

State of West Virginia Department of Human Services

# Legal Requirements and Processes Policy

Bureau for Social Services

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# **SECTION 1 - INTRODUCTION AND OVERVIEW**

## **1.1 Mission, Vision, and Values**

The Bureau for Social Services promotes the safety, permanency, and well-being of children and vulnerable adults, supporting individuals to succeed and strengthening families. Our vision is for all West Virginia families to experience safe, stable, healthy lives and thrive in the care of a loving family and community. Our values include professionalism, integrity, excellence, relationships, and staff contributions.

## **1.2 Philosophical Principles**

APS workers uphold the right to self-determination of all clients. It is of the utmost importance to enhance capacity and allow vulnerable adults to address their own needs. When working with vulnerable adults, APS workers shall ensure that the adult's rights, as guaranteed under the Fourteenth Amendment of the United States Constitution and Article III of the West Virginia Constitution, are not infringed upon unnecessarily.

## **1.3 Legal Requirements**

There may be times when the initiation of legal proceedings becomes necessary to intervene in a vulnerable adult's life. The least intrusive type of intervention that is appropriate to meet the individual's needs must 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 financial affairs. The following sections describe the components of the legal systems and some of the administrative tools that are available to Adult Protective Services (APS).

Adult Protective Services is governed by W. Va. Code §9-6-1 et seq. Excerpts from Chapter 9 regarding these obligations are included within this policy; however, reference should be made to the entire chapter and to the following chapters:

- Chapter 16- Public Health.
- Chapter 27- Mentally Ill Persons.
- Chapter 32- Uniform Securities Act.
- Chapter 39B-Uniform Power of Attorney Act.
- Chapter 44A – West Virginia Guardianship and Conservatorship Act.
- Chapter 48- Domestic Relations.
- Chapter 55- Actions, Suits, and Arbitrations.
- Chapter 61- Crimes and Their Punishments.

Because of these varied and complex considerations, it is vital that the department be able to proceed in a timely manner but also with sensitivity, understanding, and knowledge when intervening with adults. Whenever the department becomes involved, the intervention provided must be least restrictive and be

appropriate to meet the needs of the individual while assuring the highest degree of autonomy and self-determination possible. Meeting all these requirements frequently calls for maintaining a delicate and skillful balance by the APS worker.

## 1.4 General Definitions

<b>Term</b>	<b>Definition</b>
<b>Adult</b>	A person who is 18 years of age or older, or a legally emancipated minor. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Advance directives</b>	The existence of a living will, medical power of attorney, durable power of attorney or other advance directive, duly executed by a person alleged to be a “protected person”, as defined in section four of this article, or the prior appointment of a surrogate decision maker for the protected person may eliminate, limit or supersede the need for the assistance or protection of a guardian or conservator, and any person so appointed is to be the first preferred nominee for guardian or conservator, as set forth in section eight, article two of this chapter. See, <a href="#">W. Va. Code §44A-1-3</a>
<b>Advanced nurse practitioner</b>	A registered nurse with substantial theoretical knowledge in a specialized area of nursing practice and proficient clinical utilization of the knowledge in implementing the nursing process, and who has met the further requirements of the West Virginia Board of Examiners for Registered Professional Nurses rule, advanced practice registered nurse, 19 CSR 7, who has a mutually agreed upon association in writing with a physician, and has been selected by or assigned to the person and has primary responsibility for treatment and care of the person. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Agent</b>	A person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact or otherwise. The term includes an original agent, coagent, successor agent and a person to which an agent's authority is delegated. See, <a href="#">W. Va. Code §39B-1-102</a>
<b>Attending physician</b>	The physician is selected by or assigned to the person who has primary responsibility for treatment and care of the person and who is a licensed physician. If more than one physician shares that responsibility, any of those



	physicians may act as the attending physician under this article. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Change of venue</b>	The transfer of the legal jurisdiction of a guardianship case from one county or judicial district to another. See, <a href="#">W. Va. Code §44A-1-7</a>
<b>Conservator</b>	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, <a href="#">W. Va. Code §44A-1-4</a>
<b>Death</b>	A finding made in accordance with accepted medical standards of either: (1) The irreversible cessation of circulatory and respiratory functions; or (2) the irreversible cessation of all functions of the entire brain, including the brain stem. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Guardian</b>	A person appointed by the circuit court who is responsible for the personal affairs of a protected person. See, <a href="#">W. Va. Code §44A-1-4</a>
<b>Health Care Surrogate (HCS) (also known as Surrogate decision maker)</b>	An individual 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.
<b>Incapacity</b>	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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Interested person</b>	A person who is the subject of a guardianship or conservator proceeding, an appointed guardian or conservator, or any other person with an actual and substantial interest in the proceedings either generally or as to a particular matter. See, <a href="#">W. Va. Code §44A-1-4</a>
<b>Living will</b>	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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Medical Power of Attorney</b>	A written, witnessed advanced directive that authorizes an individual that is at least 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 W. Va. Code §16-30-6 or existing and executed in accordance with the laws of another state. See, <a href="#">W. Va. Code §16-30-6</a>
<b>Person</b>	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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Petition</b>	A mechanism by which the court is asked to take an action.
<b>Portable Orders for Scope of Treatment (POST) Form</b>	The Portable Orders for Scope of Treatment (POST) is a standardized forms used to reflect orders by a qualified physician, an advanced practice registered nurse, or a physician assistant for medical treatment of a person in accordance with that person's wishes or, if that person's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with that person's best interest. See, <a href="#">W. Va. Code §16-30-25</a>
<b>Protected person</b>	An adult individual 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: (1) meet the essential requirements for his/her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (2) 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. See, <a href="#">W. Va. Code §44A-1-4</a>
<b>Representative payee</b>	An individual appointed by the funding source to handle that individual's benefits.
<b>Service of process</b>	An agent for service of process appointed by a limited liability company or a foreign limited liability company is an agent of the company for service of any

	process, notice or demand required or permitted by law to be served upon the company. See, <a href="#">W. Va. Code §31B-1-111</a>
<b>Surrogate Decision-maker (also known as Health care surrogate)</b>	An adult individual 18 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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Terminal condition</b>	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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>WV e-Directive Registry</b>	An electronic registry that will house and make available to treating health care providers, West Virginians’ advance directive forms, Portable 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.

**1.5 Roles of the Prosecuting Attorney and Attorney General**

[W. Va. Code §9-5-6](#) provides, that the duties of the Attorney General, assistants, and prosecuting attorneys 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, [W. Va. Code §9-6-3](#). Having these agreed upon procedures in place in advance will facilitate access by APS staff to the legal system when this becomes necessary.

**SECTION 2 - LEGAL PROCEDURES**

**2.1 Legal Procedure Definitions**

The definitions used below are specific to this section and are a supplement to the general definition

section.

