor guardian prior to or at the time of a termination. A successor guardian appointed prior to termination of their predecessor shall be immediately empowered to assume their duties as guardian. They shall be required to file the required oath, post any required bond, and complete the mandatory education, if required by the court, within thirty (30) days following the termination of the predecessor. The successor guardian shall assume the powers and duties of the predecessor unless otherwise ordered by the court.

2. Resignation of Guardian

If a guardian wishes to resign this office, they must petition the court for permission to do so, at least sixty (60) days prior to the effective date of the resignation. The court shall grant permission to resign, except for good cause, and shall appoint a suitable successor guardian who is willing to serve in this capacity.

3. Removal of Guardian

The court may, under certain circumstances, order the removal of a guardian or order other appropriate relief. Removal of a guardian may be initiated by a petition filed by an interested party or upon motion of the court. Removal of the guardian may be appropriate if the guardian:

- Acting under an order entered mistakenly or by a misrepresentation whether fraudulently or innocently;
- Experiencing an incapacity or illness, including substance abuse, that affects their fitness to perform or is adjudged to be a protected person in any jurisdiction;
- Convicted of a crime that reflects negatively upon their ability to carry out their duties;
- Wastes or mismanages the estate and abuses their powers or fails to discharge their duties;
- Neglects the care and custody of the protected person;
- Has an interest that is adverse to performance of their duties such that there is a substantial risk that the guardian will fail to properly perform their duties;
- Fails to file reports when required, or fails to comply with any court order;
- Fails to file sufficient bond, if applicable, after being ordered by the court to do so;
- Avoids service of process notice;
- Becomes incapable of performing duties; or,
- Not acting in the best interest of the protected person, or of the estate, with or without fault.

The court may appoint a temporary guardian pending a determination on a petition for removal of the current guardian.

4. Termination, Revocation and Modification of Guardian [§44-A-6](#)

The court may, under certain circumstances, may order the termination, revocation or modification of a guardian or order other appropriate relief. Termination, revocation or modification of a guardian may be initiated by a petition filed by an interested party or upon motion of the court. Termination, revocation or modification of the guardian may be appropriate if:

- The protected person is no longer in need of the assistance or protection of a guardian or conservator;
- The extent of protection, management or assistance previously granted is either excessive or insufficient considering the current need therefore;
- The protected person's understanding or capacity to manage the estate and financial affairs or to provide for his or her health, care or safety has so changed as to warrant such action;

- No suitable guardian or conservator can be secured who is willing to exercise the assigned duties; or,
- It is otherwise in the best interest of the protected person.

When termination, revocation or modification of guardianship is authorized a guardianship of a protected person shall terminate upon the death of the protected person, whenever jurisdiction is transferred to another state, or if ordered by the court following a hearing on the petition of any interested person. See [Appendix L](#) Petition to Terminate, Revocation and Modification.

Note: When signing documents as a guardian, the social worker should sign in the following manner: “West Virginia Department of Health and Human Resources by (your name and title) does not accept financial responsibility”.

2.4 Conservatorship

2.4.1 Purpose

Appointment of a conservator is a legal process whereby a person(s) is appointed for the purpose of managing the financial affairs of another individual who has been deemed mentally incompetent, intellectually disabled, mentally handicapped, or missing. The appointment of a conservator is to be done through the circuit court in order to assure the protection of the constitutional rights of the protected person. The court also determines the type of conservatorship needed and the specific areas of management and assistance that are to be provided. Conservatorship is usually a long-term arrangement.

While the Department IS NOT to be appointed as conservator it is important for Department staff to be familiar with the requirements related to conservatorship. We will frequently need to work in collaboration with conservators as we provide services to adults, particularly if the Department has been appointed as guardian.

2.4.2 Statutory Basis

The requirements related to the appointment of a conservator are contained in [§44A](#) of the WV Code, also known as the West Virginia Guardianship and Conservatorship Act.

A. Advantages

Appointment of a conservator is a mechanism for assuring the protection of incapacitated adults. State Code requires that the court select the individual or entity that is best qualified to act in the best interest of the protected person, ability of the conservator to carry out the duties and responsibilities of the office, and commitment to promoting the protected person’s welfare. A conservator appointed under the provisions of §44A must be the least restrictive possible and the powers granted shall not extend beyond what is absolutely necessary to assure the protection of the individual.

B. Disadvantages

Appointment of a conservator severely limits the rights of the protected person to act on their own behalf.

Note: When the Department of Health and Human Resources has previously been appointed conservator, and conservatorship is being transferred to the Sheriff in accordance with Senate Bill 100, enacted April 11, 1997, the Sheriff may not refuse to accept the conservatorship appointment.

If the Department of Health and Human Resources has been appointed as conservator, the Department may petition the circuit court to be released as conservator.

2.4.3 Filing a Petition

When the Department is filing for guardianship it may also be necessary to request a conservator. To request a conservator if it is determined that an immediate need exists and without prompt action, significant harm to the protected person or their estate may result.

Please refer to [Guardianship Section](#), Adult Protective Services Policy and [Chapter 44A](#) of the WV Code for additional information.

Note: There are situations when appointment of a conservator is not to be used. These are when: the protected person's only source or major source of income and property is from Social Security Administration and they have a representative payee who is acting in their best interest; or the protected person whose opportunity for regular expenditure of resources is so limited that the impact of the appointment would deprive the individual of their rights to make decisions in daily personal matters.

2.5 Veteran's Guardian

2.5.1 Purpose

In a limited basis it may be necessary to appoint a Veteran's Guardian in order for a mentally incompetent veterans or orphans, to receive benefits from the United States government or any bureau or agency of the US government. A Veterans Guardian is designated to protect the veterans financial benefits such as pension, compensation insurance or other monies, from the United States Department of Veterans Affairs as a result of service in the Armed Forces of the United States. The Department may not serve in this capacity. The Department can serve as a guardian for a veteran for making personal decisions.

2.5.2 Statutory Basis

The requirement related to the appointment of a Veteran's Guardian, are contained in [Article 15 of Chapter 44](#) of the WV Code.

A. Advantages

Proceedings under [Article 15, Chapter 44](#) should be brought in any case where a federal agency has declared it mandatory in order for that agency to render assistance or benefits. When an individual is a veteran of any war, military occupation or expedition or is a survivor of a veteran and that individual

has a disability, either mental or physical, that would prevent them from using their veteran's check to provide for their basic needs, an appointment of a guardian becomes mandatory and a petition must be filed.

B. Disadvantages

These procedures can only be instituted once it is determined that the veteran is eligible for care or treatment by the Veterans Administration or other agency of the United States government. The only other finding that is necessary is that the appointment of a guardian is necessary for the proper treatment and care of such veteran. This is a legal device that will only apply to an extremely limited number of cases.

2.5.3 Required Procedures

The person for whom a guardian is to be appointed under this statute must have been rated incompetent by an examining board employed or convened by the government of the United States. Before making an appointment of a guardian under these provisions, the court will require that the guardian show that he/she is a fit and proper person to be appointed and must execute and file a bond. The petition for the appointment of a veteran's guardian should be filed by the individual's next of kin. If there is no such person, or if this person refuses to file the petition, a petition may be filed in any court of competent jurisdiction by any responsible person residing in the state of West Virginia. However, the Department social worker may not serve as the veteran's guardian to handle financial matters. The Department can serve as an adult legal guardian for a veteran in making personal decisions if ordered by the court.

2.6 Involuntary Commitment

2.6.1 Purpose

The purpose of involuntary commitment is to ensure the protection of individuals who are believed to be mentally ill or drug/alcohol addicted to such a degree that the individual is likely to cause serious harm to themselves or others. Frequently these commitments are of short duration. It is important to recognize that mental illness or addiction alone is not grounds for involuntary commitment. It is also important to remember that DHHR cannot commit someone to a mental health facility. Commitment must be through the mental hygiene process.

2.6.2 Statutory Basis

The requirements and specific procedures that apply related to involuntary commitment are contained in [§27-5](#) of the WV Code. This is a legal remedy where an individual who is believed to be mentally ill or drug/alcohol addicted to such a degree that the individual is likely to cause serious harm to themselves or others. When this is the case the individual may be taken into custody and placed in a hospital for evaluation and/or treatment.

2.6.3 Requirements

Two (2) conditions must be met in order for an individual to be involuntarily committed. These are: a) the individual is mentally ill or addicted to drugs or alcohol, and b) they are likely to cause serious harm to themselves or others. When filing a petition under the provisions for involuntary commitment,

the petitioner must recently have observed the behavior(s) prompting the petition. An individual cannot be involuntarily committed merely because they have been diagnosed as epileptic, mentally deficient or senility.

Transportation of an individual who has been involuntarily committed to a mental health facility or state operated psychiatric hospital is the responsibility of the local sheriff. See [WV Code §27-5-10](#).

2.6.4 Commitment Procedures

Commitment procedures vary somewhat from one judicial district to another. However, state code requires that the following actions be taken:

- Application for involuntary custody for examination must be made, under oath, to the circuit court, mental hygiene commissioner or the magistrate under special circumstances;
- Application must be made in the county of residence or the county where the individual is found.
- If immediate detention of the individual is believed to be necessary and no circuit court judge or mental hygiene commissioner is available for immediate presentation of the application, a magistrate designated by the chief judge of the judicial circuit may accept the application;
- Upon finding that immediate detention is necessary the circuit court or mental hygiene commissioner may enter an order for the individual to be detained and taken into custody for the purpose of holding a probable cause hearing and for the purpose of examination of the individual by a physician or psychologist (the period of temporary detention may not exceed twenty-four (24) hours and sheriff is to transport the individual);
- A probable cause hearing is to be held and legal counsel appointed for the individual (the hearing may be postponed only upon request by the individual or their counsel and postponement, if granted, may not exceed forty-eight (48) hours);
- The individual must be present at the hearing and has the right to present evidence, confront witnesses, examine all other evidence presented against him/her, and examine all testimony offered;
- At the conclusion of the hearing the court shall find and enter an order stating whether or not there is probable cause to believe that the individual, as a result of mental illness or addiction, is likely to cause serious harm to him/herself or to others;
- Upon filing of an order finding probable cause and upon certification by one physician or one psychologist, the individual may be admitted to a mental health facility for examination;
- Examination must be completed within three (3) days from the date on which the individual was taken into custody. If the examination is not completed within this time frame, the individual must be released. Also, if the examination is completed and reveals that the individual is not mentally ill or addicted to alcohol and/or drugs the individual must be released;
- After the examination has been completed the individual may not be detained at the mental health facility for more than five (5) days excluding Sundays and holidays, unless the individual is examined by a physician and he/she certifies that the individual is mentally ill or addicted to alcohol and/or drugs and is likely cause serious harm to him/herself or others;
- If the physician certifies that the individual is mentally ill or addicted to alcohol and/or drugs and is likely to cause serious harm to him/herself or others, the chief medical officer must

institute final commitment proceedings within fifteen (15) days from the date of admission. If these proceedings are not initiated within this period of time, the individual must be released. If all proceedings outlined in this section are not completed within thirty (30) days of institution of date proceedings are instituted, the individual must immediately be released; and,

- Upon completion of the final commitment hearing, the court must make a finding whether or not the individual is mentally ill or addicted to alcohol and/or drugs and is likely to cause serious harm to himself/herself or others.

2.6.5 The Disposition Options Available to the Court

- The individual is not to be involuntarily committed and is to be released and proceedings dismissed;
- The individual is to be involuntarily committed for an indeterminate period of time (expires two (2) years after the date of the last order of commitment); or,
- The individual is to be involuntarily committed for a temporary observation period, not to exceed six (6) months.

A. Advantages

Involuntary commitment provides a means of removing an individual who is likely to cause serious harm to himself/herself or others by providing treatment for the individual. An individual cannot be involuntarily committed merely because they have been diagnosed as epileptic, mentally deficient or with senility. During the commitment hearing, the applicant seeking commitment of the individual is required to provide evidence that a less restrictive alternative placement appropriate to meet the needs of the individual does not exist.

Commitment to the community mental health center may be ordered by the court. If this type of commitment is ordered, the individual then may be released to the authority of the mental health center for continuing care and treatment. Use of this option may prevent the need for in-patient treatment in a state operated mental health facility.

Modified commitment procedures for a treatment compliance order may be filed upon the following:

- If the individual on two (2) or more occasions within a twenty-four (24) period prior to the filing of the petition and the individual's failure to take prescribed medication or follow another prescribed regimen to treat a mental illness was a significant aggravating or contributing factor in the circumstances surrounding the crime;
- The individual's previous hospitalizations due to mental illness of the individual's crime of violence occurred after or as a result of the individual's failure to take medication or other treatment as prescribed by a physician to treat the individual's mental illness; and,
- That the individual in absence of a court order requiring him or her to take medication or other treatment as prescribed, is unlikely to do so and that his or her failure to take medication or follow other regimen or treatment as prescribed is likely to lead to further instances in the reasonably near future in which the individual becomes likely to cause serious harm or commit a crime of violence against the person.

B. Disadvantages

The most evident limitation of involuntary commitment is the difficulty of obtaining the proof that an individual is likely to cause serious harm to him/herself or others. The individual may demonstrate, either actively or passively that he/she is dangerous. Determination of danger must be based upon recent overt acts. Testimony verifying the events that lead to the conclusion that the individual is dangerous may have to be obtained from sources other than the examining physician or psychologist. This may include the applicant/petitioner as well as others who have witnessed the client's behavior. Appropriate local mental health center staff should be involved in the involuntary commitment proceedings. Involuntary commitment is the most severe restriction of an individual's rights (further restrictions are outlined on the petition) and shall only be considered after all appropriate less restrictive alternatives have been explored and rejected.

Note: For additional information and definitions applicable to involuntary commitment see [WV Code Chapter 27](#). See [Appendix N](#) Involuntary Commitment Flow Chart.

2.7 Injunctive Relief

2.7.1 Purpose

Injunctive Relief is a legal remedy available through the circuit court. It is used for the purpose of requiring a party to refrain from doing or continuing to do a particular act or activity. This remedy differs from other options in that it is directed toward a client's caregiver rather than toward the client.

2.7.2 Statutory Basis

[WV Code §9-6-4](#) sets forth the circumstances under which injunctive relief may be granted by the court. Specifically, injunctive relief may be used to restrain and abate the abuse/neglect of an incapacitated person or to alleviate an emergency situation. When the petition is filed for the purpose of alleviating an emergency situation, the court may grant relief under [§9-6-5](#) of the Code of WV, which authorizes the use of an order of attachment to remove an incapacitated adult from the home in order to assure their safety, rather than granting injunctive relief.

2.7.3 Requesting Injunctive Relief

A request to the court to grant injunctive relief may be made by the Department or any reputable person. The process must be initiated through the prosecuting attorney's office. In doing so, the petitioner must bring and maintain action against any person having the actual care, custody or control of an incapacitated adult for the purpose of restraining the person having care, custody and control in order to abate any abuse or neglect or to abate an emergency situation of an incapacitated adult. As a result of petitioning for injunctive relief, the court may issue a preliminary injunction against a caregiver and then set a hearing date to determine the need for additional injunctive relief. The most common use for this procedure is for the purpose of forcing a caregiver who is interfering with an Adult Protective Services investigation (i.e. not allowing access or adequate access to the alleged client) to cease their interference.

2.7.4 Relief that may be Ordered by the Court

- Termination of assistance granted or paid to any person found to have abused or neglected an incapacitated adult;
- Authorize assistance or payment to another person solely for the use and benefit of the abused/neglected person; and,
- Grant other relief as requested by the petitioner and as the court deems appropriate to restrain and abate the abuse/neglect (i.e., freezing financial assets).

In addition, when the petition was filed for the purpose of alleviating an emergency situation, the court may grant relief under [§9-6-5](#) of the Code of WV, which authorizes the use of an order of attachment to remove an incapacitated adult from the home in order to assure their safety, rather than granting injunctive relief.

2.7.5 Appointment of Guardian Ad Litem

In any proceeding to grant injunctive relief, a Guardian Ad Litem must be appointed by the court to protect the interests of the incapacitated adult. State statute identifies individuals who are prohibited from serving as Guardian Ad Litem for an incapacitated adult.

The following individuals shall NOT be appointed as Guardian Ad Litem to represent the interests of the incapacitated adult:

- An employee of the state;
- A party to the proceeding;
- An individual selected by a party to the proceeding; and,
- An individual employed by a party to the proceeding.

2.7.6 Court Dispositions

- a) Grant injunctive relief requested;
- b) Deny injunctive relief requested;
- c) Continue the hearing until additional information is available and a final decision can be made;
- d) Dismiss the petition; or,
- e) If injunctive relief is requested but the court grants order of attachment instead, arrange for removal of the incapacitated adult to a safe place by a law enforcement official if appropriate (the Department worker can assist with the removal upon the request of law enforcement).