<b>Term</b>	<b>Definition</b>
<b>Emancipated minor</b>	A child over the age of 16 who has been emancipated by: 1) Order of the court based on a determination that the child can provide for their physical well-being and has the ability to make decisions for themselves 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, <a href="#">W. Va. Code §49-4-115</a>
<b>Fiduciary duty</b>	A person or entity with the legal responsibility to make decisions on behalf of and for the benefit of another person; to act in good faith and with fairness; and includes a trustee, a guardian, a conservator, an executor or an agent under a financial power of attorney. See, <a href="#">W. Va. Code §9-6-1</a>
<b>Guardian ad litem</b>	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.
<b>Incompetence</b>	A legal determination that an individual lacks the ability to understand the nature and effects of their acts and as a result is unable to manage their business affairs or is unable to care for their physical well being, thereby resulting in substantial risk of harm.
<b>Limited conservator</b>	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. See, <a href="#">W. Va. Code §44A-1-4</a>
<b>Limited guardian</b>	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. See, <a href="#">W. Va. Code §44A-1-4</a>
<b>Missing person</b>	An adult individual, 18 years of age or older, who is absent from their usual place of residence in the state and whose whereabouts are unknown for a period of six (6) months or more. See, <a href="#">W. Va. Code §44A-1-4</a>

<b>Temporary conservator</b>	A person appointed by the circuit court who has only those powers and duties that are specifically set forth in the order of appointment. The appointment of a temporary conservator shall expire within six months unless it is terminated or extended for up to six months by the court or mental hygiene commissioner for good cause shown following a hearing. See, <a href="#">W. Va. Code §44A-2-14</a>
<b>Temporary Guardian</b>	A person appointed by the circuit court who has only those powers and duties that are specifically set forth in the order of appointment. The appointment of a temporary guardian shall expire within six months unless it is terminated or extended for up to six months by the court or mental hygiene commissioner for good cause shown following a hearing. See, <a href="#">W. Va. Code §44A-2-14</a>

**2.2 Introduction**

The circuit courts have exclusive jurisdiction of all matters involving determinations of mental incompetency, including the jurisdiction of any proceedings pending as of that effective date. All orders in those cases shall remain in full force and effect until terminated, revoked, or modified as provided herein.

The following procedures are civil actions that may be appropriate for some APS cases. Each, in varying degrees, limits the rights of the individual and should not be considered until all other less restrictive options have been ruled out. The APS worker must clearly document the reason(s) for pursuing legal action 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:

- Petition 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 eyewitness 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).

**2.3 Reporting Requirements to Law Enforcement and the Prosecuting Attorney**

Referrals that are received regarding a vulnerable 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 the department 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 maltreater. See, [W. Va. Code §9-6-2](#).

## **2.4 Reporting Missing Persons**

Any time a missing person is reported to APS, the worker must immediately contact the West Virginia State Police and supply them with all necessary information including a recent photograph and information related to the missing individuals electronic communication devices or electronic accounts, such as cell phone numbers, social networking login information, and email addresses and login information. Workers shall maintain annual photographs for all clients for whom the department serves as decision-maker.

## **2.5 Petition of Attachment**

A petition of attachment is a legal remedy available through the circuit court. When there is probable cause to believe that a vulnerable adult is in an emergency situation and that the person or persons having the immediate care, custody, and control of such vulnerable adult refuses to take necessary steps to alleviate such emergency, or that such vulnerable adult is without the actual care, custody, and control of any persons, it may issue an order of attachment for such vulnerable adult and direct that the peace officer executing the same deliver such vulnerable adult in his custody to a hospital or other safe place except a jail, for immediate remedial treatment to reduce or avoid the risk of death or serious injury. 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 APS staff to seek guardianship for an adult when requesting a petition of attachment. APS staff should object during the court hearing if the department has been granted guardianship of the adult.*

### ***Statutory Basis***

A petition of attachment is a legal remedy available through the circuit court. [W. Va. Code §9-6-5](#) sets forth the circumstances under which a petition of attachment may be granted by the court. Specifically, a petition of attachment may be used when there is probable cause to believe that an vulnerable 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 vulnerable adult is without a responsible person to provide for their care.

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

*Note: It is important to remember that an APS worker is to only use a petition of attachment as a last resort. All options should be exhausted prior to making this request. APS workers must consult their supervisor prior to requesting this petition with the court.*

### **Advantages**

The advantage of a petition 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 must be held within one judicial day following the issuance of the petition of attachment.

### **Disadvantages**

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

### **Process of Petition of Attachment**

If the APS worker determines during the course of an investigation that an emergency situation exists that may require a petition of attachment, they will immediately contact their supervisor to discuss the situation.

- Once the APS worker determines that a petition of attachment is needed, the worker will contact the county prosecutor's office to speak with the prosecutor about the need for the order of attachment. If the local prosecutor's office is not available to assist, the worker will contact their supervisor to request assistance from the department's regional attorney.
- The worker will provide the prosecutor with the necessary information for the petition of attachment. This includes but is not limited to the vulnerable adult's name, age, and address. It also includes the worker's facts and observations that led them to believe the client is an incapacitated adult, and what assistance and services have been offered to assist in alleviating the current emergency situation but has been refused or rejected by the alleged incapacitated person and of no remedial effect.
- The prosecutor will then write up a petition that will be taken to the circuit court judge for their signature for approval. The worker needs to be available as this is occurring, as they may be called upon to answer questions the circuit court judge may have.

- Once the petition of attachment has been signed by the judge and the order has been given, the APS worker will contact the local sheriff's office and provide a copy of the order requesting assistance from law enforcement and emergency medical services (EMS) for transport of the individual to the specified hospital or facility that is named in the order of attachment. The worker will accompany law enforcement and EMS as requested.
- As EMS and the sheriff's office are executing the order of attachment, the worker will contact the facility or hospital to advise them of the order and the situation. At times it may be necessary for the worker to appear in person at the facility or hospital.
- The treatment and care provided by the facility will vary based on each client's needs. A capacity evaluation is necessary with each client and the APS worker will need to ensure that it is provided to the court.
- A hearing will be held in one judicial day to determine if the need for the order of attachment continues to exist and if the vulnerable adult lacks capacity.
- If the evaluation shows that the client has decision-making capacity the court may dismiss the order. The client then has the right to refuse services. If the evaluation shows that the client lacks decision-making capacity and the court finds that the order of attachment was appropriate, the court may order that the treatment continue and the individual be held at the specified hospital or facility until further order of the court. If the capacity evaluation has not been completed by the time of the court hearing, a continuance may be ordered by the court.
- If the order of attachment has not been finalized, then a status hearing will be held within 30-60 days to determine the progress of the vulnerable adult.
- If the mental evaluation determines that the individual lacks decision-making capacity, the APS worker will proceed with the petition for guardianship for the alleged protected person.

*Note: The order of attachment must include wording that the hospital or facility will hold the alleged protected person until the hearing until further orders from the court.*

### ***Removal When Petition of Attachment Has Been Granted***

In most instances, removal of the vulnerable adult is not to occur until after the petition of attachment is granted by the court. After the petition of attachment has been granted, a law enforcement officer is permitted to enter the client's home and remove the vulnerable adult. The adult is then to be transported to a hospital or other safe place such as 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 APS worker accompany them to the home and assist with the removal.

### ***Removal When Petition of Attachment Has NOT Been Granted***

In rare situations, when a vulnerable 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 petition 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 vulnerable adult.



If an employee or officer of the department shall by direct observation of a vulnerable adult not in the immediate care, custody, or control of another have reasonable cause to believe that such vulnerable 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 vulnerable 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 petition 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 APS worker. When it is necessary for the APS 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 a petition of attachment following an emergency removal. The individual who initiated the removal may apply to the circuit court for the petition of attachment.*

### **Time Frames**

If a petition of attachment is granted by the court and the vulnerable 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 judicial day following the granting of the petition of attachment. The following outcomes are available to the court regarding disposition of the matter:

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

### **Appointment of Guardian Ad Litem**

Whenever a petition of attachment has been granted and, as a result, a vulnerable 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 sState, an interested party, or an individual selected or employed by an interested party.

### **Service of Process**

When a petition 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 petition of attachment and notice of the hearing, scheduled for the purpose of determining whether or not the vulnerable adult is to continue receiving treatment, are to be served on any person in whose actual care, custody, and control the vulnerable adult is found. The service of the process is to be arranged by the circuit clerk. The APS

worker may verbally advise the client and the caregiver of the hearing date and time if they are aware of this information, but APS staff is not to arrange or serve a formal service of process.