2.7.7 Court Dispositions if Injunctive Relief is NOT Granted

Regardless of the court disposition, the case worker is to complete the APS investigation to its logical conclusion following regional protocol (i.e., consulting with your supervisor, Adult Service Consultant, regional attorney, etc.).

2.8 Writ of Prohibition and Writ of Mandamus

2.8.1 Purpose

Writs of prohibition and mandamus are extraordinary remedies that DHHR may seek in appropriate circumstances. Generally speaking, all other forms of remedies should be considered or exhausted before considering a petition for a writ of prohibition or a writ of mandamus.

A writ of prohibition is issued by a superior court to prevent an interior court, board, officer or an administrative tribunal from exceeding its judicial or quasi-judicial powers. For example, a petition for a writ of prohibition maybe sought by a party in the West Virginia Supreme Court of Appeals against a circuit court that lacks jurisdiction to hear the case, or having jurisdiction, exceeds its power or authority.

A writ of mandamus is issued by a court to compel an interior court or a government officer to perform a mandatory or nondiscretionary legal duty correctly. A writ of mandamus will not be issued against a court or government officer exercising discretionary powers unless it can be shown that the court or government officer's actions are capricious, arbitrary or under the misapprehension of law. For example, a petition for a writ of mandamus maybe sought by a party in circuit court to enforce a county board of education to provide a free and appropriate education to their child.

2.8.2 Statutory Basis

The statutory basis and requirement for a writ of prohibition and mandamus are contained in [§53-1-1](#) et seq., of the WV Code.

A. Advantages

Filing a petition for a writ of prohibition or mandamus maybe the last option left to enforce or compel a court or government officer to do an act or refrain from doing an act that is contrary to the interest of a party.

B. Disadvantages

Writs of prohibition and mandamus are extraordinary remedies that are to be used only where the usual and ordinary forms of redress are unavailable or inadequate. Therefore, other options must be considered or explored before considering a writ of prohibition or mandamus.

SECTION 3

INTRODUCTION

3.1 Advanced Directives/Administrative Procedures

The following advanced directives/administrative procedures are actions that may be appropriate in some Adult Service cases. Each, in varying degrees, limit the rights of the individual and should not be considered until all other less invasive options have been ruled out. When considering these remedies, the least restrictive action which meets the client's needs is the appropriate action to pursue. The reason(s) for pursuing any of these remedies must be clearly documented in the case record and must be approved by the supervisor prior to initiating such action. These options related to Adult Service cases are listed below. Each is described in detail in the sections that follow.

- Do Not Resuscitate (DNR) Order;
- Physician's Order Scope of Treatment (POST) Form;
- Power of Attorney;
- Health Care Surrogate;
- Living Will;
- Medical Power of Attorney; and,
- Representative Payee.

3.2 Do Not Resuscitate (DNR) Order

3.2.1 Purpose

A Do Not Resuscitate Order (DNR) is a physician's order, issued by a licensed physician directed by a capacitated individual instructing the health care provider not to administer cardiopulmonary resuscitation or any mechanical means to prolong or continue life.

3.2.2 Statutory Basis

The requirements related to issuing a Do Not Resuscitate Order are contained in [§16-30C](#) of the WV Code.

3.2.3 If the Department is Guardian or Health Care Surrogate

In situations where the Department has been legally appointed to act as guardian for the protected person or has been appointed to serve as Health Care Surrogate, the decision of whether to sign a DNR should not be taken lightly. The decision to sign a DNR must be made on a case by case basis. Careful consideration should be given to the Guardian's/Health Care Surrogate's knowledge of the client and their expressed wishes. **In no instance is the Department to routinely sign DNR orders.**

When a DNR is being considered or has been requested by the attending physician, the Adult Service worker must consult with their supervisor. Approval must be granted by the supervisor prior to a DNR being signed by the Adult Service worker and documented in the client's case record in FACTS. Whenever the decision of whether or not to sign a DNR is in question, the Adult Service worker is strongly encouraged to consult with the Hospital Ethics Committee and/or Ethics Committee of the Bureau of Children and Families.

3.2.4 Requirements & Procedures

Do Not Resuscitate Orders must be in writing and completed by the person's attending physician. In certain situations, examination by a second (2nd) physician is also required before a DNR order may be written. DNR orders may be written under the following circumstances:

1. A DNR order may be written by the attending physician for a person who is present in or residing at home or in a health care facility, provided the individual, their representative or their surrogate decision-maker has consented to the order;
2. Individual's may request that their physician issue a DNR order for them;
3. The representative or surrogate decision-maker may consent to a DNR for an incapacitated person;
4. If a surrogate decision-maker is not reasonably available or capable of making a decision regarding a DNR order, an attending physician may issue a DNR order to an incapacitated person in a health care facility, provided, a second physician who has examined the person concurs with the opinion of the attending physician that the provision of cardiopulmonary resuscitation would be contrary to accepted medical standards.

Health care providers are required to comply with DNR orders when presented with one that has been completed by a physician on the specified form, and for a person present or residing in a health care facility, when the DNR order is consistent with the policies and procedures of the facility. DNR orders that meet the applicable requirements set forth in state statutes shall be honored in health care facilities, ambulances, homes and communities within the state of West Virginia.

3.2.5 Limitations & Prohibitions

Issuing a Do Not Resuscitate (DNR) order does not apply to treatment rendered at the site where trauma has occurred to persons who experienced cardiac or respiratory arrest as a result of severe trauma.

3.2.6 Revocation

A person or their representative may revoke a DNR order at any time. State statutes set forth the specific methods by which this revocation may be accomplished in various situations. These are as follows:

- A person with capacity in a health care facility may at any time revoke his/her previous request for or consent to a DNR order. Revocation may be done by making either a written, oral, or other act of communication to a physician or other professional staff of the health care facility (**Note:** If revocation is done orally, this must be documented);

- An individual residing at home may at any time revoke his/her previous request for or consent to a DNR order. Revocation may be done by destroying all copies the DNR order and removing any DNR identification from their person. The person is responsible for notifying their physician of the revocation;
- A representative or surrogate decision-maker may revoke his/her consent to do a DNR for a person with incapacity in a health care facility by notifying a physician or other professional staff of the health care facility of the revocation of consent in writing, or by orally notifying the attending physician in the presence of a witness eighteen (18) years of age or older;
- A representative or surrogate decision-maker may revoke his/her consent to do a DNR for a person with incapacity residing at home by destroying the DNR order and removing the DNR identification from the person. The person's representative or surrogate decision-maker is responsible for notifying the person's physician of the revocation.

When the attending physician is notified of the revocation of a DNR order they shall immediately cancel the DNR order if the person is in a health care facility and notify the professional staff of the facility responsible for the person's care of the revocation and cancellation. Any professional staff of the health care facility informed of or provided with a revocation of consent shall immediately notify the attending physician of the revocation. Only a licensed physician may cancel the issuance of a DNR order.

Note: See [Appendix R](#) and [WVU End of Life Care](#) for a sample DNR order.

3.3 Physician's Order Scope of Treatment (POST) Form

3.3.1 Purpose

The POST form is a standardized hot pink form containing orders by a physician who has personally examined a patient regarding that patient's preferences for end-of-life care. The form provides physician orders regarding CPR-code or no code status; level of intervention (comfort care, intermediate, or full treatment); and use or withholding of antibiotics and feeding tubes.

3.3.2 Statutory Basis

The requirements for a POST form are contained under the West Virginia Health Care Decisions Act [Chapter 16-30](#).

3.3.3 Requirements and Procedures

Any person acting as a decision maker or any person having capacity can execute a POST form.

Facility or hospital social workers, nurses, and other health care professionals can fill out the form with patients or their representatives/surrogates or with a capacitated person. The person preparing the form should sign their name in the space provided for the preparer. To activate the form, a physician who has examined the patient must review and sign it as well as the decision maker or capacitated person.

Note: Health Care Surrogate and Guardianship Policy state the DHHR worker should not complete the form but it is appropriate for them to sign as an appointed decision maker.

The original POST form should be kept with the patient at all times. If the patient resides at home, the POST form should be kept on the refrigerator. Health care facilities are required to keep the POST form as the first page in a person's medical record unless otherwise specified in the health care facility's policies and procedures.

The POST form can be electronically filed with the e-Directive Registry by opting in and providing the form to them. e-Directive Registry can be accessed through the website at www.wvendoflife.org or fax to (304) 293-7442.

3.3.4 Limitations and Prohibitions

The POST form is voluntary and can't be a requirement for admission to a health care facility.

The POST form should not be completed, changed, or voided unless there is a conversation with either the patient or, if the patient lacks capacity, their representative or surrogate. If the client is unable to express their wishes or values, decisions must be made in their best interest. If there is a conflict as to what the wishes of the client are or there is a disagreement with the decision maker and/or by the attending physician it can be resolved by discussing the issues, seeking another medical opinion, an Ethics Consult or some other means.

Occasionally there is more than one (1) POST form. The most recent POST form is to be utilized.

3.3.5 Revocation

If a patient or representative/surrogate changes their mind about the wishes documented on the POST form the form should be voided and a new form completed.

Note: See [Appendix R](#) and [WVU End of Life Care](#) for a sample POST form.

3.4 Power of Attorney

3.4.1 Purpose

A power of attorney is a directive by which an individual (principal) designates another person to act as their representative (attorney in fact). The power of attorney specifies the areas in which the attorney in fact can exercise authority. A power of attorney created under the statute is durable unless it expressly provides that it is terminated by the incapacity of the principal.

3.4.2 Statutory Basis

The requirements related to the creation of a uniform power of attorney are contained in [§39B-1-101](#) et seq., of the WV Code.

3.4.3 Requirements & Procedures

Any person having the capacity to do so may execute a power of attorney.

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney and must be acknowledged by the principal before a notary public or other individual authorized by law to take acknowledgments.

Finally, the principal may nominate, by the power of attorney, the conservator and/or guardian for consideration by the court if protective proceedings are initiated after the power of attorney becomes effective.

3.4.4 Rights & Responsibilities

An agent appointed under a power of attorney has certain rights and responsibilities as they carry out this role. They need to be aware of the following (not an all inclusive list):

- Act in the principal's best interest;
- Act in good faith;
- Act only in the scope of the authority granted in the power of attorney;
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances;
- Keep a record of all receipts, transactions made on behalf of the principal;
- Cooperate with a person or entity that has authority to make health care decisions for the principal.

Note: For additional duties required by an agent appointed under a power of attorney see [§39B-1-114](#).

3.4.5 Duties and Responsibilities of an Agent Appointed as Power of Attorney with Respect to WV-DHHR

Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal or provide an accounting unless:

- Ordered by a court or DHHR acting as decision maker or acting as APS having authority to protect the welfare of the principal or, on the death of the principal, by the personal representative or successor in interest in the principal's estate.
- If so requested, within thirty days the agent must comply with the request or provide in writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.
- If an agent fails or refuses to comply, the court may award the principal or other authorized party requesting the disclosure reimbursement of reasonable attorney fees and costs incurred.

Note: DHHR acting as decision maker or acting as APS may petition a court to review a power of attorney or review the agent's inappropriate conduct and grant appropriate relief if there are allegations of abuse, neglect or financial exploitation. For further information see [WV Code §39B-1-1166](#).

3.4.6 Limitations

This act applies to all powers of attorney except:

- 1) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;
- 2) A power to make health-care decisions;
- 3) A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and,
- 4) A power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for governmental purpose.

3.4.7 Revocation

There are a number of methods by which a power of attorney may be terminated. These may include but are not limited to:

- Death of the principal;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;
- The purpose of the power of attorney is accomplished; or
- The agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

Note: The Uniform Power of Attorney Act dictates that if the client is incapacitated and does not have a guardian, conservator, co-agent or successor agent and the agent resigns as the power of attorney, they must notify the client's caregiver, or another person reasonably believed to have sufficient interest in the client's welfare or to notify APS of a need for guardianship of incapacitated client. See [Appendix R](#) and [WVU End of Life Care](#) for a sample Power of Attorney form.

3.5 Health Care Surrogate

3.5.1 Purpose

A Health Care Surrogate is a person selected by an incapacitated person's attending physician to make health care decisions **only**, about and on behalf of that incapacitated person. A Health Care Surrogate can be appointed without review by the court and can usurp a client's right to make health care decisions about himself/herself. The Health Care Surrogate may make decisions regarding giving, withholding, or withdrawing informed consent to any type of health care, including, but not limited to, medical and surgical treatments, including life-prolonging interventions, psychiatric

treatment, nursing care, hospitalization, treatment in a nursing home or other facility, home health care, and organ or tissue donation.

Decisions made by a Health Care Surrogate, though made by a person other than the incapacitated adult, are intended to be in accordance with the expressed and values and wishes of the incapacitated persons. If the values and wishes of the incapacitated adult are not known, the decisions made are to be in the person's best interest.

3.5.2 Statutory Basis

WV Code sets forth the provisions regarding the appointment of a Health Care Surrogate in [§16-30-8](#), also referred to as the Health Care Surrogate Act. The intent of this law is to create a process by which health care decisions can be made for incapacitated adults without involvement of the court.

A Advantage

Required medical care and services for an Adult Services client can be obtained more quickly through the appointment of a Health Care Surrogate than would be possible through 1) obtaining an order of attachment; 2) appointment of a guardian or 3) if there is no other entity or interested person to complete the Medicaid or Medicare application, the Adult Service worker as Health Care Surrogate may complete the application upon the approval of their supervisor or by following their regional protocol.

B Disadvantage

A single physician, without review by a court or other body, can make the determination that a person is incapacitated and that a Health Care Surrogate is needed. If DHHR is appointed as Health Care Surrogate, the Adult Service worker can only consent to medical treatment and decisions related to admission of a medical facility. The Adult Service worker may not apply for Social Security benefits, medical insurance, etc.

3.5.3 Selection of a Health Care Surrogate

State statute permits the individual's attending physician to appoint a Health Care Surrogate for an incapacitated adult when there is no medical power of attorney representative or court appointed guardian. As a last resort, an employee of the department may be appointed in this capacity. There are seven (7) categories of individuals identified in state statutes as potential surrogate decision-makers. These are listed in priority order of consideration and are as follows:

1. Spouse;
2. Adult children;
3. Parent(s);
4. Adult sibling(s);
5. Adult grandchildren;
6. Close friend(s);
7. Any other person/entity, including but not limited to public agencies, public guardians, public officials, public and private corporations and other persons or entities which DHHR may from

time to time designate in rules and regulations promulgated pursuant to [§29A-1-1](#) et seq. of the Code of WV.

In the event there are multiple potential surrogate decision makers at the same priority level (i.e. multiple adult children or siblings), the attending physician is to consider each individual and select the one who is believed to be the best candidate. This decision is to be based on their ability/willingness to make decisions in accordance with the known wishes of the incapacitated adult or the best interest of the incapacitated adult if their wishes are not known.

Before agreeing for the Department to be appointed to act as a Health Care Surrogate, the Adult Service worker must require documentation from the health care provider of efforts to locate a suitable Health Care Surrogate along with the actual Health Care Surrogate Appointment form. See [Appendix P](#) for actual Health Care Surrogate Appointment form. This documentation must identify any potential surrogate(s) from categories 1 – 7 that were deemed unavailable and/or unsuitable to serve as Health Care Surrogate for the incapacitated adult. In addition to identification of these individuals, the health care provider must document the reason(s) each potential surrogate was ruled out. See [Appendix O](#) for Health Care Selection form.

Note: In rare situations where the Department is not providing Adult Services at the time the request to act as Health Care Surrogate is made, after consultation with the supervisor the decision may be made to accept appointment of the Department as Health Care Surrogate IF there is no other individual available to serve in this capacity AND there is a risk of the case becoming an APS case without assistance by the Department. In this instance, an Adult Services case must be opened for Health Care Surrogate services and all case work processes apply (Assessment, Case Review and service planning, etc.)

If an individual disagrees with the appointment of a Health Care Surrogate by the attending physician, this appointment may be challenged. To do so, the challenging party must initiate declaratory proceedings in the circuit court in the county where the incapacitated adult resides. For further information see [WV Code §16-30-8e](#).

3.5.4 Rights and Responsibilities

A Health Care Surrogate who has been appropriately appointed has the right to make any and all health care decisions on behalf of the incapacitated adult. **WV-DHHR's authority for assuming Health Care Surrogate begins upon the acceptance of the appointment.**

The decisions made by the Health Care Surrogate are to be consistent with the known wishes and values of the incapacitated adult, when these are known, and in their best interest when their wishes and values are not known.