### ***Payment for Care under Petition of Attachment***

[W. Va. Code §9-6-6](#) states that if any vulnerable adult requires and is granted petition of attachment for an emergency, or the department determines that a vulnerable adult is abused, neglected, or financially exploited, the department may pay any assistance granted for the use and benefit of such vulnerable adult to the person actually providing care for such adult, and terminate payments to any person alleged or shown to have abused, neglected, or financially exploited such vulnerable adult, or to whom such payments were made prior to such remedial treatment, for so long as such remedial treatment continues, or until such abuse, neglect, or financial exploitation is abated, and such vulnerable adult continues to be in the immediate care, custody, and control of such person. During the hearing, the APS 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.

### ***Sample Petition of Attachment Forms***

In situations where the department is requesting that the court issue a petition of attachment, it may be necessary for the APS 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 a petition of attachment is to be done in accordance with the local protocol established between the department and the court. A sample of the petition can be viewed in [Appendix B](#).

## **2.6 Guardianship**

### ***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 completed 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.

### ***Statutory Basis***

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

### ***Advantages***

Appointment of a guardian is a mechanism for ensuring 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 [W. Va. Code §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.

### ***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.

### ***Full Guardianship***

A guardian appointed by the court who has full responsibilities of the personal affairs of a protected person. Refer to the *Substitute Decision-Maker Policy* for additional details.

### ***Limited Guardianship***

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. Refer to the *Substitute Decision-Maker Policy* for additional details.

### ***Temporary Guardianship***

A guardian 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 [W. Va. Code §44A-2-14](#) for the appointment of a guardian may result in significant harm to a person or the estate, and that no other individual or entity appears to have authority to act on behalf of the person, or that the individual or entity with authority to act is unwilling, or has ineffectively or improperly exercised the authority. A temporary guardian is time limited to six months unless terminated or extended by the circuit court upon good cause following a hearing. Refer to the *Substitute Decision-Maker Policy* for additional details.

### ***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 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 Conservator/Guardian.*
- *Evaluation Report of a Licensed Physician/Psychologist*, if this is available at the time of filing.
- If the *Evaluation Report* is not available at filing, submit a *Motion For Leave to File Petition Without Evaluation Report* when the petition is filed. If this option is used, the *Evaluation Report*

must be completed and filed with the Circuit Clerk and a copy provided to the attorney for the alleged protected person prior to the hearing date.

- *Affidavit of Physician* if the alleged protected person is unable to attend due to medical reasons.
- *Statement of Financial Resources* if a conservator is to be appointed.
- *Affidavit Certifying Completion of Mandated Education*.

### **Court Fees**

When the department is the petitioner, the department is responsible for paying the required filing fees. The APS 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 *Substitute Decision-Maker Policy* for additional details.

### **Who May File**

For a guardianship case, any interested person may file a petition to request the appointment of a guardian or conservator. The following individuals are specifically identified in [W. Va. Code §44A-2-2](#) as persons who may file:

- 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.

### **Contents of the Petition**

When a petition for the appointment of a guardian or conservator is filed it must contain certain information about the individuals who are involved, including the alleged protected person, the petitioner, and other potential candidates for guardian or conservator. Information about individuals that must be provided includes the following:

Information about the petitioner:

- Name.
- Place of residence.
- Post office mailing address.
- Relationship to the alleged protected person; and,
- Attorney representing the petitioner during the appointment proceedings, if applicable.

Information about the alleged protected person:

- Name.
- Date of birth.
- Place of residence or location; and,
- Post office address.

Information about the alleged protected person's relatives:

- Name(s).
- Post office addresses of the alleged protected person's nearest relatives.
- The spouse and children (age seven and above), if any; or if none.
- The parents and brothers and sisters, if any; or if none;
- The nearest known relatives who would be entitled to succeed to the person's estate by intestate succession [W. Va. Code §42-1-3a](#).

*Note: Once a relative or several relatives have been identified in one of the categories identified, relatives in a lower category do not have to be listed in the petition.*

Information about persons acting in a decision-making capacity to the alleged protected person.

If there are no known relatives but there are other individuals that serve in some decision-making capacity, the following information must be included for each of these individuals:

- Name.
- Place of residence or location.
- Post office address.
- Capacity in which they serve and, a detailed list of the acts performed by this person on behalf of the alleged protected person.

Information for all individuals who serve in any of the following roles:

- Person or facility that is responsible for the alleged protected person's care or custody.
- Person(s) acting as De facto guardian or de facto conservator.
- Appointed health care surrogate.
- Representative acting under a durable power of attorney.
- Representative acting under a medical power of attorney; and,
- Person nominated by the alleged protected person to serve as guardian and/or conservator.

Other Required Information:

- Statement regarding the type of guardianship/conservator being requested (limited, temporary, full).
- The reason(s) for the request.
- Existing advanced directives and the degree to which these tools address the needs of the alleged protected person.
- Whether or not the alleged protected person will be able to attend the hearing and if not, why.
- The individual(s) nominated to serve as guardian or conservator by the alleged protected person.
- The individual(s) proposed to serve as guardian or conservator by the petitioner

### ***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.

### ***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.

### ***Statement of Financial Resources***

If the petition requests the appointment of a conservator, a Statement of Financial Resources will be completed for the alleged protected person. To the extent known, the worker will complete this form which includes social security number, value of real and personal property, and annual gross income.

### ***Notice of Hearing***

A Notice of Hearing fixing the date, hour, and location for a hearing to take place within sixty days must accompany the Guardian/Conservator petition.

### ***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 no later than 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 days prior to the scheduled hearing to all individuals seven years of age or older and to all individuals and entities whose names and addresses appear in the petition. Refer to *Substitute Decision-Maker Policy* for further information.

*Note: When determining the date to mail notifications to other parties, the date of the hearing is not to be counted as one of the 14 days. The protected person must be served by Personal Service of Process not later than 14 days prior to the date of the hearing. The court clerk can arrange to have this accomplished by the county sheriff. As an alternative, it may be necessary to employ a private process server. Because of potential conflicts of interest, The department must not serve the Personal Service of Process.*

### ***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 their choice.

### ***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 60 days following the filing. For guardianship hearings involving youth turning 18, the hearing may not be held more than 7 days prior to the youth turning 18, if the hearing is held before a circuit judge, and not more than 14 days prior to the youth turning 18, if the hearing is held before the mental hygiene commissioner.

### ***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.

### ***Individuals and Organizations 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 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:
  - Where payment for services provided under the contract or agreement is pursuant to a waiver program.
  - Where the person is related to the protected person by blood, marriage, or adoption.
  - Where the contract or agreement is disclosed in writing to the court; and,
  - 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 in accordance with Senate Bill 100, enacted April 11, 1997, the department may not refuse to accept the guardianship appointment.*

### ***Individuals and Organizations Who May NOT Be Appointed Guardian***

The following individuals or organization 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. Adult family care providers cannot become guardians 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, they may petition the circuit court to be released as guardian.*

### **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.

### **Full Guardian or Limited Guardian**

Within 14 days following the entry of an order of appointment the 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.

### **Temporary Guardian**

Within five days following the entry of an Order of Appointment the 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 department as guardian, not an individual social worker. If a social worker is named, the court must be petitioned to modify the order.*

### **Appealing an Appointment**

An appointment of the department as guardian or conservator may be appealed in certain circumstances. Examples of situations when the department filing an appeal may be appropriate include:

- The department is appointed guardian without being a party to the action (did not receive notification prior to the hearing and was not present at the hearing).
- When the department has proposed a potential individual to serve as guardian, but the department is appointed instead.
- When the department is appointed to serve as conservator; and,



- When the department is appointed as a co-guardian or committee, and others.