For the sole purpose of making health care decisions for the incapacitated adult, the Health Care Surrogate shall have the same right of access to the incapacitated person's medical information and to discuss this information with the incapacitated person's attending physician that the person would have had. See [WV Code §16-30-6\(e\)](#).

3.5.5 Limitations

There are certain limitations that apply to appointment of Health Care Surrogates and the authority of those who are appointed in this capacity. These are as follows:

- In the event the adult is determined by the physician that they are no longer incapacitated, the authority of the Health Care Surrogate ceases.
- An individual shall not be presumed to be incapacitated merely by reason of advanced age or disability.
- An individual shall not be presumed to be incapacitated merely by reason of being diagnosed as having mental illness or diagnosed as intellectually disabled.

Appointment of a Health Care Surrogate shall not occur when there is a duly authorized living will or medical power of attorney that addresses the health care issues in question. If either of these exists the client's wishes as set forth in the living will or the course of treatment authorized by the medical power of attorney is to apply.

3.5.6 Determination of Incapacity

A determination that a person is incapacitated shall be made by the attending physician or an advanced nurse practitioner. This determination, once made, must be entered by the attending physician in the adult's medical record. Additionally, if a second (2nd) or subsequent opinion(s) is obtained to further verify the adult's incapacity, this opinion is also to be documented in the adult's medical record. This documentation must include the basis for the determination of the incapacity, including the cause, nature, and expected duration if these are known. If the adult is conscious, the physician shall inform them that they have been determined to be incapacitated and that a surrogate decision maker has been appointed to make health care decisions on their behalf.

A second (2nd) opinion is only required if treatment for mental illness and/or addiction will be needed as stated in [WV Code §16-30-24](#). Refer to Health Care Surrogate Policy Section 5.3 for further information.

3.5.7 Decision to Withhold/Withdraw Life-Prolonging Intervention

When the Department has been appointed as Health Care Surrogate and a decision about whether to withhold/withdraw life-prolonging intervention is being considered or has been requested by the attending physician, (in best case practice the Adult Service worker should obtain a second (2nd) medical opinion) the Adult Service worker must consult with their supervisor. Approval must be granted by the supervisor prior to withdrawing life-prolonging intervention being signed by the Adult Service worker and documented in the client's case record in FACTS. Whenever the decision of whether or not to sign a request is in question, the Adult Service worker is strongly encouraged to consult with the Hospital Ethics Committee and/or Ethics Committee of the Bureau of Children and Families.

The Adult Service worker is to obtain written verification of the attending physician's recommendation and worker will document in FACTS all relevant information in the client's case record.

3.5.8 Revocation

In order to change Health Care Surrogate from one person to another, a new HCS will need to be appointed and a new form completed and signed by the attending physician or advanced nurse practitioner.

In [WV Code §16-30-22\(c\)](#) et seq., to determine a person has regained capacity requires two (2) physicians, one (1) of whom may be the attending physician, or one (1) physician and a qualified psychologist, or one (1) physician and an advanced nurse practitioner, certify that the client has regained capacity.

3.6 Living Will

3.6.1 Purpose

Any mentally competent person who is eighteen (18) years of age or older may at any time execute a Living Will. This document is used for the purpose of stating, in advance, an individual's wishes regarding the withholding or withdrawal of life-prolonging intervention from himself/herself. Creation of a Living Will is an administrative procedure. Though an attorney may assist in preparing this document, this is not required.

3.6.2 Statutory Basis

The requirements related to the creation of a Living Will are contained in [§16-30](#) of the WV Code.

3.6.3 Requirements and Procedures

Requirements that are applicable to the creation of a Living Will are set forth in state statutes. They include the following:

- In writing;
- Executed by the principal or other person in the principal's presence at the principal's express direction if the principal is physically unable to do so;
- Dated;
- Signed in the presence of two (2) or more witnesses who are at least eighteen (18) years of age; and,
- Signatures and attestations of the witnesses shall be acknowledged before a notary public.

In addition, a witness may not be:

- The person who signed the Living Will or Medical Power of Attorney on behalf of and at the direction of the principal;
- Related to the principal by blood or marriage;
- Entitled to any portion of the estate of the principal under any will of the principal or codicil thereto;
- Directly financially responsible for the principal's medical care;
- The attending physician; or,

- The principal's Medical Power of Attorney representative or successor Medical Power of Attorney representative.

Note: Though not required by statute, it is recommended that the Living Will be filed with the county clerk so it becomes a matter of public record and filed electronically with the WV End of Life Registry. After the creation of a Living Will, it is the responsibility of the principal to notify their attending physician and other health care providers of the existence of the document. Upon receipt of the Living Will or a copy of the Living Will, the attending physician or health care provider is to make it a part of the individual's medical record.

3.6.4 Requirements for Health Care Facilities

At the time of admission to any health care facility, the facility is to notify the patient of the existence and availability of forms to create a Living Will, should they desire to do so. If needed, assistance should be provided in completing the applicable forms.

3.6.5 Prohibitions

Under no circumstances may admission to the health care facility be predicated upon a person having completed either a Medical Power of Attorney or a Living Will.

3.6.6 Revocation

A Living Will may be revoked at any time only by the principal or at the express direction of the principal by any of the following methods:

- Destroyed by the principal or by some person in the principal's presence and at his/her direction;
- By a written revocation of the Living Will signed and dated by the principal or a person acting at the direction of the principal. The written revocation becomes effective only upon delivery to the attending physician. Upon receipt, the attending physician is to document the date and time the revocation was received in the patient's medical record;
- By a verbal expression of the intent to revoke the Living Will or Medical Power of Attorney in the presence of a witness eighteen (18) years of age or older who signs and dates a writing confirming that such expression of intent was made. Any verbal revocation shall become effective only upon communication of the revocation to the attending physician by the principal or by a person acting on behalf of the principal. The attending physician shall record, in the principal's medical record, the time, date and place of when he or she receives notification of the revocation.

Note: Similarly, if a living will is subsequently revoked, a documentation of the revocation must also be filed with the county clerk and/or the e-Directive Registry. See [Appendix R](#) and [WVU End of Life Care](#) for a sample Living Will form.

3.7 Medical Power of Attorney

3.7.1 Purpose

A medical power of attorney is a springing power of attorney by which any person (the principal) designates another person (the representative), in writing, to make health care decisions for them in the event they are unable to do so. In addition, the medical power of attorney may be used to nominate a conservator or guardian to be considered by the court if protective proceedings are initiated after the medical power of attorney becomes effective.

3.7.2 Statutory Basis

Requirements related to the creation of a medical power of attorney are contained in [§16-30](#) of the WV Code.

3.7.3 Requirements & Procedures

Any competent adult eighteen (18) years old or older may execute at any time a Living Will or Medical Power of Attorney. To be executed it must be the following:

- In writing;
- Executed by the principal or by another person in the principal's presence and at the principal's express direction;
- Dated;
- Signed in the presence of two (2) or more witnesses at least eighteen (18) years of age; and,
- Acknowledged before a notary public.

Note: Though not required by statute, it is recommended that the medical power of attorney be filed with the county clerk so it becomes a matter of public record and electronically filed with the e-Directive Registry.

In addition, the document must contain the following wording or wording of like import. **“This medical power of attorney shall become effective only upon my incapacity to give, withdraw or withhold informed consent to my own medical care.”**

In order for a medical power of attorney to become affective, the “principal” must become incapacitated, meaning they lack the ability, due to physical or mental impairment, to appreciate the nature and implications of a health care decision, to make an informed choice regarding the alternatives presented, and to communicate that choice in a clear manner. A determination of incapacity requires that the adult be examined by the attending physician, a qualified physician, a qualified psychologist or an advanced nurse practitioner who has personally examined the client.

Note: A physician or other health care provider who receives a copy of a medical power of attorney or revocation of a medical power of attorney must make it part of the individual's current medical record.

3.7.4 Successor Medical Power of Attorney

The principal may appoint one (1) or more successor representatives in the medical power of

attorney. The successor will take over in the event the original representative is unable, unwilling, or disqualified to serve. In this instance, the successor representative assumes all the rights and responsibilities of the original representative unless the principal expressly provided to the contrary.

3.7.5. Who May Not Serve as Representative

The following persons may not serve as a representative or successor under a medical power of attorney:

- Treating health care provider of the principal;
- An employee of the treating health care provider not related to the principal;
- An operator of the health care facility serving the principal; and,
- Any person who is an employee of an operator of a health care facility serving the principal and who is not related to the principal.

3.7.6 Rights and Responsibilities

An individual who has been named as representative under a medical power of attorney has certain rights and responsibilities as they carry out this role. These may include:

- It is the responsibility of the principal or their representative to provide notification to their attending physician and other health care providers of the medical power of attorney. Similarly if the medical power of attorney is revoked or modified notification must be made to same.
- The appointed representative must at all times act in accordance with the wishes of the incapacitated adult they represent either as specifically expressed in the medical power of attorney or which have otherwise been made known to the representative. If the principal's wishes are unknown, the representative is to act in the best interest of the principal.
- The representative has the authority to give, withhold, or withdraw informed consent to the health care of the principal in the areas of medical treatment, surgical treatment, nursing care, medications, hospitalization, care and treatment in a nursing home or other facility, and home health care unless expressly excluded.
- The representative has authority to gain access to the principal's medical records and to authorize access to these medical records by others.
- The representative has authority to acknowledge receipt of notification of rights or responsibilities and applicable rules of medical or health care facilities.
- The representative has authority to employ or discharge medical providers.
- The representative has authority to consent to, refuse or withdraw any and all medical treatment or diagnostic procedures.
- The representative has authority to make decisions about the gift or donation of a body organ or tissue per [WV Code §16-30-6\(f\)](#).
- The representative has authority to enforce a declaration made in accordance with the West Virginia Health Care Decisions Act [§16-30-1](#).

3.7.7 Limitations

There are certain limitations that apply to a representative carrying out their responsibilities under a medical power of attorney. These are as follows:

- The wishes of a principal who has capacity always supersede the effect of the medical power of attorney.
- The representative does not have the authority to give, withhold, or withdraw informed consent to the health care of the principal in the areas of medical treatment, surgical treatment, nursing care, medications, hospitalization, care and treatment in a nursing home or other facility, and home health care that are expressly excluded.
- In the event the representative and the successor representative(s) be unable, unwilling, or disqualified to serve, the medical power of attorney shall lapse.
- The lapsing of a medical power of attorney does not prevent any advance directives, statement of personal values or specific instructions therein from serving as guidelines for the medical or health care of the principal.

3.7.8 Prohibitions

WV Code sets forth specific prohibitions in the use of a medical power of attorney as follows:

- The existence of a medical power of attorney is not intended to be used for the purpose of condoning, authorizing, or approving mercy killing or to permit any affirmative or deliberate act or omission to end a human life other than to permit the natural process of dying; and,
- Under no circumstances may the presence or absence of a medical power of attorney be used to deny a patient admission to a health care facility.

3.7.9 Revocation

A medical power of attorney may be revoked by the principal at any time by a number of methods. The methods by which a medical power of attorney may be revoked are:

- Destruction of the medical power of attorney either by the principal or by another person in the principal's presence and at their direction;
- By written revocation, signed and dated by the principal or by another person acting at the direction of the principal's, such a revocation shall become effective only upon delivery of the revocation to the attending physician.
Upon receipt of this notification, the attending physician shall record in the client record the date and time at which notification of the written revocation was received; or,
- By verbal expression of the intent to revoke in the presence of a witnesses eighteen years of age or older who, at the time the verbal expression is made, signs and dates a written statement confirming that the individual expressed their intent to revoke, such a revocation shall become effective only upon communication of the revocation to the attending physician by the principal or a person acting on behalf of the principal, upon receipt of this notification the physician shall record in the medical record the date, time and place at which notification of the verbal revocation was received; or,

- The granting of a final divorce decree shall act as an automatic revocation of the designation of the former spouse to act as a representative or successor representative.

Note: Though not required by statute, it is recommended that the medical power of attorney be filed with the county clerk so it becomes a matter of public record and electronically filed with the e-Directive Registry. Similarly, if a medical power of attorney is subsequently revoked, a documentation of the revocation must also be filed with the county clerk and electronically filed with the e-Directive Registry. See [Appendix R](#) and [WVU End of Life Care](#) for a sample Medical Power of Attorney form.

3.8 Representative Payee

3.8.1 Description

Appointment of a representative payee is an administrative action that may be voluntary but which can be obtained, if necessary, without the individual's consent. This is an individual designated by the Social Security Administration to manage Social Security and/or Supplemental Security Income benefits in instances where the beneficiary is physically and/or mentally incapable of managing these benefits. A representative payee is also required by law ([1631 \(a\) \(2\) of the Social Security Act](#)) for an individual who has been determined to be a drug addict or an alcoholic. While the appointment of a representative payee does not require court action, it does restrict the individual's rights.

3.8.2 Advantages

The representative payee that is appointed has control over the Social Security and/or SSI benefit check and is responsible for receiving the payment and using the funds to meet the beneficiary's needs. There does not need to be a finding of incompetence by a court in order to establish a representative payee. Medical evidence from a physician may be used if the physician determines that the beneficiary is not capable of managing their benefits.

When an adult is in a placement setting the residential provider may be named to serve as the representative payee if there is no one else.

Note: In no instance is the Department to be named as representative payee for any adult benefits.

3.8.3 Disadvantages

The Social Security Administration can appoint anyone they choose to be representative payee. This means that they are not required to name court appointed guardians or conservators to serve as the payee.

The Social Security Administration may be unable to locate a person willing to serve as representative payee. If no relative, friend or neighbor is willing to accept this responsibility, the social worker may be able to assist in the recruitment of a payee, through the use of volunteer services or appropriate community resources such as local mental health facilities, service clubs, or church groups and through the use of paid agencies that serve as representative payee for a fee. In the event no representative payee can be found or the appointed payee can no longer serve, the Social

Security Administration may hold the client's benefits. This may result in the client not having access to their resources for a period of time.

Since a judgment of incompetence by a court is not required for payee appointment, this procedure may appear to be a relatively simple solution in an Adult Service situation. However, it is important to remember that this does limit the client's rights without a review by the court. The beneficiary does have the right to protest the appointment of a representative payee and is entitled to an administrative hearing on the question.

3.8.4 Required Procedures

Application to have a representative payee appointed must be made to the local Social Security Administration office. A spouse or relative is generally preferred for selection as payee but an agency or institution that has responsibility for care of the beneficiary, or a friend who demonstrated concern or responsibility for the beneficiary, would also be considered. Behavioral Health Centers and service providers are sometimes appointed as representative payee for a client. **DHHR MAY NOT accept appointment as a representative payee for a client.**

Evidence of an adult's inability to manage their benefits must be submitted to the Social Security Administration before a payee will be appointed. This evidence may include medical or legal findings. Required medical evidence may include a physician's statement indicating the client's diagnosed condition(s), prognosis for improvement, and their opinion regarding the client's capability to manage their benefits. Specific forms are to be used for this purpose. These forms may be obtained at the local Social Security office. Legal evidence that a client is unable to manage their finances may be in the form of a certified copy of a court order either adjudging client incompetence or appointing a legal guardian.

3.8.5 Responsibilities

The representative payee must properly use the benefits on behalf of and for the well-being of the beneficiary. The payee must be kept informed about the beneficiary's needs in order to determine how the funds are best used. This is particularly important if the beneficiary does not live with the representative payee.

The representative payee must report on how the funds were used when asked to do so by the Social Security Administration. Therefore, it is important that the representative payee maintain records of funds received and how those funds were spent or saved on the client's behalf. If the representative payee is not a spouse or a parent, a formal accounting of the expenditure of benefits is required by the Social Security Administration once yearly.

The representative payee must promptly report any changes that may affect benefit payments to the Social Security Administration. Examples include: change of address, entering or leaving an institution, starting or stopping work, changes in income or resources, client death or that the representative payee is no longer responsible for the beneficiary.

3.8.6. Misuse

If it is suspected that the client's benefits are being misused by the representative payee, it should immediately be reported to the local Social Security office, in writing, so that Social Security may request an accounting of the funds. In addition, an Adult Protective Services referral may be warranted by contacting your local DHHR office or by contacting Hotline at 1-800-352-6513. If it appears that the resources are not being used to meet the client's needs, the Social Security office is responsible for selection of a new representative payee.