If the department is contesting an appointment as a guardian, the worker must file an appeal immediately upon receipt of notification of the appointment. This is accomplished by filing a Petition for Termination, Revocation or Modification requesting the necessary change in the appointment. If the department is contesting appointment the legal counsel for Adult Services must be notified immediately. The legal counsel for APS must file an appeal with the circuit court stating the basis for the appeal and requesting appropriate action.

### ***Responsibility of the Court***

#### ***During the Hearing***

- Determine if a guardian or conservator should be appointed.
- Determine the type of guardian or conservator and the specific areas of protection, management and assistance to be granted.
- Determine if the individual meets the definition as a protected person.
- Consider the suitability of the proposed guardian or conservator, the limitations of the alleged protected person, the development of the person's maximum self-reliance and independence, the availability of less restrictive alternatives including advance directives and the extent to which it is necessary to protect the person from neglect, exploitation, or abuse; and,
- Select the individual or entity best qualified to act in the best interest of the protected person, after consideration of the proposed guardian or conservator's geographic location, familial or other relationship with such person, ability to carry out the powers and duties of the office, commitment to promoting such person's welfare, any potential conflicts of interest, the criminal history of the proposed guardian or conservator and the recommendations of the spouse, the parents, children or other interested relatives, whether made by will or otherwise. The court may order a background check to be conducted by the state police or county sheriff on any person being considered by the court for appointment as a guardian or conservator, [W. Va. Code §44A-1-8.](#)

### ***Confidentiality***

All information contained within the court file is confidential. The protected person, and their attorney may inspect or copy the file. Another party may request to inspect or copy the file through petitioning the court, [W. Va. Code §44A-2-5.](#)

### ***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 [W. Va. Code §44C-3-1.](#)

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.

### **Reports to the Court**

The guardian is to file an initial report with the court within six months following the date of entry of the order of appointment. This semi-annual report is only required during the first year of appointment, unless ordered otherwise by the court. Reporting thereafter is required on an annual basis. The completed report is to be submitted to the Circuit Clerk in the county of venue. In most instances this will be the county where the original appointment was done. If the court of appointment grants a change of venue, the report would be submitted thereafter to the new county of venue. The law provides for two options related to the time frame to be used for submission of this annual report to the court. These are:

- On a calendar year basis (if this option is used the report may not cover a period of more than 12 months and must be filed with the circuit clerk no later than December 31st); or,
- Other time frames as ordered by the court.

A final report is also due upon termination of the guardianship or death of the client. A copy of the death certificate will need to be submitted with the final report. Each report must include all of the following:

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

This report must be prepared by the worker and approved by the supervisor prior to submission to the court. This report also requires notarization.

*Note: The Periodic Report to the Court may be accessed through the [West Virginia Supreme Court webpage](#). The same form is to be used for both the initial and annual reports. The Periodic Report can either be hand delivered or mailed to the appropriate circuit clerk's office (venue may differ).*

### **Other Reports to the Court**

In addition to the initial (semi-annual) and annual reports to the court, there are points in time when the court may require additional reports. These include:

- Additional reports or accountings prescribed by the court.
- When the guardian or conservator resigns or is removed; and,
- When the appointment of guardian or conservator is terminated (this report may be waived by the court for a guardian).

*Note: These reports must be prepared by the worker and approved by the supervisor prior to submission to the court. Upon completion of the report, it is to be filed with the circuit clerk.*

### **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, including being required to pay restitution for any embezzled or concealed funds.

The guardian is not liable for the acts of the protected person, unless the guardian has been personally negligent. The guardian is not required to expend their personal funds on behalf of the protected person.

### **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 when appointed to serve as guardian.

### **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 [W. Va. Code §44A-1-10](#), the proposed guardian must complete the required educational training within 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.

Every three years, staff must complete the mandatory education training due to term limits. Staff are directed to file the *Affidavit Certifying Completion of Mandated Education* along with new guardianship

petitions and related documents. To access the West Virginia Guardian/Conservator Online Training Tutorial, follow the steps listed below:

1. Go to the [West Virginia Judiciary Guardian / Conservator Online Training Tutorial](#)
2. Above the page title Guardian / Conservator Online Training Tutorial, click on *Table of Contents*.
3. To start the online training, click the Chapter 1 link. Complete Chapters 1 through 6 and related tests.
4. The form Affidavit Certifying Completion of Mandated Education is accessible via link on the training page and [Mental Hygiene Adult Guardianship/Conservators Forms page](#).

## ***Termination, Revocation, and Modification of Appointments***

### ***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 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.

### ***Resignation of Guardian***

If a guardian wishes to resign this office, they must petition the court for permission to do so, at least 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.

### ***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 averse 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.

### ***Termination, Revocation and Modification of Guardian***

The court may, under certain circumstances, 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.

The guardianship of a protected person shall terminate when one of the following circumstances occur:

- 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.

Note: *When signing documents as a guardian, the APS worker should sign in the following manner: "West Virginia Department of Human Services by (worker's name and title) does not accept financial responsibility".*

## **2.7 Conservatorship**

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. Workers will frequently need to collaborate with conservators, particularly if the department has been appointed as guardian.

### ***Statutory Basis***

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

### **Advantages**

Appointment of a conservator is a mechanism for ensuring the protection of incapacitated adults. State statute 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 [W. Va. Code §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.

### **Disadvantages**

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

*Note: When the department 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 has been appointed as conservator, the department will petition the circuit court to be released as conservator.

### **Filing a Petition**

When the department is filing for guardianship, it may also be necessary 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. Refer to *Substitute Decision-Maker Policy, Adult Protective Services Policy* and [W. Va. Code §44A](#) 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.*

## **2.8 Veterans Guardianship**

On a limited basis it may be necessary to appoint a veteran's guardian in order for mentally incompetent veterans or orphans to receive benefits from the United States government or any bureau or agency of the US government. A veteran's guardian is designated to protect the veteran's 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.

### **Statutory Basis**

The requirements related to the appointment of a Veteran's Guardian, are contained in [W. Va. Code §44-15-1 et seq.](#)

### **Advantages**

Proceedings in [W. Va. Code §44-15-1 et seq.](#) 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.

### **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 veterans. This is a legal device that will only apply to an extremely limited number of cases.

### **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 they are 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. The department 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.

## **2.9 Involuntary Commitment**

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. The department cannot commit someone to a mental health facility. Commitment must be through the mental hygiene process.

### **Statutory Basis**

The requirements and specific procedures that apply related to involuntary commitment are contained in [W. Va. Code §27-5-3](#). 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.

### **Requirements**

Two conditions must be met in order for an individual to be involuntarily committed. These are:

- The individual is mentally ill or addicted to drugs or alcohol, and
- 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. A diagnosis of dementia, epilepsy, or intellectual or developmental disability alone may not be a basis for involuntary commitment to a state hospital.

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, or local community mental health center and emergency medical services. If an alternative transportation program has been arranged with the local sheriff and local county commission, the agreement shall clearly define the responsibilities of each of the parties, the requirements for program participation, and the persons bearing ultimate responsibility for the individual's safety and well-being. See, [W. Va. Code §27-5-10](#).

### **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, mental hygiene commissioner, or magistrate 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 video conference, a physician, psychologist, a licensed professional counselor, a licensed independent clinical social worker, an advanced nurse practitioner with psychiatric certification,, or a physician assistant.
- A probable cause hearing shall be held promptly (the hearing may be postponed only upon request by the individual or their counsel and postponement, if granted, may not exceed 48 hours).
- If the individual has not obtained legal counsel, counsel will be appointed for the individual.



- The individual must be present or attend by video conference 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 themselves or to others.
- Upon filing of an order finding probable cause and upon certification by a physician, psychologist, licensed professional counselor, licensed independent social worker, advanced nurse practitioner, or physician's assistant, the individual may be admitted to a mental health facility for examination.
- Examination must be completed within three 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 does not have a substance use disorder, 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 three days excluding Sundays and holidays, unless the individual is examined by a physician and they certifies that the individual is mentally ill or has a substance use disorder and is likely cause serious harm to him/herself or others.
- If the physician certifies that the individual is mentally ill or has a substance use disorder and is likely to cause serious harm to themselves or others, the chief medical officer must institute final commitment proceedings within 20 calendar days from the date of admission. If these proceedings are not initiated within the 20-day period absent of good cause, the individual must be released. If all proceedings outlined in this section are not completed within 35 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 as to:
  - Whether the individual is mentally ill or has a substance use disorder.
  - As a result of mental illness or substance use disorder the individual is likely to cause serious harm to self or others if allowed to remain at liberty and requires continued commitment and treatment.
  - Whether the individual is a resident of the county in which the hearing is held or currently a patient at a mental health facility in the county; and
  - Whether there is a less restrictive alternative to commitment for the individual that is appropriate and available. The burden of proof of the lack of the least restrictive alternative than commitment is on the person or persons seeking the commitment of the individual; provided that for any commitment to a state hospital as defined by [W. Va. Code §27-1-6](#) a specific finding shall be made that commitment of, or treatment for, the individual requires inpatient hospital placement and that no suitable outpatient community based treatment program exists that is appropriate and available in the individual area.

### ***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 a period not to exceed 90 days, unless the chief medical officer determines the need for further commitment and treatment.

### ***Advantages***

Involuntary commitment provides a means of removing an individual who is likely to cause serious harm to themselves 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 or more occasions within a twenty-four 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 has 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.

### ***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 themselves or others. The individual may demonstrate, either actively or passively, that they are 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.

## **2.10 Injunctive Relief**

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.

### ***Statutory Basis***

[W. Va. 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 maltreatment of a vulnerable adult 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 [W. Va. Code §9-6-4](#) which authorizes the use of a petition of attachment to remove a vulnerable adult from the home in order to assure their safety, rather than granting injunctive relief.

### ***Resting 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 APS investigation by not allowing access or adequate access to the alleged client to cease their interference.

### ***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 [W. Va. Code §9-6-4](#), which authorizes the use of a Petition of Attachment to remove an incapacitated adult from the home in order to assure their safety, rather than granting injunctive relief.

### ***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.

### ***Court Dispositions***

- Grant injunctive relief requested.
- Deny injunctive relief requested.
- Continue the hearing until additional information is available, and a final decision can be made.
- Dismiss the petition; or,
- If injunctive relief is requested but the court grants a petition 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).

### ***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 by consulting with your supervisor, adult service program manager, regional attorney, etc.).

## **2.11 Writ of Prohibition and Writ of Mandamus**

Writs of prohibition and mandamus are extraordinary remedies that the department 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 may be 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 non discretionary 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 may be sought by a party in circuit court to enforce a county board of education to provide a free and appropriate education to their child.

### **Statutory Basis**

The statutory basis and requirement for a writ of prohibition and mandamus are contained in [W. Va. Code §53-1-1](#).

### **Advantages**

Filing a petition for a writ of prohibition or mandamus may be 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.

### **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. All other options must be considered or explored before considering a writ of prohibition or mandamus.

## **SECTION 3 - ADVANCED DIRECTIVES AND ADMINISTRATIVE PROCEDURES**

### **3.1 Advanced Directives and Administrative Procedures Definitions**

The definitions used below are specific to this section and are a supplement to the general definition section. The definitions used below are specific to this section and are a supplement to the general definition section.

<b>Term</b>	<b>Definition</b>
<b>Close friend</b>	Any adult who has exhibited significant care and concern for an incapacitated person who is willing and able to become involved in the incapacitated person's health care and who has maintained regular contact with the incapacitated person so as to be familiar with his or her activities, health and religious and moral beliefs. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Do Not Resuscitate Order (DNR)</b>	An order issued by a licensed physician that cardiopulmonary resuscitation should not be administered to a particular person. See, <a href="#">W. Va. Code §16-30C-3</a>

<b>Health care decision</b>	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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Health care facility</b>	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. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Health care provider</b>	Any licensed physician, dentist, nurse, physician assistant, paramedic, psychologist, or other person providing medical, dental, nursing, psychological, or other health care services of any kind. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Life-prolonging intervention</b>	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, but not limited to, among others nutrition and hydration administered intravenously or through a feeding tube. Does not include administration of medication or performance of other medical procedures deemed necessary to provide comfort or alleviate pain. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Principal</b>	A person who has executed a living will, medical power of attorney, or combined medical power of attorney and living will. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Qualified physician</b>	A physician licensed to practice medicine who has personally examined the person. See, <a href="#">W. Va. Code §16-30-3</a>
<b>Qualified psychologist</b>	A psychologist licensed to practice psychology who has personally examined the person. See, <a href="#">W. Va. Code §16-30-3</a>

The following advanced directives/administrative procedures are actions that may be appropriate in some APS cases. Each, in varying degrees, limits 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 APS cases are listed below. Each is described in detail in the sections that follow:

- Do Not Resuscitate (DNR) Order.
- Portable 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**

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

#### ***Statutory Basis***

The requirements related to issuing a Do Not Resuscitate (DNR) Order are contained in [W. Va. Code §16-30C-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 HCS, 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 substitute decision maker'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 APS worker must consult with their supervisor. Approval must be granted by the supervisor prior to a DNR being signed by the APS and documented in the client's case record in CCWIS. Whenever the decision of whether or not to sign a DNR is in question, the APS worker is strongly encouraged to consult with the hospital ethics committee and/or ethics committee of the BSS.

#### ***Requirements & Procedures***

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

- A DNR order may be written by the attending physician for a person who is present in or residing at home or in a healthcare facility, provided the individual, their representative or their HCS has consented to the order.
- Individuals may request that their physician issue a DNR order for them.

- The representative or surrogate decision-maker may consent to a DNR for an incapacitated person.
- If a surrogate decision-maker is not reasonably available or capable of making a decision regarding a DNR order, an attending physician, physician's assistant, or advanced practice registered nurse may issue a DNR order to an incapacitated person in a healthcare facility, provided, a second physician who has examined the person concurs with the opinion of the attending physician, physician's assistant, or advanced practice registered nurse 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 healthcare 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.

### ***Limitations & Prohibitions***

Issuing a 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.

### ***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 healthcare facility may at any time revoke their 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 their previous request for or consent to a DNR order. Revocation may be done by destroying all copies of the DNR order and removing any DNR identification from their person. The person is responsible for notifying their physician of the revocation, along with the e-registry.
- A representative or surrogate decision-maker may revoke their 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 18 years of age or older.
- A representative or surrogate decision-maker may revoke their 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 healthcare 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 [WV Center for End-of-Life Care](#) for a sample DNR order.*

### **3.3 Portable Order Scope of Treatment Form**

The Portable Order Scope of Treatment (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).
- Use or withholding of antibiotics and feeding tubes.

#### ***Statutory Basis***

The requirements for a POST form are contained under the West Virginia Health Care Decisions Act in [W. Va. Code §16-30-1 et seq.](#)

#### ***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 capacitated patients or their legal representatives. 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: The Substitute Decision Maker Policy states the department 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. The [WV Center for End-of-Life Care](#) website identifies how to file a POST form for the e-Directive Registry.

#### ***Limitations and Prohibitions***

The POST form is voluntary and cannot be a requirement for admission to a healthcare 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 legal representative. 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. For information on an ethics consult, see *Substitute Decision-Maker policy*. If the attending physician cannot resolve the conflict with the medical power of attorney representative, the attending physician may transfer the care of the person pursuant to §16-30-12(b) of this code.

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

### **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 [WV Center for End-of-Life Care](#) for a sample POST form.*

## **3.4 Power of Attorney**

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.