SECTION 4

INTRODUCTION

4.1 Confidentiality

4.1.1 Confidential Nature of Adult Protective Service Records

Legal provisions concerning confidentiality have been established on both the state and federal levels. In federal law, provisions are contained in the Social Security Act and the Health Insurance Portability and Accountability Act 1996 (HIPAA). On the state level, provisions related to confidentiality of client information is contained in [WV Code §9-2-16 & 17](#). Additionally, requirements related to confidentiality specifically related to Adult Protective Services cases are contained in [§9-6-8](#) and can also be found in [Personnel Common Chapters Policy](#). Confidentiality is also contained in [WV Code §44-2-5](#) relating to Guardianship cases.

4.1.2 When Confidential Information May be Released on Adult Protective Service Records

All records of the Bureau for Children and Families concerning an Adult Protective Services client shall be kept confidential and may not be released except as follows:

- a) A copy of any substantiated report of abuse, neglect, or emergency situation involving a perpetrator shall be provided in writing to the prosecuting attorney, and in the case of death, to the appropriate medical examiner or coroner's office. Substantiated cases of self abuse and/or neglect do not need to be reported to the prosecutor unless court action becomes necessary;
- b) All other reports of abuse and neglect shall be maintained by the Department and shall be made available, upon request, to the prosecuting attorney and any law enforcement agency; and in reports involving facilities, to the appropriate licensing body within the Department;
- c) Specific information may be shared with other offices within the Department of Health and Human Resources who are also mandated to maintain client confidentiality (i.e., Medicaid Fraud, OBHS, and OHFLAC). When specific information is requested, the worker must consult with the supervisor prior to releasing any information. If there is a question concerning the request, the supervisor will consult with the Adult Services Consultant and/or regional attorney per regional protocol;

- d) According to state statute the long-term care Ombudsman is to receive a carbon copy of all Adult Protective Service Reporting Forms that are submitted by mandated reporters involving certain long-term care facilities (nursing homes, assisted living facilities, registered unlicensed homes). With the exception of reporter information which is only disclosed to Adult Protective Services, both the Department and the long-term care Ombudsman have received exactly the same information when this form is used. Discussion of the content of the report itself is not a breach of confidentiality. Beyond discussion of this information however, only certain information may be shared with the State and local long-term care Ombudsman. This information is limited to 1) the name of the facility where the abuse/neglect occurred, 2) general information about the nature of the allegations, and 3) whether or not abuse/neglect of an adult was substantiated. Specific information regarding the Adult Protective Service case is confidential and shall not be released, including but not limited to the name of the reporter;
- e) Information about developmentally disabled adults who are the subject of abuse/neglect may be shared with West Virginia Advocates (WVA) , the recognized protection and advocacy agency for West Virginia under federal law, §42 USCA 15043 under certain circumstances. They too must agree to keep all information shared confidential;
- f) In addition, a circuit court or the Supreme Court of Appeals subpoenaing the records. The court shall, before permitting use of the records in connection with any court proceeding, review the records for relevancy and materiality to the issues in the proceeding. The court may issue an order to limit the examination and use of the records or any part of the record;
- g) A grand jury, by subpoena, upon its determination that access to the records is necessary in the conduct of its official business;
- h) The victim; and,
- i) The victim's legal representative, unless he or she is the subject of an investigation.

In addition, summaries concerning substantiated investigative reports of abuse, neglect or exploitation of adults may be made available to:

1. Any person who the Department has determined to have abused, neglected or exploited the victim.
2. Any appropriate official of the state or regional long-term care ombudsman investigating a report of known or suspected abuse, neglect or exploitation of a vulnerable adult.
3. Any person engaged in bona fide research or auditing, as defined by the Department. However, information identifying the subjects of the report may not be made available to the researcher.
4. Employees or agents of an agency of another state that has jurisdiction to investigate known or suspected abuse, neglect or exploitation of vulnerable adults.

5. A professional person when the information is necessary for the diagnosis and treatment of, and service delivery to, a vulnerable adult.
6. A Department administrative hearing officer when the hearing officer determines the information is necessary for the determination of an issue before the officer.

The identity of any person reporting abuse, neglect or exploitation of a vulnerable adult may not be released, without that person's written consent, to any person other than employees of the Department responsible for protective services or the appropriate prosecuting attorney or law-enforcement agency.

Note: For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports. Before any information is released the worker will need to follow local regional protocol.

The statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record. Before any information is released the worker will need to follow local regional protocol.

4.1.3 When Information is released to the Courts for Adult Protective Service Records

In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.

Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the social worker must consult with the supervisor. The supervisor will follow regional protocol to determine the appropriate action. Contact with the regional attorney may be necessary to determine if further assistance or review is necessary.

If there is insufficient time to consult the regional attorney, seek the advice of the local prosecuting attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the social worker or the Department being held in contempt. Also, the Department should always comply with an order of the court unless that order is amended by the court or over-turned; and, the statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record.

Note: Consultation with the regional attorney and/or prosecuting attorney must not be documented in the FACTS case record/hard copy client file. However, if the regional attorney

and/or prosecuting attorney represented Adult Protective Services in court proceedings, only their attendance can be entered in the FACTS case record/hard copy client file.

4.1.4 Confidential Nature of Adult Family Care Service Records

Legal provisions concerning confidentiality have been established on both the state and federal levels. In federal law, provisions are contained in the Social Security Act. On the state level, provisions related to confidentiality of provider information is contained in [§9-2-16](#) and [§9-2-17](#) of the Code of West Virginia. Additionally, requirements related to confidentiality specifically related to Adult Protective Service cases are contained in [§9-6-8](#). In addition, this provision requires DHHR to establish rules and regulations governing the custody, use, and preservation of the records, papers, files and communications concerning applicants and recipients of DHHR services. For more detailed information refer to [Common Chapters](#).

4.1.5 When Confidential Information May be Released for Adult Family Care Records

All records of the Bureau for Children and Families concerning an Adult Services client/provider shall be kept confidential and may not be released, except as follows:

- a) In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.
- b) Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the Adult Service worker/homefinder must follow the protocol established to contact the regional attorney in order to determine if further assistance or review is necessary. For example, in some instances the request for document(s) in a subpoena duces tecum may not be relevant or their release may violate state or federal law. The attorney should make this determination and may file a motion to quash the subpoena duces tecum when this is appropriate.

If there is insufficient time to consult the regional attorney, seek the advice of the local Prosecuting Attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local Prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the Adult Service worker or the Department being held in contempt. Also, the Department should always comply with an order of the court unless that order is amended by the court or over-turned. Questions regarding the validity of a court order may be submitted to the state office of the Bureau for Children and Families for possible submission to the regional attorney for review.

Note: For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports. Before any information is released the worker will need to follow local regional protocol.

The statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record. Before any information is released the worker will need to follow local regional protocol.

4.1.6 When Information is released to the Courts for Adult Family Care Records

In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.

Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the social worker/homefinder must follow the protocol established to contact the regional attorney in order to determine if further assistance or review is necessary.

For example, in some instances the request for document(s) in a subpoena duces tecum may not be relevant or their release may violate state or federal law. The attorney must make this determination and may file a motion to quash the subpoena duces tecum when this is appropriate.

If there is insufficient time to consult the regional attorney, seek the advice of the local prosecuting attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the social worker or the Department being held in contempt. Also, the Department must always comply with an order of the court unless that order is amended by the court or over-turned. Questions regarding the validity of a court order may be submitted to the state office of the Bureau for Children and Families for possible submission to the regional attorney for review.

Note: The provider may request to view his/her provider record and may be allowed to do so. Certain information contained in the record shall not be accessible such as: reference letters, APS information, and/or sensitive issues. Before any information is viewed or released, the social worker/homefinder must confer with his/her supervisor and Community Service Manager.

4.1.7 Confidential Nature of Adult Residential Service Records

Legal provisions concerning confidentiality have been established on both the state and federal levels. In federal law, provisions are contained in the Social Security Act. On the state level, provisions related to confidentiality of client information is contained in [§9-2-16 & 17](#) of the West Virginia Code. Additionally, requirements related to confidentiality specifically related to Adult Protective Services cases are contained in [§9-6-8](#). In addition, this provision requires DHHR “to establish rules and regulations governing the custody, use, and preservation of the records, papers,

files and communications” concerning applicants and recipients of DHHR services. For more detailed information, refer to [Common Chapters](#).

4.1.8 When Confidential Information May be Released for Adult Residential Services Records

All records of the Bureau for Children and Families concerning an Adult Services client/provider shall be kept confidential and may not be released, except as follows:

- a) In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.
- b) Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the Adult Service worker/homefinder must follow the protocol established to contact the regional attorney in order to determine if further assistance or review is necessary. For example, in some instances the request for document(s) in a subpoena duces tecum may not be relevant or their release may violate state or federal law. The attorney should make this determination and may file a motion to quash the subpoena duces tecum when this is appropriate.

If there is insufficient time to consult the regional attorney, seek the advice of the local Prosecuting Attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local Prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the Adult Service worker or the Department being held in contempt. Also, the Department should always comply with an order of the court unless that order is amended by the court or over-turned. Questions regarding the validity of a court order may be submitted to the state office of the Bureau for Children and Families for possible submission to the regional attorney for review.

Note: For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports. Before any information is released the worker will need to follow local regional protocol.

The statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record. Before any information is released the worker will need to follow local regional protocol.

4.1.9 When Information is released to the Courts for Adult Residential Service Records

In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as

subpoena duces tecum.

Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the social worker must follow the protocol established to contact the regional attorney in order to determine if further assistance or review is necessary. For example, in some instances the request for document(s) in a subpoena duces tecum may not be relevant or their release may violate state or federal law. The attorney should make this determination and may file a motion to quash the subpoena duces tecum when this is appropriate.

If there is insufficient time to consult the regional attorney, seek the advice of the local prosecuting attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the social worker or the Department being held in contempt. Also, the Department should always comply with an order of the court unless that order is amended by the court or over-turned. Questions regarding the validity of a court order may be submitted to the Office of Social Services for possible submission to the regional attorney for review.

The client may request to view his/her client record and should be allowed to do so. Certain information contained in the record shall not be accessible such as: APS information and /or sensitive issues. Before any information is viewed/released, the social worker must confer with his/her supervisor and Community Service Manager.

4.1.10 Confidential Nature of Guardianship Service Records

Legal provisions concerning confidentiality have been established on both the state and federal levels. In federal law, provisions are contained in the Social Security Act and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). On the state level, provisions pertaining to confidentiality for Guardianship cases are contained in [§44A-2-5](#) and Chapter 200 of the Department of Health and Human Resources, [Common Chapters](#). Specifically, requirements in [§44A-2-5](#) relate to confidentiality of the legal proceedings and the [Common Chapters](#) addresses confidentiality of the case record of the Department.

4.1.11 When Confidential Information May be Released for Guardianship Service Records

All records concerning an Adult Guardianship Services client shall be kept confidential and may not be released except as follows:

- a) Certain information may be released to the protected person or their documented legal representative. When releasing information to these parties, information that may NOT be included would be information and documents provided by another entity such as medical reports, psychological reports, information from Social Security Administration, etc. In addition, prior to release of case information the worker and supervisor must review the record to determine if any of the information contained therein would be detrimental to the protected person. If so, this information is to also be excluded from the information provided for review. In the

event the request appears to be unreasonable or questionable, supervisor/worker is to contact the regional attorney prior to release of any information;

- b)** Upon written request, information about developmentally disabled adults may be shared with the federally recognized protection and advocacy entity within West Virginia (West Virginia Advocates or West Virginia EMS Technical Services Network). This request must state the specific information being requested and the reason(s) for the request. The recipient of this information must agree to keep all information shared confidential. (Sharing information does not apply to all advocacy groups - long-term care ombudsman, patient rights advocates, etc. It is limited to ONLY the federally recognized protection and advocacy entity);
- c)** Conditions that apply when considering whether or not information may be shared with West Virginia Advocates are as follows:
 - 1.** WVA does have authority under federal law to investigate allegations of abuse/neglect involving individuals with developmental disabilities if the incident is reported to WVA or if there is probable cause to believe that the incidence occurred.
 - 2.** WVA shall have access to all records within three (3) days for
 - a.** Any individual with a developmentally disability who is a client of WVA if they or their legal representative has authorized WVA to have access,
 - b.** Any individual with developmental disability in a situation where the individual
 - c.** Is unable to authorize WVA to have access,
 - d.** Does not have a legal representative or the Department is Guardian,
- d)** a complaint has been received by WVA or WVA has probable cause to believe the individual has been subject to abuse/neglect;
- e)** When a request for access to the record is made based on probable cause, the basis for probable cause should be made known to the Department prior to access of the record.
- f)** WVA shall have immediate access (within twenty-four (24) hours of request) without consent to the records of the developmentally disabled individuals who meet the above criteria if WVA determines there is probable cause to believe the health and safety of the individual is in serious and immediate jeopardy or in the case of death of the individual.
- g)** If the entire record is requested, relevant case information may be copied (with the exception of the reporter's identity) and a reasonable charge may be assessed by the local DHHR to cover the time and cost involved in the duplication and mailing of the material.

Note: For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports. Before any information is released the worker will need to follow local regional protocol.

The statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record. Before any information is released the worker will need to follow local regional protocol.

4.1.12 When Information is Released to the Courts for Guardianship Service Records

In some instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.

- a) In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.
- b) Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the Adult Service worker/homefinder must follow the protocol established to contact the regional attorney in order to determine if further assistance or review is necessary. For example, in some instances the request for document(s) in a subpoena duces tecum may not be relevant or their release may violate state or federal law. The attorney should make this determination and may file a motion to quash the subpoena duces tecum when this is appropriate.

If there is insufficient time to consult the regional attorney, seek the advice of the local Prosecuting Attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local Prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the Adult Service worker or the Department being held in contempt. Also, the Department should always comply with an order of the court unless that order is amended by the court or over-turned. Questions regarding the validity of a court order may be submitted to the state office of the Bureau for Children and Families for possible submission to the regional attorney for review.

Note: Consultation with the regional attorney and/or prosecuting attorney must not be documented in the FACTS case record/hard copy client file.

4.1.13 Confidential Nature of Health Care Surrogate Service Records

Legal provisions concerning confidentiality have been established on both the state and federal levels. In federal law, provisions are contained in the Social Security Act and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). On the state level, provisions pertaining to confidentiality for Health Care Surrogate cases are contained in Chapter 200 of the Department of Health and Human Resources, [Common Chapters](#). Specifically, requirements in the [Common Chapters](#) address confidentiality of the case record of the Department.

Whenever the Department has been appointed as the Health Care Surrogate, under HIPAA requirements the Department is considered to be the personal representative for the adult. As such, they are considered to stand in place of the adult, having the ability to act on their behalf with respect to use and disclosure of the adult's protected health information. Specifically, under the HIPAA Privacy Rule the Health Care Surrogate has access to the protected health information of the incapacitated adult to the extent that the information is relevant to carrying out the duties as Health Care Surrogate. The Health Care Surrogate also may authorize disclosures of the adult's protected health information to the extent this is necessary, such as information necessary for insurance, billing and treatment purposes (45 CFR 164.502(g) and 45 CFR 164.524).

4.1.14 When Confidential Information May be Released for Health Care Surrogate Records

All records of the Bureau for Children and Families concerning a Health Care Surrogate services client shall be kept confidential and may not be released except as follows:

- a) Certain information may be released to the adult services client or their documented legal representative. When releasing information to these parties from the Department's case record, information that may NOT be included would be information and documents provided to the Department by another entity, such as medical reports, psychological reports, information from Social Security Administration, etc. In addition, prior to release of case information the worker and supervisor must review the record to determine if any of the information contained therein would be detrimental to the incapacitated adult. If so, this information is to also be excluded from the information provided for review. In the event the request appears to be unreasonable or questionable, supervisor/worker is to contact the regional attorney prior to release of any information.
- b) Upon written request, information about developmentally disabled adults may be shared with the federally recognized protection and advocacy entity within West Virginia (West Virginia Advocates or West Virginia EMS Technical Services Network). This request must state the specific information being requested and the reason(s) for the request. The recipient of this information must agree to keep all information shared confidential. (Sharing information does not apply to all advocacy groups - long-term care ombudsman, patient rights advocates, etc. It is limited to ONLY the federally recognized protection and advocacy entity). In addition, the worker must document the items which were sent.
- c) In some instances the court will seek information for use in their proceedings.
- d) For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports.

- e) The Appointment of Health Care Surrogate may be presented, as appropriate, to provide verification of the Department's legal relationship to the incapacitated adult, and the scope of authority granted by state statute.
- f) The Department, in our capacity as Health Care Surrogate, may release or authorize the release of necessary medical information about the incapacitated adult to third parties necessary for billing, insurance, and treatment purposes (45 CFR 164.524).