### **Statutory Basis**

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

### **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.

### **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 [W. Va. Code §39B-1-114](#).*

### ***Duties and Responsibilities of an Agent Appointed as Power of Attorney with Respect to the Department***

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 the department 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: The department 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 [W. Va. Code §39B-1-116](#).*

### ***Limitations***

This act applies to all powers of attorney except:

- 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.
- A power to make healthcare decisions.
- A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and,
- A power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for governmental purpose.

### ***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 [WV Center for End-of-Life Care](#) or a sample Power of Attorney form.*

### **3.5 Health Care Surrogate**

For detailed information concerning the department as Health Care Surrogate (HCS), refer to *Substitute Decision-Maker policy*. A surrogate decision-maker is a person selected by an incapacitated person's attending physician or advanced nurse practitioner to make healthcare decisions only, about and on behalf of that incapacitated person. A HCS can be appointed without review by the court and can usurp a client's right to make healthcare decisions about themselves. The HCS 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 HCS, 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.

#### ***Statutory Basis***

[W. Va. Code §16-30-8](#) sets forth the provisions regarding the appointment of a HCS, 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.

#### ***Advantages***

Health Care Surrogate is the least restrictive option for the department to serve as substitute decision-maker. Required medical care and services for an APS client can be obtained more quickly through the appointment of a HCS than would be possible through:

- Obtaining a petition of attachment.

- Appointment of a guardian
- If there is no other entity or interested person to complete the Medicaid or Medicare application, the APS worker as HCS may complete the application upon the approval of their supervisor or by following their regional protocol.

### ***Disadvantages***

A determination that a person is incapacitated, and a HCS is needed can be determined without review by a court or other body. If the department is appointed as HCS, the APS worker can only consent to medical treatment and decisions related to admission to a medical facility. The APSworker may not apply for Social Security benefits, private medical insurance, etc.

### ***Determination of Incapacity***

A determination that a person is incapacitated shall be made by a qualified physician, a qualified psychologist or an advanced nurse practitioner who has personally examined the client. This determination, once made, must be entered in the adult's medical record. Additionally, if a second 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. See, [W. Va. Code §16-30-7](#).

For persons with psychiatric mental illness, intellectual disability, 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. The general rule of determining capacity could therefore be stated that it takes only one medical professional to make a determination of capacity, and it takes only one medical professional to make a determination that an individual has regained capacity.

*Note: While determination of incapacity may be done by one or more of the following, a qualified physician, a qualified psychologist, or an advanced nurse practitioner, actual appointment of a HCS may only be done by a qualified physician or advanced nurse practitioner.*

### ***Selection of a Health Care Surrogate***

State statute permits the individual's attending physician or advanced nurse practitioner to appoint a HCS for an incapacitated adult when there is no medical power of attorney representative or court appointed guardian. As a last resort, the department may be appointed in this capacity. There are seven categories of individuals identified in state statutes as potential HCS. 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 the department may from time to time designate in rules and regulations promulgated pursuant to [W. Va. Code §29A-3](#) *et seq.*

In the event there are multiple potential HCS at the same priority level such as multiple adult children or siblings, the attending physician or advanced nurse practitioner 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 HCS, the APS worker must require documentation from the health care provider of efforts to locate a suitable HCS along with the [State of West Virginia Checklist for Surrogate Selection Form](#). This documentation must identify any potential surrogate(s) from categories 1 – 7 that were deemed unavailable and/or unsuitable to serve as HCS 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.

If an individual disagrees with the appointment of a HCS 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 [W. Va Code §16-30-8 \(e\)](#).

### ***Appointment of a Health Care Surrogate***

Appointment of a HCS must be made by a qualified physician or advanced nurse practitioner who has personally examined the adult and determined that they lack the capacity to make healthcare decisions on their own behalf. West Virginia state code identifies the individuals who may be considered to be appointed in priority order. The department may be appointed only if there is no one else who is able, willing, and appropriate to serve as HCS.

For persons who are in need of treatment for mental illness or addiction, as opposed to treatment of physical needs, who have been determined by their attending physician or a qualified physician to be incapacitated, a second opinion by a qualified physician or psychologist that the person is incapacitated is required before the attending physician is authorized to select a surrogate.

If the adult has one or more advance directive in effect that adequately addresses their decision-making needs, it is NOT appropriate for the department to be appointed. If it is believed that the designated

decision-maker is not adequately addressing the adult's decision-making needs, it may be appropriate to explore appointment of an alternate decision-maker. If so, the reason(s) for seeking a change in decision-maker must be clearly documented. It may be appropriate for the appointing medical professional to seek appointment of another decision-maker if:

- The current decision-maker is no longer physically/mentally able to carry out their responsibilities.
- The current decision-maker is not acting in the best interest of the adult; or,
- The adult's decision-making needs cannot be met by appointment of only a surrogate decision maker.

It is NOT appropriate to seek an alternate decision-maker solely because the physician or other family members are not in agreement with decisions made by the authorized decision-maker. Whenever there are disagreements among family members, decision-makers, or others, the physician is to arbitrate to reach a solution.

West Virginia statute allows for someone to challenge the appointment of a HCS if they feel that the appointment is not appropriate. [W. Va. Code §16-30-8 \(e\)](#) states: If a person who is ranked as a possible surrogate wishes to challenge the selection of a surrogate or the health care decision of the selected surrogate, he or she may seek injunctive relief or may file a petition for review of the selection of, or decision of, the selected surrogate with the circuit court of the county in which the incapacitated person resides or the supreme court of appeals. There shall be a rebuttable presumption that the selection of the surrogate was valid and the person who is challenging the selection shall have the burden of proving the invalidity of that selection. The challenging party shall be responsible for all court costs and other costs related to the proceeding, except attorneys' fees, unless the court finds that the attending physician or advanced nurse practitioner acted in bad faith, in which case the person so acting shall be responsible for all costs. Each party shall be responsible for his or her own attorneys' fees.

Advance directives, such as medical power of attorney, durable power of attorney with health care decisions, and/or living wills, take precedence over the HCS appointment. If, in the opinion of the medical professional, decisions are not being made in the best interest of the client, the medical professional should first attempt to arbitrate to resolve the issues. If this cannot be accomplished, these instruments require court action to terminate before a HCS may be appointed. It is the medical professionals and/or the client's family responsibility to seek legal intervention.

The department can serve as an appointed HCS if an individual has already been convicted and/or before the individual was convicted. The department should only serve as HCS as a last resort.

### ***Process for Appointment***

When the department is requested to accept appointment as HCS, the State of West Virginia Checklist for Surrogate Selection Form Appointment of Health Care Surrogate form must be completed by a qualified physician or advanced nurse practitioner who has personally examined the adult. This form must be completed and received prior to the department accepting appointment as HCS. The department will not accept a verbal appointment as HCS. Health Care Surrogate.

*Note: (The State of West Virginia Checklist for Surrogate Selection Form Appointment of Health Care Surrogate form is available as a DDE in CCWIS). There may be rare situations and cases where the department may go ahead and accept HCS appointments before the department has completed their full assessment.*

### ***Rights and Responsibilities***

A HCS 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 HCS begins upon the acceptance of the appointment.

The decisions made by the HCS 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 HCS 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. See [W. Va. Code §16-30-8 \(e\)](#).

### ***Limitations***

There are certain limitations that apply to the appointment of a HCS 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 HCS 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 HCS 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.