Note: For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports. Before any information is released the worker will need to follow local regional protocol.

The statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record. Before any information is released the worker will need to follow local regional protocol.

4.1.15 When Information is Released to the Courts for Health Care Surrogate Records

All records of the Bureau for Children and Families concerning a Health Care Surrogate services client shall be kept confidential and may not be released except as follows:

- a) Certain information may be released to the adult services client or their documented legal representative. When releasing information to these parties from the Department's case record, information that may NOT be included would be information and documents provided to the Department by another entity, such as medical reports, psychological reports, information from Social Security Administration, etc. In addition, prior to release of case information the worker and supervisor must review the record to determine if any of the information contained therein would be detrimental to the incapacitated adult. If so, this information is to also be excluded from the information provided for review. In the event the request appears to be unreasonable or questionable, supervisor/worker is to contact the regional attorney prior to release of any information.
- b) Upon written request, information about developmentally disabled adults may be shared with the federally recognized protection and advocacy entity within West Virginia (West Virginia Advocates or West Virginia EMS Technical Services Network). This request must state the specific information being requested and the reason(s) for the request. The recipient of this information must agree to keep all information shared confidential. (Sharing information does not apply to all advocacy groups - long-term care ombudsman, patient rights advocates, etc. It is limited to ONLY the federally recognized protection and advocacy entity). In addition, the worker must document the items which were sent.
- c) In some instances the court will seek information for use in their proceedings.

- d) The Appointment of Health Care Surrogate may be presented, as appropriate, to provide verification of the Department's legal relationship to the incapacitated adult, and the scope of authority granted by state statute.

The Department, in our capacity as Health Care Surrogate, may release or authorize the release of necessary medical information about the incapacitated adult to third parties necessary for billing, insurance, and treatment purposes (45 CFR 164.524).

4.1.16 Confidential Nature of Homeless Service Records

Legal provisions concerning confidentiality have been established on both the state and federal levels. In federal law, provisions are contained in the Social Security Act and the federal regulations promulgated related to implementation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). On the state level, provisions related to confidentiality are contained in Chapter 200 of the Department of Health and Human Resources, [Common Chapters](#).

4.1.17 When Confidential Information May be Released for Homeless Service Records

For information on releasing confidential information on a Homeless Service Record please review Homeless Policy for clarification.

Note: For reporting and statistical purposes, non-identifying information may be released for the preparation of non-client specific reports. Before any information is released the worker will need to follow local regional protocol.

The statutes further permit the Circuit Court or Supreme Court of Appeals to subpoena the case record, but shall, before permitting their use in connection with any court proceeding, review them for relevancy to the issues being addressed in the proceeding and may, based upon that review, issue an order to limit the examination and use of the information contained in the case record. Before any information is released the worker will need to follow local regional protocol.

4.1.18 When Information is Released to the Courts for Homeless Service Records

In many instances, courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.

- a) In many instances courts will seek information for use in their proceedings. The process by which a court commands a witness to appear and give testimony is typically referred to as a subpoena. The process by which the court commands a witness who has in his/her possession document(s) which are relevant to a pending controversy to produce the document(s) at trial is typically referred to as subpoena duces tecum.
- b) Records shall be released to a court only upon receipt of a valid subpoena duces tecum or court order. Immediately upon receipt of a subpoena or subpoena duces tecum the Adult

Service worker/homefinder must follow the protocol established to contact the regional attorney in order to determine if further assistance or review is necessary. For example, in some instances the request for document(s) in a subpoena duces tecum may not be relevant or their release may violate state or federal law. The attorney should make this determination and may file a motion to quash the subpoena duces tecum when this is appropriate.

If there is insufficient time to consult the regional attorney, seek the advice of the local Prosecuting Attorney. If there is insufficient time to obtain legal advice from either the regional attorney or the local Prosecutor prior to the hearing, the Department must comply with the subpoena or the subpoena duces tecum. Failure to do so may result in the Adult Service worker or the Department being held in contempt. Also, the Department should always comply with an order of the court unless that order is amended by the court or over-turned. Questions regarding the validity of a court order may be submitted to the state office of the Bureau for Children and Families for possible submission to the regional attorney for review.

4.1.19 Subpoena, Subpoena duces tecum and Court Orders

The Department may be requested by the court or other parties to provide certain information regarding Adult Services cases with which we have/have had involvement. The various mechanisms that may be used are:

- a) Subpoena
- b) Subpoena duces tecum
- c) Court order

Upon receipt of any of these, the Department **MUST** respond. Failure to comply is contempt of court and could result in penalties.

A subpoena commands a witness to appear to give testimony while a subpoena duces tecum commands a witness, who has in his/her possession document(s) that are relevant to a pending controversy, to produce the document(s) at trial. Subpoenas may be court ordered or administrative (ordered by a party other than the court). Though all subpoenas must be responded to, the manner in which this response occurs is somewhat different dependent on who issues the subpoena.

1. Court Ordered Subpoenas

These include subpoenas issued by the circuit court, the magistrate court or the mental hygiene commissioner. There may be times when a questionable court order or a subpoena requesting that confidential information be provided is received. In this event, the social worker must advise his/her supervisor immediately and promptly refer the matter to the appropriate regional attorney for review and possible legal action, including filing a motion to quash. The locally established protocol is to be followed whenever a referral is being made to the regional attorney. In the event there is not sufficient time for the regional attorney to become involved in the situation prior to the scheduled hearing, the Department should request a continuance until such time as legal representation can be arranged. If a

continuance is not granted, the Department should comply with the subpoena or court order.

2. Administrative Subpoenas (not DHHR issued)

These include subpoenas issued by an attorney or administrative law judge (other than a DHHR administrative law judge). These subpoenas generally request that the social worker appear to provide testimony and/or produce the case record. The social worker should advise his/her supervisor immediately and promptly refer the matter to the appropriate regional attorney for review and possible legal action, including filing a motion to quash. The locally established protocol is to be followed whenever a referral is being made to the regional attorney. The Department is to respond to the subpoena by certified mail advising the issuing party that the requested information is confidential and cannot be provided in accordance with [§9-6-8](#) of the WV Code. In the event the Department is ordered to appear even after being advised that information may not be released, the Department should comply with the subpoena and appear but testimony must be limited to advising those present that the requested information is confidential and cannot be provided in accordance with [§9-6-8](#) of the WV Code.

3. Administrative Subpoenas Issued by DHHR. See [Appendix Q](#) for a sample Administrative Subpoena.

These subpoenas are issued by the Department in order to obtain information regarding the location of an adult who is the subject of an allegation of abuse or neglect. Prior to issuing this type of administrative subpoena, every attempt should have been made to obtain the needed information through other means. Should an administrative subpoena of this type be needed, the following steps are to be followed:

- a.** Contact the Community Services Manager to initiate this process and arrange for service delivery by certified mail or service of process or both under the name of the Community Services Manager. Personal service should be done by a county sheriff or professional process server and should not be attempted by Department staff;
- b.** If the information requested is provided, no further action is needed;
- c.** If the entity/individual fails to respond or refuses to provide the requested information, the Community Services Manager is to contact the Secretary for DHHR, explain the circumstances in which the information is being sought and the response received, requesting to be designated with the authority to invoke the aid of the circuit court to require the production of the requested information;
- d.** Once the Community Services Manager is designated, they should contact the county prosecutor and request that they file a petition before the appropriate circuit court to compel the provision of the information being sought; and,

- e. If the prosecutor is unable or unwilling to assist, contact the regional attorney as soon as possible.

APPENDIX A

Order of Attachment

IN THE CIRCUIT COURT OF YOUR COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF
HUMAN SERVICES, BY _____
ADULT PROTECTIVE SERVICE WORKER

PETITIONER

VS

RESPONDENT

IN THE INTEREST OF:

An Alleged Incapacitated Adult

CASE NO: _____

PETITION FOR ATTACHMENT TO
ABATE AN EMERGENCY SITUATION

The undersigned Adult Protective Service Worker for the _____ County Department of Health and Human Resources, hereby

represents unto Your Honor as follows:

1. That Petitioner is an Adult Protective Service Worker for the West Virginia Department of Health and Human Resources as an

Adult Protective Service Agency, providing services pursuant to West Virginia Code Chapter 9, Article 6, Section 1, et. Seq.

2. That _____ is an __ year old _____ and is believed to be an incapacitated adult as defined by law, (9-6-1) (4) by

reason of the following: _____ is (here document what the client is doing to be in a possible life threatening situation).

3. That _____ is presently in the actual care, custody and control of no one.

4. That _____ is presently in an emergency situation that presents a substantial and possible immediate risk of injury by reason of the following;

_____ is _____.

5. That a Guardian Ad Litem should be appointed to represent the interest of the incapacitated adult and a copy of the Petition Order and Notice shall be served upon the incapacitated adult and the Respondent at the time of the attachment. The Petitioner asks that the resources of the incapacitated adult, pay for the services of the Guardian Ad Litem as well as any other fees incurred through the course of this petition.

WHEREFORE, petitioner prays that an attachment be issued to the Sheriff or other peace officer for the body of the incapacitated

adult, directing the officer executing the same to deliver the incapacitated adult to _____ for an immediate

medical evaluation and necessary referral for further medical or mental health services as deemed appropriate by medical staff at the

facility; for immediate protection and safety of the adult: that the officer be directed and empowered to enter any place of abode to remove the incapacitated adult. That if necessary, an ambulance be ordered to transport Mr./Ms. _____ to

_____.

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

By Counsel:

Prosecuting Attorney

APPENDIX B

Notarized Statement for Order of Attachment

STATE OF WEST VIRGINIA

COUNTY OF _____. TO-WIT:

_____, the Petitioner, after first being duly sworn; says that the facts and allegations contained in the forgoing petition are true to the best of his/her knowledge and belief and that he/she has knowledge of the facts contained herein.

PETITIONER

Taken, sworn to and subscribed before me, a Notary Public, on this the ____ day of _____, _____.

My commission expires: _____

NOTARY PUBLIC

APPENDIX C**Judge's Order**IN THE CIRCUIT COURT OF **YOUR** COUNTY, WEST VIRGINIAIN THE MATTER OF
NAME: _____

CASE NO.

AN ALLEGED INCAPACITATED ADULT**ATTACHMENT ORDER**To the Sheriff of **Your** County:

On **date**, this Court found probable cause to believe that **name** is an incapacitated adult in an emergency situation and that the adult having care, custody and control of **name** have refused to take necessary steps to alleviate this emergency.

Accordingly, the Court ORDERS and DECREES that the Sheriff of **Your** County, or his authorized agent, shall immediately secure the person of **name** and forthwith have the **Your** County Sheriff's Department transfer him/her to **Your** Hospital for an immediate medical evaluation. The Court further DECREES that **Social Work Name**, an employee of the West Virginia Department of Health and Human Resources shall accompany the **Your** County Sheriff's Department, or his agent, and **Social Work Name** shall enter the abode of **Name** to remove him/her, notwithstanding the resident therein of any other person. The Defendant shall not be incarcerated in a jail.

Nothing in this ORDER shall in anyway limit the authority of the **Your** County Sheriff, or his authorized agent, or any ambulance service to provide transportation for **name** to **Your** Hospital by ambulance, if necessary. The Court further ORDERS that **name** assets will pay for any and all charges to the extent **name** has assets or insurance coverage. If **name** does not have such assets or medical coverage, the West Virginia Department of Health and Human Resources shall be responsible for any treatment provided pursuant to this order.

The Court finally ORDERS the Sheriff to properly serve a Notice of Hearing regarding this matter for **date**, at **time** on **name** or any other person having the care, custody and control of **name**.

Attorney, a competent and active member of the **Your** County Bar is hereby appointed to act as Guardian Ad Litem for **name**.

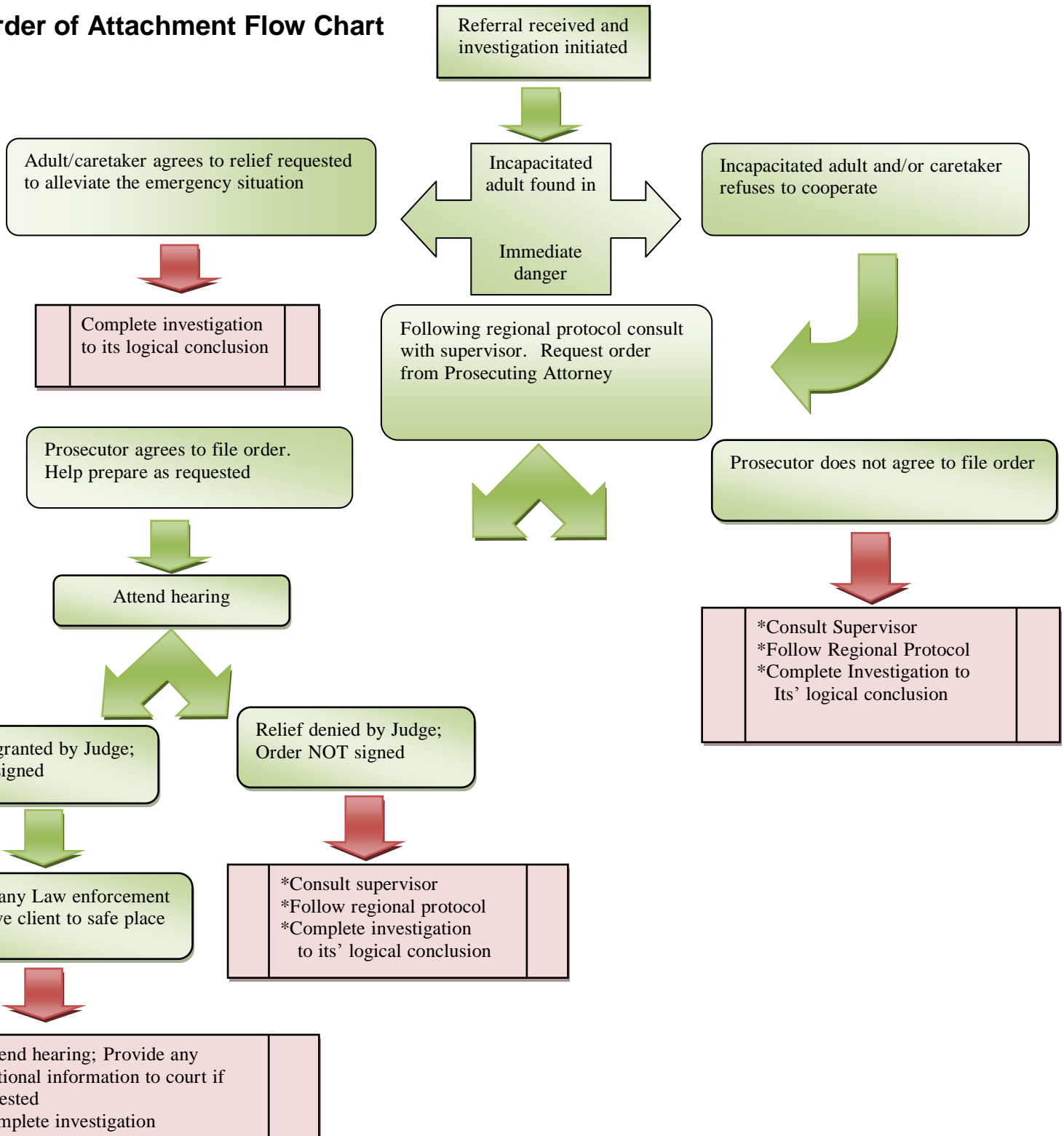
Entered this the ____ day of _____, 2012.

Order
Enter: _____

Judge Name
Circuit Court Judge

APPENDIX D

Order of Attachment Flow Chart



APPENDIX F**Guardianship Petition**

IN THE CIRCUIT COURT OF COUNTY, WEST VIRGINIA

For Clerk's Use Only

IN RE: _____, AN ALLEGED PROTECTED PERSON

DATE: _____ CASE NUMBER _____ - G -

PETITION FOR THE APPOINTMENT OF A GUARDIAN/CONSERVATOR

[West Virginia Code: § 44A-1-1, et seq.]