### ***Revocation***

In order to change the HCS from one person to another, a new HCS will need to be appointed and a new form completed and signed. Determinations of capacity, including determinations that a person has regained capacity, are governed by [W. Va. Code §16-30-7](#), which requires only one medical professional (attending physician, qualified physician, qualified psychologist, or an advanced nurse practitioner who has personally examined the person) to make such determination. The general rule of determining capacity could therefore be stated that it takes only one medical professional to make a determination of capacity, and it takes only one medical professional to make a determination that an individual has



regained capacity. Refer to *Substitute Decision-Maker Policy* for additional details. When an individual regains capacity, the HCS shall cease.

### **3.6 Living Will**

Any mentally competent person who is 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 the client. Creation of a living will is an administrative procedure. Though an attorney may assist in preparing this document, this is not required.

#### ***Statutory Basis***

The requirements related to the creation of a living will are contained in [W. Va. Code §16-30-4](#).

#### ***Requirements and Procedures***

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

- Must be 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 or more witnesses who are at least 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, such as 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 Center for End of Life Care e-Directive 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.*

#### ***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.

### **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.

### **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 their 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 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 [WV Center for End-of-Life Care](#) for a sample Living Will form.*

## **3.7 Medical Power of Attorney**

A medical power of attorney is a springing power of attorney by which a person (the principal) designates another person (the representative), in writing, to make healthcare 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.

### **Statutory Basis**

Requirements related to the creation of a medical power of attorney are contained in [W. Va. Code §16-30-4](#).

### **Requirements & Procedures**

Any competent adult 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 or more witnesses at least 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 [WV Center for End of Life Care e-Directive Registry](#).*

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 effective, 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.

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.

### ***Successor Medical Power of Attorney***

The principal may appoint one or more successor representatives as 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.

### ***Who May Not Serve as Representative***

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

- Treating healthcare 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 healthcare facility serving the principal and who is not related to the principal.

### ***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 the 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 [W. Va. Code §16-30-6\(f\)](#); and,
- The representative has authority to enforce a declaration made in accordance with the West Virginia Health Care Decisions Act.

### ***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) are 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.

### ***Prohibitions***

W. Va. 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. See [W. Va. Code §16-30-15](#); and,
- Under no circumstances may the presence or absence of a medical power of attorney be used to deny a patient admission to a healthcare facility. See [W. Va. Code §16-30-23](#).

### **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, 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 witnesses 18 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 [WV Center for End of Life Care 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 [WV Center for End-of-Life Care](#) for a sample Medical Power of Attorney form.*

### **3.8 Representative Payee**

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, see [Social Security Act §1631 et seq.](#) for an individual who

has been determined to have a drug or alcohol addiction. While the appointment of a representative payee does not require court action, it does restrict the individual's rights.

### ***Advantages***

The representative payee that is appointed has control over the Social Security 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.*

### ***Disadvantages***

The Social Security Administration (SSA) 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 SSA 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 SSA 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.

### ***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. The department may not accept appointments as a representative payee for a client.

Evidence of an adult's inability to manage their benefits must be submitted to the SSA 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.

### ***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 maintains 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.

### ***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 Centralized Intake 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 - CONFIDENTIALITY**

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). Requirements related to confidentiality specifically related to APS cases are contained in [W. Va. Code §9-6-8](#) and can also be found in *Personnel Common Chapters Policy*. Confidentiality is also contained in [W. Va. Code §44A-2-5](#) relating to guardianship cases.

## 4.1 Confidentiality Definitions

The definitions used below are specific to this section and are a supplement to the general definition section.

<b>Terms</b>	<b>Definition</b>
<b>Subpoena</b>	An order that is issued to require the attendance of a witness to testify at a particular time and place.
<b>Subpoena Duces Tecum</b>	An order that requires a witness to bring documents, books, or other items under his, her or their control, that he or she is bound by law to produce into evidence.

## 4.2 When Information is Released to the Courts

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 their 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 or subpoena duces tecum. Immediately upon receipt of a subpoena or subpoena duces tecum the social worker must consult with the supervisor. The supervisor will contact Adult Services legal counsel to determine the appropriate action.

If there is insufficient time to consult with the adult services legal counsel, seek the advice of the local prosecuting attorney. If there is insufficient time to obtain legal advice from either counsel 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 overturned 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 adult services legal counsel must not be documented in the CCWIS case record/hard copy client file. Additionally, if the adult services legal counsel represented APS in court proceedings, only their attendance can be entered in the CCWIS case record/hard copy client file.*

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 consult with the Adult Services legal counsel.



### **4.3 When Confidential Information May be Released on Adult Protective Service Records**

All records of BSS concerning an APS client shall be kept confidential and may not be released except as follows:

- A copy of any substantiated report of abuse, neglect, financial exploitation, 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 neglect do not need to be reported to the prosecutor unless court action becomes necessary.
- All other reports of abuse, neglect, or financial exploitation 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.
- Specific information may be shared with other offices within the department who are also mandated to maintain client confidentiality (i.e., Medicaid Fraud, Office of Behavioral Health Services (OBHS), and Office of Health Facility Licensure and Certification (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 program manager and/or regional attorney per regional protocol.
- According to state statute the long-term care Ombudsman is to receive a carbon copy of all APS 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 APS, 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:
  - The name of the facility where the abuse/neglect/financial exploitation occurred.
  - General information about the nature of the allegations, and
  - If the allegations of abuse, neglect, or financial exploitation of an adult were substantiated. Specific information regarding the APS case is confidential and shall not be released, including but not limited to the name of the reporter.
- Information about developmentally disabled adults who are the subject of maltreatment may be shared with Disability Rights of West Virginia, the recognized protection and advocacy agency for West Virginia under federal law, §42 USCA 15043 under certain circumstances. They must agree to keep all information shared confidential.
- 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 relevance 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.

- A grand jury, by subpoena, upon its determination that access to the records is necessary in the conduct of its official business.
- The victim; and,
- The victim's legal representative, unless they are the subject of an investigation.

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

- Employees or agents of an agency of another state that has jurisdiction to investigate known or suspected abuse, neglect or exploitation of vulnerable adults.
- A professional person when the information is necessary for the diagnosis and treatment of, and service delivery to, a vulnerable adult; and
- 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 financial 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.

#### **4.4 When Confidential Information May be Released for Guardianship Service Records**

All records of the BSS concerning an adult guardianship services client shall be kept confidential and may not be released except as follows:

- 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 is information and documents provided by another entity such as medical reports, psychological reports, information from SSA, 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, the supervisor/worker is to contact the legal counsel for adult services prior to release of any information.
- Upon written request, information about adults with intellectual or developmental disabilities may be shared with the federally recognized protection and advocacy entity within West Virginia (Disability Rights of West Virginia). 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).

- DR of WV has authority under federal law to investigate allegations of maltreatment involving individuals with developmental disabilities if the incident is reported to DR of WV or if there is probable cause to believe that the incident occurred.
- DR of WV shall have access to all records within five days for:
  - Any individual with a disability who is a client of DR of WV if they or their legal representative has authorized DR of WV to have access.,
  - Any individual with disability in a situation where the individual.
    1. Is unable to authorize DR of WV to have access; and,
    2. Does not have a legal representative or the department is guardian.
- A complaint has been received by DR of WV or DR of WV has probable cause to believe the individual has been subject to abuse/neglect.
- 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.
- DR of WV shall have immediate access (within 24 hours of request) without consent to the records of the individual who meet the above criteria if DR of WV 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.
- 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 office to cover the time and cost involved in the duplication and mailing of the material.

#### **4.5 When Confidential Information May be Released for Health Care Surrogate Client**

All records of the BSS concerning a health care surrogate client shall be kept confidential and may not be released except as follows:

- Certain information may be released to the 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 SSA, 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 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, the supervisor/worker is to contact the regional attorney prior to release of any information.
- Upon written request, information about adults with disabilities may be shared with the federally recognized protection and advocacy entity within West Virginia (Disability Rights of West Virginia). 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.