INSTRUCTIONS TO APPLICANT

- A. All information must be printed or typed and be clearly readable.
- B. All information requested **MUST** be provided, if known. If unknown, you must state it is unknown.
- C. Any petition which does not provide the necessary information, or is unreadable, may be dismissed for incompleteness. Please be sure you read and answer all questions.
- D. In this document, the **PROTECTED PERSON** is the person for whom a guardian or conservator is sought. The person requesting the appointment is the **PETITIONER**. (Two or more petitioners may apply to serve as co-guardians or co-conservators. If so, the required information must be completed for all petitioners.)
- E. Answers to some questions may require more space than provided. If so, attach additional pages as needed and label each response on such page(s) with the number of the applicable question.
- F. Additional guidelines and instructions are contained on Page 7. Please read these instructions carefully since substantial delays may result from failure to perform all the requirements of law.
- G. **WARNING: If a guardian or conservator is appointed for an individual who is unable to handle their affairs due to mental illness or insanity, the individual will be:**
- (1) prohibited from possessing and receiving firearms and ammunition, in some cases for his or her entire life,
 - (2) required to immediately surrender ANY firearms owned or in his or her possession,
 - (3) reported to both federal and state database registries used for firearm purchases and permits/licenses to carry concealed weapons, and
 - (4) subject to future criminal charges for possession or receipt of firearms or ammunition. Conviction in West Virginia can result in a fine up to \$1,000.00 or jail time of up to one year. Federal conviction is a **FELONY** and can result in fines and jail time up to **TEN** years. (See, W. Va. Code § 61-7-7 and 18 U.S.C.A. § 924(a)(2))

PART I

INFORMATION ABOUT THE PETITIONER

1. PETITIONER'S [your] FULL NAME:
2. PETITIONER'S [your] PLACE OF RESIDENCE:
3. PETITIONER'S [your] POST OFFICE ADDRESS:
TELEPHONE NUMBER: WORK: HOME:
4. WHAT IS YOUR RELATIONSHIP TO THE PROTECTED PERSON:

PART II

INFORMATION ABOUT THE PROTECTED PERSON

5. FULL NAME OF PROTECTED PERSON:
6. PROTECTED PERSON'S DATE OF BIRTH [MMDDYYYY]:
7. PROTECTED PERSON'S PLACE OF BIRTH [state or country]:
8. PROTECTED PERSON'S RESIDENCE ADDRESS:
9. PROTECTED PERSON'S CURRENT LOCATION:
10. PROTECTED PERSON'S POST OFFICE ADDRESS:
11. PROTECTED PERSON'S GENDER [initial one]: ____ male or ____ female
12. PROTECTED PERSON'S RACE [initial one]: ____ White, ____ Black or African American, ____ Hispanic or Latino, ____ Asian, ____ American Indian or Alaska Native, or ____ Native Hawaiian or Other Pacific Islander, or ____ unknown
13. PROTECTED PERSON'S HEIGHT [initial one]: ____ feet, and ____ inches
14. PROTECTED PERSON'S NATURAL EYE COLOR [initial one]: ____ brown, ____ blue, ____ green, ____ hazel, or ____ other

PART III

INFORMATION ABOUT THE PROTECTED PERSON'S RELATIVES

You are required to provide information about the Protected Person's nearest relatives. You must answer each question fully and completely. If additional space is needed, attach additional page(s) as necessary.

15. DOES THE PROTECTED PERSON HAVE A SPOUSE AND/OR CHILDREN? _____ YES _____ NO.

If you have answered "YES," complete the following and then go to PART IV. If you have answered "NO," go to question 16.

SPOUSE'S FULL NAME: _____

SPOUSE'S POST OFFICE
ADDRESS: _____

FULL NAME(S) AND **POST OFFICE ADDRESSES** OF EACH OF PROTECTED PERSON'S CHILDREN:

NAME	ADDRESS

16. DOES THE PROTECTED PERSON HAVE PARENTS, BROTHERS AND/OR SISTERS? ___ YES ___ NO.

IMPORTANT NOTE: Complete this question **ONLY** if you answered "NO" to Question 15 above. If you have answered "YES," to this question, complete the information requested below and go to PART IV. If you have answered "NO," go to question 17 below.

FULL NAME(S) AND **POST OFFICE ADDRESSES** OF EACH OF PROTECTED PERSON'S PARENTS AND BROTHERS AND SISTERS:

NAME	RELATIONSHIP	ADDRESS

17. IMPORTANT NOTE: Provide the following information **ONLY** if you have answered "NO" to BOTH questions 15 and 16 above.

LIST THE PROTECTED PERSON'S NEAREST KNOWN RELATIVES, AND THE POST OFFICE ADDRESS(ES) FOR EACH, WHO WOULD BE ENTITLED TO SUCCEED TO THE PROTECTED PERSON'S ESTATE BY INTESTATE SUCCESSION AS SET FORTH IN **WEST VIRGINIA CODE: §421-1, et seq.** :

NAME	RELATIONSHIP	ADDRESS

PART IV

OTHER REQUIRED INFORMATION

18. LIST ANY INDIVIDUAL AND/OR FACILITY, INCLUDING ANY PERSON ACTING AS A DE FACTO CONSERVATOR, DE FACTO GUARDIAN, MEDICAL POWER OF ATTORNEY REPRESENTATIVE OR APPOINTED SURROGATE, THAT IS RESPONSIBLE FOR THE PROTECTED PERSON'S CARE OR CUSTODY.

NAME OF THE INDIVIDUAL/FACILITY	PLACE OF RESIDENCE OR LOCATION	POST OFFICE ADDRESS:

IMPORTANT NOTE: *If you have named any individual and/or facility in this question, you MUST provide a detailed listing of the acts performed by any and all such persons and/or facilities on behalf of the protected person on a separate sheet which MUST be attached to this petition.*

19. HAS ANY PERSON BEEN DESIGNATED AS A SURROGATE DECISION MAKER FOR THE PROTECTED PERSON? A "surrogate decision maker" is an adult individual or individuals who are reasonably available, are willing to make health care decisions on behalf of an incapacitated person, and are identified as such by the person's attending physician in accordance with West Virginia Code § 16-30B-3(p). _____ YES _____ NO.

If "YES," provide information requested below. If "NO," go to Question 20.

NAME(S) OF THE SURROGATE DECISION MAKER	PLACE OF RESIDENCE(S) / POST OFFICE ADDRESSES

20. DOES THE PROTECTED PERSON HAVE A REPRESENTATIVE OR REPRESENTATIVES DULY APPOINTED UNDER A DURABLE POWER OF ATTORNEY, MEDICAL POWER OF ATTORNEY AND/OR A LIVING WILL? _____ YES _____ NO. If "YES," complete the information requested below AND attach a copy of any such document with this petition. If "NO," go to Question 16.

NAME(S) OF REPRESENTATIVE(S)	REPRESENTATIVE(S) PLACE OF RESIDENCE OR LOCATION/ POST OFFICE ADDRESS(ES)

21. WILL THE PROTECTED PERSON'S INCAPACITY PREVENT THE PROTECTED PERSON FROM ATTENDING THE HEARING ON THIS PETITION? _____ YES _____ NO. *If "YES," you must provide the reason(s) in the space below.*
REASON(S): _____

IMPORTANT NOTE: The Court cannot conduct a hearing on the merits of this petition without the presence of the protected person unless one of the following is submitted to the Court at the beginning of the hearing: (1) a physician's

affidavit (GC Form 5), (2) qualified expert testimony or, (3) evidence that the person refuses to appear. SEE: West Virginia Code: § 44A-2-9(c).]

22. WHAT TYPE OF GUARDIANSHIP OR CONSERVATORSHIP IS BEING REQUESTED? **Check all appropriate spaces:**
- _____ TEMPORARY GUARDIANSHIP _____ TEMPORARY CONSERVATORSHIP
- _____ LIMITED GUARDIANSHIP _____ LIMITED CONSERVATORSHIP
- _____ GUARDIANSHIP _____ CONSERVATORSHIP

LIST THE REASON OR REASONS SUPPORTING THE TYPE OR TYPES OF GUARDIANSHIP OR CONSERVATORSHIP REQUESTED:

TYPE:	
REASON:	

23. IF A LIMITED *GUARDIANSHIP* IS BEING REQUESTED, INDICATE THE SPECIFIC AREAS OF PROTECTION AND ASSISTANCE TO BE INCLUDED IN THE ORDER OF APPOINTMENT:

24. IF A LIMITED *CONSERVATORSHIP* IS BEING REQUESTED, INDICATE THE SPECIFIC AREAS OF MANAGEMENT AND ASSISTANCE TO BE INCLUDED IN THE ORDER OF APPOINTMENT:

25. NAME OF THE PROPOSED GUARDIAN:

PROPOSED GUARDIAN: _____

POST OFFICE ADDRESS: _____

IF AN INDIVIDUAL IS BEING PROPOSED, PROVIDE THE FOLLOWING INFORMATION ABOUT THE INDIVIDUAL:

AGE: _____ OCCUPATION: _____

RELATIONSHIP TO PROTECTED PERSON: _____

26. NAME OF THE PROPOSED CONSERVATOR: _____

PROPOSED CONSERVATOR: _____

POST OFFICE ADDRESS: _____

IF AN INDIVIDUAL IS BEING PROPOSED, PROVIDE THE FOLLOWING INFORMATION ABOUT THE INDIVIDUAL:

AGE: _____ OCCUPATION: _____

RELATIONSHIP TO PROTECTED PERSON: _____

27. HAS THE PROTECTED PERSON NOMINATED A GUARDIAN OR CONSERVATOR DIFFERENT FROM THE PROPOSED GUARDIAN OR CONSERVATOR? ____YES ____NO. *If "YES," complete the following:*
NOMINATED GUARDIAN: _____

POST OFFICE ADDRESS: _____

IF AN INDIVIDUAL, PROVIDE THE FOLLOWING INFORMATION ABOUT THE INDIVIDUAL:

AGE: _____ OCCUPATION: _____

RELATIONSHIP TO PROTECTED PERSON: _____

NOMINATED CONSERVATOR: _____

POST OFFICE ADDRESS: _____

IF AN INDIVIDUAL, PROVIDE THE FOLLOWING INFORMATION ABOUT THE INDIVIDUAL:

AGE: _____ OCCUPATION: _____

RELATIONSHIP TO PROTECTED PERSON: _____

28. PROVIDE THE NAME(S) AND ADDRESS(ES) OF ANY GUARDIAN OR CONSERVATOR CURRENTLY ACTING ON BEHALF OF THE PROTECTED PERSON IN WEST VIRGINIA OR ELSEWHERE:

NAME OF ACTING GUARDIAN	POST OFFICE ADDRESS

NAME OF CONSERVATOR	POST OFFICE ADDRESS

29. HAS ANY INDIVIDUAL PROPOSED, NOMINATED OR ACTING CONSERVATOR OR GUARDIAN, WHOSE NAME IS LISTED IN ANY OF THE ANSWERS TO QUESTIONS 20 THROUGH 23, EVER BEEN CONVICTED OF A CRIMINAL OFFENSE OTHER THAN A TRAFFIC OFFENSE?

[check one] _____ YES _____ NO. *If the answer to this question is "Yes," list the name of each such individual AND provide the CRIMINAL HISTORY of that individual:*

I, the Petitioner named in the foregoing **Petition for the Appointment of a Conservator/Guardian** hereby respectfully request that the Circuit Court set this matter for hearing and, following such hearing, appoint a guardian and/or conservator for the protected person named herein as requested and petitioned.

Given under my hand this _____ day of _____, 20_____.

Petitioner's Signature

COUNSEL FOR PETITIONER

Bar ID: _____

Address: _____

Phone Number: _____

ALL PETITIONERS MUST NOTE THE FOLLOWING MATTERS ABOUT FILING THIS PETITION:

1. This petition must be filed in the Office of the Clerk of the Circuit Court of the County in West Virginia where the Protected Person resides, ***OR*** the County where the Protected Person has been admitted to a health care or correctional facility ***OR***, in the case of a missing person (a person who is absent from his or her usual place of residence in West Virginia and whose whereabouts are unknown for a period of six months or more), the petition must be filed in the County in which the missing person last resided . If this is not the case, ask for assistance from the Circuit Court Clerk.
2. You are required to pay a filing fee of \$ 110.00 to the Clerk of the Circuit Court upon filing of this petition. As the Petitioner, you are responsible for the payment of this fee and any other fees required for service of process, court costs, and for copies of court documents and transcripts. Once a guardian or conservator has been appointed, such fees may be reimbursed by the Protected Person's estate, but only if an appointment is made and only if funds are available for reimbursement. ***West Virginia Code***: §§ 44A-2-1(c) and 59-1-1, et seq., provide that if you are pecuniary unable to advance these fees, you will not be required to pay the fees and costs. Ask the Court Clerk for assistance if you are unable to advance these fees and costs.
3. You are required to submit additional documents with this petition. Unless the Court, for good cause shown, has waived it, you ***MUST*** file an ***EVALUATION REPORT***, GC Form 4, which is a required evaluation and report on the condition of the Protected Person which must be completed by a licensed psychologist or physician. If you do not have this report, you may obtain a blank form from the Circuit Court Clerk. It is your responsibility to arrange for an examination and completion of this form prior to filing. You may also be required to file a ***PHYSICIAN'S AFFIDAVIT***. See the note to Question 21. If the Protected Person has executed a durable power of attorney, a medical power of attorney or a living will, you must attach copies of these documents to this petition as directed by Question 20.
4. Upon proper and complete filing of the Petition, the Court will issue a ***NOTICE OF HEARING*** that establishes the date, time and location of the hearing on the Petition. It is the ***PETITIONER'S*** responsibility to insure that the following parties are served with a copy of court documents as follows:
 - (a) The Protected Person must be served by ***Personal Service of Process*** not later than fourteen (14) days prior to the date of the hearing. The documents which must be served upon the Protected Person are:
 1. The Notice of Hearing, and
 2. This Petition, and
 3. The Evaluation report.

Upon request and payment of the appropriate fee, the Court Clerk can arrange to have this accomplished by the County Sheriff. As an alternative, you may employ a private process server to effect service, provided that service is made as required by law.

- (b) You must also serve every individual who has reached the age of seven (7) years or older, and every entity whose names and post office addresses appear in the Petition. The documents required to be served upon these individuals/entities are:

1. The Notice of Hearing, and
2. This Petition.

This service is made by sending each Notice and Petition by certified mail, return receipt requested, at least fourteen (14) days before the hearing. You are further required to submit the certified mail return receipts to the Court Clerk for filing on or before the hearing date. It is your responsibility to obtain proper service and file the required documentation with the Circuit Clerk **BEFORE** the hearing.

IMPORTANT NOTE: A failure by the Petitioner to properly serve the Protected Person and/or other individuals as required by law will likely result in delay of the hearing or, possibly, dismissal of the petition. Make sure ALL parties are served as required. The Protected Person cannot waive this requirement. If you have questions, consult an attorney for advice.

5. Under **West Virginia Code:** § 44A-2-7, the Circuit Court is required to appoint an attorney to represent the Protected Person. You have the right to retain an attorney of your choosing to represent you in this matter, which is not mandatory, but is mentioned merely to insure that you understand that you have the right to be represented by an attorney at this hearing.
6. If you are seeking the appointment of a conservator, you **MUST** file a “Statement of Financial Resources” with the Court any time prior to the hearing. The Circuit Clerk has a blank form which you may obtain for completion before the hearing.
7. A person who is appointed as a guardian or conservator will be required to complete mandatory education within thirty days of a finding that he or she should be appointed as a guardian or conservator and must file an affidavit indicating that such education has been completed. If you are unsure about any matter contained in these instructions, you may ask the Circuit Clerk for assistance. However, the Court and Clerk are prohibited from providing legal advice. **If you need legal advice, you should contact an attorney.**

APPENDIX G**Evaluation Report****EVALUATION REPORT OF LICENSED PHYSICIAN/PSYCHOLOGIST****INSTRUCTIONS FOR COMPLETION OF REPORT**

- A. This form is a required submission under *West Virginia Code*: § 44A-2-3 in a case seeking the court appointment of a guardian and/or conservator for an alleged “protected person” and must be completed by a licensed physician or psychologist. Since the law requires that this report address certain matters contained in the Petition seeking such appointment, it will be necessary for you to have a true copy of the completed Petition before you complete this form. Please insure that the Petitioner has provided you with a copy of the Petition intended to be filed.
- B. All information provided in this report must be printed or typed and be clearly readable.
- C. All information requested *MUST* be provided, if known. If unknown, you must state it is unknown.
- D. Please be sure you read and answer all questions carefully and in as much detail as possible.
- E. Answers to some questions may require more space than provided. If so, attach additional pages as needed and label each response on such page(s) with the number of the applicable question.

I, _____, a licensed [*check category*] physician psychologist, in the State of _____, license number _____ hereby certify that I have examined and/or evaluated the condition of [*insert name of alleged Protected Person here*] _____, and that the examination(s) or assessment(s) performed which form the basis of this report were conducted on the following date(s): _____, and hereby submit this report and evaluation with the following findings:

1. *West Virginia Code*: § 44A-1-4(13) defines a "protected person" as an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to:
 - (a) receive and evaluate information effectively, ***OR***

- (b) respond to people, events and environments to such an extent that the individual lacks the capacity to *either*:
- (i) 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) 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*.

This same section also provides that even if the Court determines that the person displays poor judgment, this finding ***alone*** is not sufficient evidence to determine that the person is a "protected person" as defined above.

CONSIDERING THIS DEFINITION, IN MY OPINION, I FIND THE ALLEGED PROTECTED PERSON
[*initial appropriate finding*]:

_____ ***IS NOT*** INCAPACITATED [*If you have initialed this finding, go to Question 2*]

_____ ***LACKS*** CAPACITY [*If you have initialed this finding, complete Questions 1a and 1b below*]

1a. DESCRIBE THE NATURE, TYPE AND EXTENT OF THE PERSON'S INCAPACITY:

1b. THE PERSON'S SPECIFIC COGNITIVE AND FUNCTIONAL LIMITATIONS ARE:

2. MY EVALUATION OF THE PERSON'S MENTAL AND PHYSICAL CONDITION IS AS FOLLOWS [*Where appropriate, include an evaluation of the Person's educational condition, adaptive behavior and social skills*]:

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

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

If the person is unable to handle his or her own affairs due to mental illness or insanity, please provide the following:

3a. The gender of the Respondent is [*initial one*] _____ male or _____ female.

3b. The race of the Respondent is believed to be [*initial one*] _____ White, _____ Black or African American, _____ Hispanic or Latino, _____ Asian, _____ American Indian or Alaska Native, or _____ Native Hawaiian or Other Pacific Islander, or _____ unknown.

3c. The height of the Respondent is _____ feet, and _____ inches.

3d. The natural eye color of the Respondent is brown, blue, green, hazel, or _____ other.

4. IF THE PETITION CONTAINS A REQUEST FOR A GUARDIAN, TEMPORARY GUARDIAN AND/OR, LIMITED GUARDIAN, DESCRIBE THE SERVICES, IF ANY, CURRENTLY BEING PROVIDED FOR THE PERSON'S HEALTH, CARE, SAFETY, HABILITATION OR THERAPEUTIC NEEDS. INCLUDE A RECOMMENDATION AS TO THE MOST SUITABLE LIVING ARRANGEMENT AND, WHERE APPROPRIATE, THE MOST SUITABLE TREATMENT OR HABILITATION PLAN AND THE REASON'S FOR SUCH RECOMMENDATION(S):

IT IS MY OPINION THAT THE APPOINTMENT OF [initial appropriate office]

_____ A GUARDIAN

_____ A CONSERVATOR

_____ A GUARDIAN AND A CONSERVATOR

IS NECESSARY FOR THIS PERSON.

5. THE TYPE AND SCOPE OF GUARDIANSHIP AND/OR CONSERVATORSHIP NEEDED, AND THE REASONS THEREFOR, ARE AS FOLLOWS:

6. IF THE PETITION STATES THAT THE PERSON'S INCAPACITY WILL PREVENT THE PERSON'S ATTENDANCE AT THE HEARING [SEE: Petition for Appointment of Conservator/Guardian, Page 4, Question 16], IT IS MY OPINION THAT SUCH ATTENDANCE AT THE HEARING [initial appropriate finding]:

WOULD BE DETRIMENTAL TO THE PERSON'S HEALTH, CARE AND/OR SAFETY.

WOULD NOT BE DETRIMENTAL TO THE PERSON'S HEALTH, CARE AND/OR SAFETY.

IMPORTANT NOTE: If a protected person is unable to appear at the hearing, the law requires that one of the following be submitted to the Court at the beginning of the hearing: (1) a physician's affidavit (*GC Form 5*), (2) qualified expert testimony, or (3) evidence that the person refuses to appear. **SEE:** *West Virginia Code*: § 44A

2-9(c). This Evaluation Report is ***NOT*** the required physician's affidavit. The affidavit is a separate form which may only be completed by a physician.]

7. IF IT APPEARS THE PERSON WILL ATTEND THE HEARING, IS THE PERSON ON ANY MEDICATION(S) THAT MAY AFFECT THE PERSON'S ACTIONS, Demeanor, AND PARTICIPATION AT THE HEARING?

YES NO [*If "YES," describe the medication and the affect(s) such medication(s) may have*]

I, the undersigned evaluating physician/psychologist named on page 1 of this Report, do hereby certify that the foregoing report is complete and accurate to the best of my information and belief. I further certify that other individuals [*initial appropriate category*] DID DID NOT perform, supervise or review the assessment(s) or examination(s) upon which this Report is based, or otherwise made substantial contributions toward this Report's preparation. [*If you initialed "DID," see note below and secure signatures of all such individuals on page 5.*]

Given under my hand this _____ day of _____ [*month*], 20____ [*year*].

EVALUATING PHYSICIAN/PSYCHOLOGIST

[West Virginia Code: § 44A-2-3(7) also requires the signatures of ". . . any other individuals who performed, supervised or reviewed the assessments or examinations upon which the report is based. . . ." or of any other person who made substantial contributions towards the report's preparation.]

We, the undersigned individuals, hereby certify that each individual signatory executing this Report below performed, supervised and/or reviewed the assessment(s) and/or examination(s) upon which the foregoing report is based, or made a substantial contribution toward the preparation of this Report, and that by signing below, each individual further certifies that to the best of his or her information and belief, the information contained in the foregoing report is complete and accurate.

DATE

SIGNATURE

PRINT NAME AND TITLE

DATE

SIGNATURE

PRINT NAME AND TITLE

DATE

SIGNATURE

PRINT NAME AND TITLE

DATE

SIGNATURE

PRINT NAME AND TITLE

DATE

SIGNATURE

PRINT NAME AND TITLE

APPENDIX H**Physician's Affidavit**

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

For Clerk's Use Only

IN RE: _____ CASE NUMBER _____ - G - _____
AN ALLEGED PROTECTED PERSON

AFFIDAVIT OF PHYSICIAN
[West Virginia Code: § 44A-2-9(c)]

STATE OF _____,

COUNTY OF _____, to-wit:

This day, personally appeared before me the undersigned physician who, having been first duly sworn, says, represents and certifies as follows:

I, _____, a licensed physician in the State of _____, hereby certify that I have examined and/or evaluated the condition of *[insert name of alleged protected person here]* _____, and that in my expert opinion, this individual cannot attend the hearing addressing whether a guardian or conservator should be appointed for this individual for the following reasons *[check applicable reasons and provide supporting facts in spaces provided and attach additional pages, if necessary]*:

_____ The presence of the individual is not possible due to a physical inability. The basis for this opinion is as follows:

_____ Requiring the presence of the individual would significantly impair the individual's health.

Explain : _____

_____ Other Reason(s): _____

Given under my hand this _____ day of _____ [month], _____ [year].

SIGNATURE OF PHYSICIAN

The foregoing affidavit was taken, subscribed and sworn to before me by the said _____, in my said County and State on this, the _____ day of _____ [month], _____ [year].

Given under my hand and **NOTARIAL SEAL**

[AFFIX NOTARIAL SEAL]

NOTARY PUBLIC

My Commission Expires: _____

APPENDIX I

Financial Resources

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

For Clerk's Use Only

IN RE: _____, AN ALLEGED PROTECTED PERSON

DATE FILED: _____ CASE NUMBER _____ - G - _____

STATEMENT OF FINANCIAL RESOURCES

[West Virginia Code: § 44A-2-4]

The Petitioner, in any case where the appointment of a *conservator* is requested, is required to submit a reasonably detailed statement of the financial resources of the alleged Protected Person. **This form does not need to be completed or filed if the only relief requested is for the appointment of a guardian.** This form must be completed in its entirety and filed with the Clerk of the Circuit Court *prior to the hearing* to be held on the petition to appoint a conservator. The Petitioner should make a reasonable investigation into the Protected Person's real and personal assets and income, no matter where those assets may be located, and report the findings in this Statement. ***Attach additional pages as necessary.***

1. ALLEGED PROTECTED PERSON'S SOCIAL SECURITY NUMBER _____ - _____ - _____

2. TO THE EXTENT KNOWN, WHAT IS THE FAIR MARKET VALUE OF THE PROTECTED PERSON'S REAL ESTATE OR REAL PROPERTY? [check whether each parcel of real estate is improved or unimproved and give a brief description of the land (size) and improvements (if any), the location of the parcel (state, county, district), and the fair market value of the parcel]

PARCEL 1: Improved? _____ Yes _____ No. Description: _____

Location: _____ VALUE \$ _____

PARCEL 2: Improved? _____ Yes _____ No. Description: _____

Location: _____ VALUE \$ _____

[Describe any additional parcels on a separate sheet using the format above, then add the values of all parcels and enter the total in the space below.]

COMBINED VALUE OF ALL REAL ESTATE VALUE \$ _____

3. TO THE EXTENT KNOWN, WHAT IS THE APPROXIMATE VALUE OF ALL THE PROTECTED PERSON'S PERSONAL PROPERTY? *[Personal property includes cash on hand or in bank (or other) accounts, stocks, bonds, furniture, automobiles, jewelry, debts due from others (notes/accounts receivable) and other assets not considered to be real estate. List each item or classification of personal property]*

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

ITEM(S): _____ VALUE \$ _____

[Describe any additional personal property on a separate sheet using the format above, then add the values of all the listed items and enter the total in the space below.]

COMBINED VALUE OF ALL ITEMS OF PERSONAL PROPERTY VALUE \$ _____

4. TO THE EXTENT KNOWN, WHAT IS THE ANTICIPATED ANNUAL GROSS INCOME OR OTHER RECEIPTS OF THE PROTECTED PERSON? *[List each source of income and the anticipated annual amount of income from that source]*

SOURCE: _____ ANNUAL INCOME: \$ _____

SOURCE: _____ ANNUAL INCOME: \$ _____

SOURCE: _____ ANNUAL INCOME: \$ _____

[List any additional sources of annual income on a separate sheet using the format above, then add the income from all sources and enter the total in the space below.]

TOTAL ANNUAL INCOME FROM ALL SOURCES: \$ _____

5. SUMMARY OF ASSETS & ANNUAL INCOME

COMBINED VALUE OF ALL REAL ESTATE (Question 2 total) \$ _____

COMBINED VALUE OF ALL ITEMS OF PERSONAL PROPERTY (Question 3 total) + \$ _____

TOTAL ALL ASSETS (Real Property + Personal Property) \$ _____

TOTAL ANNUAL INCOME FROM ALL SOURCES \$ _____

I, _____, the Petitioner in the foregoing matter, hereby certify that I

have conducted a reasonable investigation into the assets and income of the alleged protected person named in

this Statement, that the foregoing Statement of Financial Resources is true, complete and correct to the best of my knowledge, information and belief, that I have included within the foregoing Statement, and any and all attachments thereto, all items of real property, personal property and all sources of income of the alleged protected person which are known, or have been disclosed, to me.

Given under my hand this _____ day of _____ [month], _____ [year].

PETITIONER'S SIGNATURE

APPENDIX J**Hearing Notice**IN THE CIRCUIT COURT OF **YOUR** COUNTY, WEST VIRGINIA

IN RE: _____

A PROTECTED PERSON

CASE NO. _____

NOTICE OF HEARING

TO:

You are hereby notified that the attached Petition for Termination, Revocation or Modification of Guardianship/Conservatorship shall be brought on for hearing before the Honorable **Judge's Name**, Chief Judge, **Your** County Circuit Court, on **Date**, **Year**, at the hour of **Time** a.m., or as soon afterward as may be heard, at the **Your** County Courthouse, **City**, West Virginia. You may be present to protect your

WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES. PETITIONER

By Counsel

Attorney's Name

Assistant Attorney General

Address(304) **Telephone Number**Fax: (304) **Number**

E-mail:

APPENDIX K**Periodic Report of Guardian**

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

For Clerk's Use Only

IN RE: _____, A PROTECTED PERSON

DATE FILED: _____ CASE NUMBER: _____

PERIODIC REPORT OF GUARDIAN
[*West Virginia Code: § 44A-3-2 and 11*]**INSTRUCTION FOR COMPLETION OF REPORT**

- A. This form is a required submission under *West Virginia Code: § 44A-3-2*. Pursuant to the provisions of *West Virginia Code: § 44A-3-11*, the first report of guardian must be completed and filed within six months of your appointment as a guardian, and thereafter by December 31 of each following calendar year. You are also required to file a report of guardian if you resign or are removed from your appointment as a guardian. If the appointment of a guardian is terminated, you are required to file a report unless the Court determines there is no need for a report. The Court may order the filing of additional reports. This report, and any subsequent reports, must be filed with the Circuit Court Clerk on or before the due date above, and also with the fiduciary commissioner or other person to whom the Court may have referred this matter. Failure to file a report of guardian as required by law or by the Court is a misdemeanor criminal offense and can result in a fine of \$100 to \$500 per infraction. The Circuit Clerk is required by law to notify the Court if a required report is not filed or is administratively incomplete.
- B. If a fiduciary commissioner or other person has been referred this matter by the Court, you must provide a copy of this report to him/her. The fiduciary commissioner or other person is responsible for reviewing the report, may request additional information from you, and is required by law to notify the Court or mental hygiene commissioner if any questions or discrepancies appear in a report or if a report is not filed when due. The Court or mental hygiene commissioner may take further action including setting a hearing on the matter.
- C. All information provided in this report must be printed or typed and be clearly readable.
- D. All information requested *MUST* be provided, if known. If unknown, you must state it is unknown.
- E. Please be sure you read and answer all questions carefully and in as much detail as possible.

- A. Answers to some questions may require more space than provided. If so, attach additional pages as needed and label each response on such page(s) with the number of the applicable question.

PLEASE GO TO THE NEXT PAGE TO BEGIN REPORT

Name of Protected Person:

Court Case Number:

Name of Guardian: **WV Department of Health and Human Resources**

Date of Appointment:

This report is [check any applicable category]

 first report periodic annual report final report other report order by Court

Date of this report: covering a time period from _____ to _____

Date of your last report [*if applicable*]: _____ covering _____ to _____

1. Describe the Protected Persons *mental, physical and social* condition during the time period covered by this report:

Mental/Emotional:

Physical:

Behavioral:

Social:

2. Describe the Protected Person's living arrangements during the period covered by this report:

Environmental Factors:

Household/Family Composition:
Specify:

Type of Residence:

Modification Date:

Modification Comments:

3. Describe the medical, educational, vocational and other professional services which were provided to the Protected Person during the period covered by this report:

Medical Services:

Educational Services:

Vocational Services:

Other Professional Services:

4. What is your opinion as to the adequacy of the Protected Person's care?

Primary Caregiver:

Reliability:

Specify:

5. Do you agree with the current treatment and/or habilitation plan for the Protected Person? Explain your response.

6. What is your recommendation as to the need for continued guardianship? Explain your response.

7. Do you recommend any changes in the *scope* of the guardianship? If so, detail the changes recommended and explain the reasons for recommending such changes.

8. Summarize your visits with, and activities on behalf of, the Protected Person:

Guardian Visits:

Guardian Activities:

9. In the space below, provide any information requested by the Court but not otherwise requested in this form:

10. In the space below, provide any further information which, in your opinion, the Court may find useful in reviewing the case of the Protected Person:

11. Are you requesting compensation for your services as guardian? YES NO
If you responded with "YES," what is the amount of your request: \$

12. What are the reasonable and necessary expenses you have incurred as guardian \$
[if you listed an amount in this question, attach an itemized listing of your reasonable and necessary expenses]

STATE OF WEST VIRGINIA
COUNTY OF, to-wit:

I, _____, WV Department of Health and Human Resources, the guardian named in this report, do hereby certify that the information provided in this PERIODIC REPORT OF GUARDIAN is true, correct and complete to the best of my knowledge, information and belief.

Given under my hand this _____ Day of _____ 20. _____

GUARDIAN'S SIGNATURE

The foregoing was taken, subscribed and sworn to before me by the said _____, in my said county _____ and state _____ on this, the _____ day of _____ 20____.

Given under my hand and NOTARIAL SEAL.

[AFFIX NOTARIAL SEAL]

NOTARY PUBLIC

My Commission Expires: _____

APPENDIX L**Petition for Termination, Revocation or Modification**

IN THE CIRCUIT COURT OF ____ COUNTY, WEST VIRGINIA

For Clerk's Use Only

IN RE: _____, A PROTECTED PERSON

DATE FILED: _____ CASE NUMBER ____ - G - ____

**PETITION FOR TERMINATION, REVOCATION OR MODIFICATION
OF GUARDIANSHIP/CONSERVATORSHIP**

[West Virginia Code: § 44A-4-6]

NOW COMES the Petitioner *[name of person filing Petition]* _____

in the above captioned cause, and respectfully petitions this Court to *[check the statement below which reflects what you want the Court to do]*:

_____ terminate or revoke the appointment of the guardian and/or conservator *[Note: To remove a specific individual serving as a guardian or conservator, but maintain the guardianship/conservatorship, use CG Form 21 pursuant to West Virginia Code Section 44A-4-4.]*

_____ modify the type of appointment of the guardian and/or conservator, or modify the areas of protection, management or assistance previously granted

of *[insert name of the Protected Person]* _____. The grounds alleged for the termination, revocation or modification are *[initial all grounds that apply; you must initial at least one applicable ground below]*:

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

APPENDIX M

Inventory Forms

WEST VIRGINIA SUPREME COURT OF APPEALS

Inventory of Forms for Mental Hygiene for Adult Guardianship/Conservatorship Proceedings

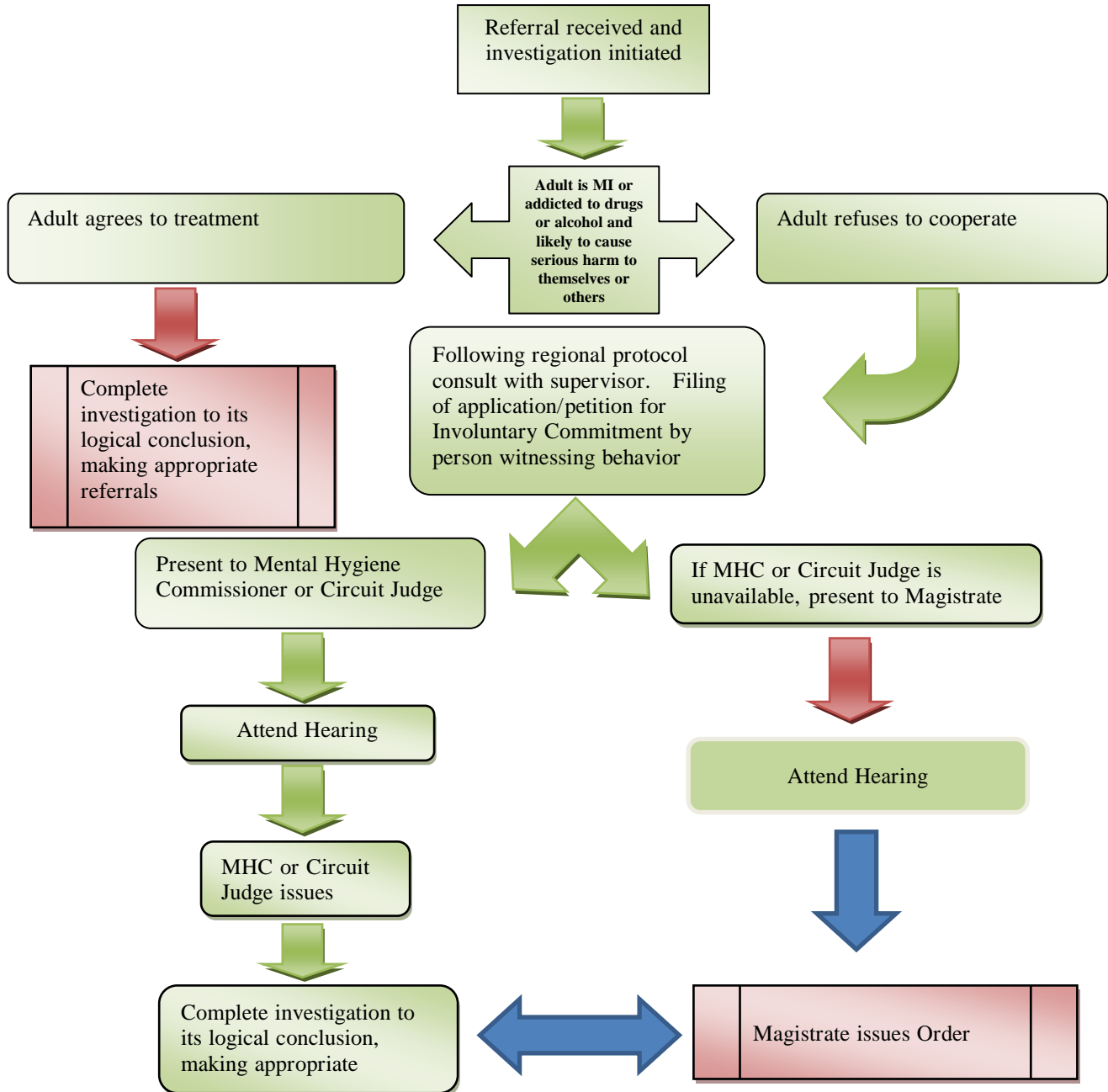
[Mental Hygiene Adult Guardianship-Conservators Forms - West Virginia Judiciary](#)

FORM	DESCRIPTION OF FORM	SIGNATORY
CG 901	Petition for the Appointment of a Conservator/Guardian [REVISED significantly to collect additional information]	Petitioner
CG 901M	Motion for Leave to File Petition without Evaluation Report	Petitioner
CG 902-1	Evaluation Report of Licensed Physician or Psychologist [REVISED significantly to collect expert opinion and other information]	Physician or Psychologist
CG 902A	Affidavit of Physician Certifying Protected Person Cannot Attend	Physician
CG 903	Statement of Financial Resources (Summary Form)	Petitioner
CG 905B	Request for Approval of Appointed Attorney Hourly Rate and Fee for Representation of Non-Indigent Protected Person	Appointed Counsel
CG 906A	Affidavit Certifying Completion of Mandated Education	Conservator/Guardian; Notary
CG 907O	Oath of Appointment	Any Authorized Official
CG 909	Cash Bond Form and/or Corporate Surety (Insurance Company) Bond Form for Conservator/Guardian [REVISED content to combine previous forms 909 C, S, and O]	Conservator or Guardian and Insurance Rep.
CG 910M	Petition by Conservator/Guardian for Permission to Resign	Conservator or Guardian

CG 911M	Petition for Removal of a Conservator or Guardian	Petitioner
CG 912M	Petition for Termination, Revocation or Modification of the Appointment of a Conservator or Guardian	Petitioner
CG 915C	Accounting of Conservator (Initial and Annual)	Conservator
CG 915G	Periodic Report of Guardian (Initial and Annual)	Guardian
CG 916	Inventory of Conservator for Initial and any Amended Inventory	Conservator
CG 921	Guardianship/Conservatorship Services: Appointed Attorney Voucher and Expense Statement	Appointed Attorney
CG 940	Petition for Permission to sell or Mortgage Real Estate of a Protected Person	Guardian or Conservator

APPENDIX N

Involuntary Commitment Process



APPENDIX O

Health Care Surrogate Selection

Opt In INITIAL box if surrogate agrees to have this form submitted to the WV *e-Directive* Registry, and released to treating health care providers.

Complete information to RIGHT.

REGISTRY FAX: 304-293-7442

Last Name/First/Middle

Address

City/State/Zip

Date of Birth (mm/dd/yyyy) _____/_____/_____

Checklist for Surrogate Selection

(In accordance with the West Virginia Health Care Decisions Act)

W.V. Code - § 16-30-8

Patient's Name: _____

A. DETERMINATION IF HEALTH CARE DECISIONS ACT APPLICABLE

1. Is this patient an adult (over the age of 18), an emancipated minor, or a mature minor? Yes _____ No _____
If no, stop now. The Health Care Decisions Act of 2000 does not apply to selecting a surrogate to make decisions for children. An emancipated minor is a person over the age of 16 who has been declared emancipated by a judge or who is over the age of 16 and married. A mature minor is a person less than 18 years of age who has been determined by a qualified physician, a qualified psychologist, or an advanced nurse practitioner to have the capacity to make health care decisions.
2. Has the patient been declared "incapacitated"? Yes _____ No _____
If no, stop now. Make the decision with the patient. ("Incapacity" means the inability because of physical or mental impairment to appreciate the nature and implications of a health care decision, to make an informed choice regarding the alternatives presented, and to communicate that choice in an unambiguous manner.)
3. The determination of incapacity must be made by the attending physician, a qualified physician, a qualified psychologist, or an advanced nurse practitioner.

Name of the physician _____ Date _____ Time _____

a. Cause: _____

b. Nature: _____

c. Duration: _____

i. Was the determination made regardless of age and disability? Yes _____ No _____
If no, the patient must be reevaluated without a presumption of incapacity.

ii. Does this patient have a Medical Power of Attorney (MPA)? Yes _____ No _____
Note that one physician, one licensed psychologist, or one advanced nurse practitioner who has personally examined the patient must document incapacity for the Medical Power of Attorney to be in effect.) If yes, the MPA representative is authorized to make any and all health care decisions.

Patient Name _____ Hospital # _____

Is the representative named in the MPA available and willing to serve? Yes _____ No _____

If yes, stop and follow the directives of this representative. Selection of a surrogate is not required. If no, check for a successor representative in the MPA. If neither representative is available and willing to serve, proceed with surrogate selection.

B. SELECTION OF A SURROGATE

4. Identification of potential surrogates (If yes, enter name(s) in order of priority)

Does the patient have:

- a. A committee or guardian? Name: _____
- b. Spouse? Name: _____
- c. Any adult child of the patient? Names: _____
- d. Either parent of the patient? Names: _____
- e. Any adult sibling of the patient? Names: _____
- f. Any adult grandchild of the patient? Names: _____
- g. A close friend of the patient? Names: _____
- h. Such other persons or classes of persons including, but not limited to, such public agencies, public guardians, other public officials, public and private corporations, and other representatives as the department of health and human resources may from time to time designate?

Names: _____

When selecting a surrogate, look first to the individual highest in priority listed in #4.

5. Who is best qualified to act as surrogate? Name: _____ Why?

Does this person:

- a. Know the patient's wishes, including religious and moral beliefs? Yes _____ No _____

If yes, basis:

- b. Know the patient's best interests? Yes _____ No _____

The determination of knowing the patient's best interests was based on a discussion regarding (check if yes):

1. The patient's medical condition _____
2. Prognosis _____

- 3. The dignity and uniqueness of the patient _____
- 4. The possibility and extent of preserving the patient's life _____
- 5. The possibility of preserving, improving or restoring the patient's functioning _____
- 6. The possibility of relieving the patient's suffering _____
- 7. The balance of the burdens to the benefits of the proposed treatment or intervention _____
- 8. and, such other concerns and values as a reasonable individual in the patient's circumstances would wish to consider _____

c. Have regular contact with patient? Yes _____ No _____
If yes, enter nature and frequency of contact:

d. Demonstrate care and concern for the patient? Yes _____ No _____
If yes, enter the basis for this decision:

e. Visit the patient regularly during the illness? Yes _____ No _____

f. Engage in FACE-TO-FACE contact with the caregivers? Yes _____ No _____

g. Fully participate in the decision-making process? Yes _____ No _____

6. Is person available and willing to serve as surrogate? Yes _____ No _____
If no, select the best qualified person who is available and willing to serve and enter name

7. Is this person the highest person in the list from #4? Yes _____ No _____
If no, or if there are several persons at the same priority level, enter the reasons why the selected person is more qualified under factors 5 a-g above.

8. If conscious, the patient must be notified of the determination of incapacity and who the patients surrogate will be.

Date and time when notified: _____

Record patient response: _____

9. If the determination of incapacity is for a patient with psychiatric mental illness, mental retardation, or addiction, incapacity must be confirmed by another physician or licensed psychologist who has examined the patient. Is this necessary for this case? Yes _____ No _____

10. If yes, has this been done? Yes _____ No _____

If so, name of second health care professional declaring the patient incapacitated

Patient Name _____ Hospital # _____

11. Were other potential surrogates notified of surrogate selection? Yes ___ No ___
If yes, enter names, date, time and by whom they were contacted.

Name	Date	Time	Contacted by

12. If a family member / close friend who was not selected disagrees with the surrogate chosen, tell him or her it is his / her responsibility to:
a. Notify the attending physician in writing. ___ (Initial when done)
b. Go to court to challenge the selection of the surrogate. ___ (Initial when done)

13. Did any potential surrogate object? Yes ___ No ___

If yes, enter name and basis for objection: _____

14. Notify the person who objects that he / she has 72 hours to get a court order.

Date _____ and time _____ notified.

I HAVE COMPLETED OR REVIEWED THIS FORM AND MADE THE DECISION TO APPOINT

_____ AS SURROGATE WHO

CAN BE REACHED AT PHONE NUMBER(S)

_____ (home) _____ (work) _____ (cell phone)

Physician Signature / Date / Time

Signature of person assisting the physician in completing this form (if any).

Patient Name _____ Hospital # _____

**Acceptance of Surrogate
Selection**

I accept the appointment as surrogate for _____ and
understand I have the authority to make all medical decisions for _____
_____.

Signature of Surrogate

APPENDIX P**Health Care Surrogate Form****APPOINTMENT OF HEALTH CARE SURROGATE
(WV State Code § 16-30)**Initial Appointment Continued Appointment **In accordance with WV Code § 16-30-7 Determination of incapacity,**

I have personally examined _____ on this date _____, 20____ and found him/her to be mentally/physically incapable of granting informed consent for health care.

Basis of Incapacity: *(Additional information may be attached)*

Expected duration: _____

(§16-30-8) Selection of a Surrogate:

(a) When a person is or becomes incapacitated, the attending physician or the advance practice nurse in collaboration with the attending physician, with the assistance of other health care providers as necessary, shall select, in writing, a surrogate. The attending physician shall reasonably attempt to determine whether the incapacitated person has appointed a representative under a medical power of attorney in accordance with the provisions of section four of this article, or if the incapacitated person has a court-appointed guardian in accordance with the provisions of article one, chapter forty-four-a of this code. If no representative or court-appointed guardian is authorized or capable and willing to serve, the attending physician or advance practice nurse is authorized to select a health care surrogate. In selecting a surrogate, the attending physician or advanced practice nurse must make a reasonable inquiry as to the existence and availability of a surrogate from the following persons:

- (1) The person's spouse;
- (2) The person's adult children;
- (3) The person's parents;
- (4) The person's adult siblings;
- (5) The person's adult grandchildren;
- (6) The person's close friends;
- (7) Any other person or entity

(§16-30-8b (E) (2)) The attending physician or the advanced practice nurse in consultation with the attending physician may select a proposed surrogate who is ranked lower in priority if, in his or her judgment, that individual is best qualified, as described in this section, to serve as the incapacitated person's surrogate. The attending physician or the advanced practice nurse shall document in the incapacitated person's medical records his or her reasons for selecting a surrogate in exception to the priority order provided in subsection (a) of this section.

(§16-30-24) For persons with psychiatric mental illness, mental retardation or addiction who have been determined by their attending physician or a qualified physician to be incapacitated, a second opinion by a qualified physician or qualified psychologist that the person is incapacitated is required before the attending physician is authorized to select a surrogate. The requirement for a second opinion **shall not** apply in those instances in which the medical treatment to be rendered is not for the person's psychiatric mental illness.

I select: **West Virginia Department of Health and Human Resources** as Health Care Surrogate in the belief that the assigned Social Service Worker will make health care decisions which will be in the best interest of this patient.

This selection expires _____, 20____

Signature

Title

Date

As required under section §16-30-24, I have personal knowledge of the patient and concur with the attending physician.

Signature

Title

Date

Appointment accepted/refused _____, WVDHHR
Signature

Date

Reason for refusal: _____

APPENDIX Q

Administrative Subpoena



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Earl Ray Tomblin
Governor

Address Inserted Here

Rocco S. Fucillo
Cabinet Secretary

Subpoena

ADMINISTRATIVE SUBPOENA DUCES TECUM
Adult Protective Services Division

TO: (Individual's name or name of records custodian of company)
(Address)

Pursuant to the authority by § 9-6-16 of the West Virginia Code, the Secretary of his/her designee for the West Virginia Department of Health and Human Resources commands that you provide any and all information which will lead to the location of (Protected Person's Name).

The information must be provided within twenty-four (24) hours of being served with this subpoena. All information leading to the location of the above named individual shall be provided to _____, Community Service Manager for the West Virginia Department of Health and Human Resources located at _____ Telephone number: _____ - _____.

Upon receipt of this subpoena, please contact _____, Community Service Manager at _____

Note: In accordance with §49-6A-9 et seq., failure to provide such information may result in circuit court proceedings.

APPENDIX R

Acknowledgement

*Special thanks to Dr. Alvin Woody Moss with the WVU End of Life Care for the availability of medical forms and website.