- In some instances, the court will seek information for use in their proceedings;
- The Surrogate Selection Checklist 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 code.
- The department, serving as substitute decision-maker, 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).

#### **4.6 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.

#### **4.6 When Confidential Information May be Released for Adult Residential Services**

The provider or client may request to view their 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 APS worker and homefinder must confer with their supervisor and program manager.

#### **4.7 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:

- Subpoena.
- Subpoena duces tecum; and,
- 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 depending on who issues the subpoena.

#### ***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.

### ***Administrative Subpoenas (Not Department Issued)***

These include subpoenas issued by an attorney or administrative law judge (other than a department 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 [W. Va. Code §9-6-8](#). 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 [W. Va. Code §9-6-8](#).

### ***Administrative Subpoenas (Issued by the Department)***

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:

- Contact the program manager to initiate this process and arrange for service delivery by certified mail or service of process or both under the name of the program manager. Personal service should be done by a county sheriff or professional process server and should not be attempted by department staff.
- If the information requested is provided, no further action is needed.
- If the entity/individual fails to respond or refuses to provide the requested information, the program manager is to contact the cabinet secretary for the department to 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.

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

## **SECTION 5 - NONDISCRIMINATION, PROCEDURE & DUE PROCESS STANDARDS, REASONABLE MODIFICATION POLICIES, AND CONFIDENTIALITY**

### **5.1 Nondiscrimination**

As a recipient of Federal financial assistance, the Bureau for Social Services (BSS) does not exclude, deny benefits to, or otherwise discriminate against any person on the ground of race, color, national origin, disability, age, sex, sexual orientation, gender identity, religion or creed in admission to, participation in, or receipt of the services and benefits under any of its programs and activities, whether carried out by BSS directly or through a contractor or any other entity with which BSS arranges to carry out its programs and activities.

This statement is in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (nondiscrimination on the basis of race, color, national origin) (“Title VI”), Section 504 of the Rehabilitation Act of 1973 (nondiscrimination on the basis of disability) (“Section 504”), the Age Discrimination Act of 1975 (nondiscrimination on the basis of age) (“Age Act”), regulations of the U.S. Department of Health and Human Services issued pursuant to these three statutes at Title 45 Code of Federal Regulations Parts 80, 84, and 91.

The Bureau for Social Services shall not retaliate against, intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title VI, Section 504 or the Age Act, or because she or he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.

In addition, BSS will make all reasonable modifications to policies and programs to ensure that people with disabilities have an equal opportunity to enjoy all BSS programs, services, and activities. For example, individuals with service animals are welcomed in the department, BSS, offices even where pets are generally prohibited.

In case of questions, or to request an auxiliary aid or service for effective communication, or a modification of policies or procedures to participate in a BSS program, service, or activity, please contact:

Children and Adult Services  
Section 504/ADA Coordinator  
350 Capitol St. Rm 691

## 5.2 Non-Discriminatory Placement Protocol

The department ensures that all parties involved in adult welfare programs have equal opportunities. All potential placement providers for vulnerable adults, are afforded equal opportunities, free from discrimination and protected under the [Americans with Disabilities Act](#) (ADA). The department will not deny a potential placement provider the benefit of its services, programs, or activities due to a disability. Under the Americans with Disabilities Act it defines a person with a disability as:

“An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.”

The ADA does not specifically name all the impairments that are covered. The ADA does not allow a person to be discriminated against due to a disability in employment, state and local government activities, public transportation accommodations, telecommunication relay services, fair housing, air carrier access, voting accessibility or education. Examples of disabilities include physical disabilities which require auxiliary aids and mental health issues. Those persons with substance use disorders, including opioid use disorder, currently participating in a treatment option such as Medication Assisted Treatment (MAT), are also covered by the ADA. Participation in a MAT program is not considered the illegal use of drugs. Qualifying MAT programs are defined in [W. Va. Code §16-5Y-1](#), et seq. The ADA also addresses the civil rights of institutionalized people and architectural barriers that impact people with disabilities.

When making diligent efforts to locate and secure appropriate placement for vulnerable adults, a worker cannot discriminate against a potential placement based upon a person with a disability according to the Americans with Disabilities Act (ADA) Title II. The department shall determine if the potential placement for the vulnerable adult represents a direct threat to the safety of the adult. Safety threat decisions will be based on assessment of the individual and the needs of the vulnerable adult, as the safety of the adult always remains at the forefront of the determination of the best interest of an adult, when placing a vulnerable adult in anyone's home. This determination cannot be based on generalizations or stereotypes of individuals.

If a provider protected under the ADA is identified as an appropriate and best interest placement for a vulnerable adult they may, at some point, require services specific to their disability in order to preserve the placement. In such situations, consideration for services must be given if it is in the best interest of the adult to preserve the placement. Any specific auxiliary aids or services should be determined by the worker at no cost to the provider and should be considered on a case-by-case basis.

## 5.3 Complaint Procedure and Due Process Standards

### ***Complaints Based on Disability or other Forms of Discrimination***

It is the policy of the West Virginia Department of Human Services not to discriminate on the basis of race, color, national origin, disability, age, sex, sexual orientation, gender identity, religion, or creed. The department has adopted an internal complaint procedure providing for prompt, equitable resolution of

complaints alleging discrimination. Laws and Regulations, 28 C.F.R. Part 35 and 45 C.F.R. Part 84, may be examined by visiting <https://www.ada.gov/reg3a.html>. Additional laws and regulations protecting individuals from discrimination in adult welfare programs and activities may be examined by visiting the U.S Department of Health and Human Services complaint under this procedure. It is against the law for the Bureau for Children and Families, including employees, contracted providers or other BSS representatives, to retaliate in any way against anyone who files a complaint or cooperates in the investigation of a complaint.

### ***Procedure***

Complaints due to alleged discriminatory actions must be submitted to the Department of Human Services, Equal Employment Opportunity (EEO)/Civil Rights Officer within 60 calendar days of the date the person filing the complaint becomes aware of the alleged discriminatory action.

The complainant may make a complaint in person, by telephone, by mail, or by email. To file the complaint by mail or email, a Civil Rights Discrimination Complaint Form, IG-CR-3 (See Appendix A) must be completed and mailed or emailed to the West Virginia Department of Human Services, Office of Human Resources Management, EEO/Civil Rights Officer, One Davis Square, Suite 400, Charleston, WV 25301 or email at [DHHRCivilRights@WV.Gov](mailto:DHHRCivilRights@WV.Gov). If the complainant requires assistance completing the IG-CR-3 form, they may request assistance from the department. The complaint must state the problem or action alleged to be discriminatory and the remedy or relief sought. The complainant may also contact the WV DHHR, EEO/Civil Rights Officer, for more information.

West Virginia Department of Human Services  
Office of Human Resource Management  
EEO/Civil Rights Officer  
(304) 558-3313 (voice)  
(304) 558-6051 (fax)  
[DHHRCivilRights@WV.Gov](mailto:DHHRCivilRights@WV.Gov) (email)

The EEO/Civil Rights Officer shall conduct an investigation of the complaint. This investigation may be informal, but it must be thorough, affording all interested persons an opportunity to submit evidence relevant to the complaint. The EEO/Civil Rights Officer will maintain the files and records of Bureau for Social Services relating to such complaints. To the extent possible, and in accordance with applicable law, the EEO/Civil Rights Officer will take appropriate steps to preserve the confidentiality of files and records relating to complaints and will share them only with those who have a need to know.

The EEO/Civil Rights Officer shall issue a written decision on the complaint, based on the preponderance of the evidence, no later than 30 calendar days after its filing, including a notice to the complainant of his or her right to pursue further administrative or legal remedies. If the EEO/Civil Rights Officer documents exigent circumstances requiring additional time to issue a decision, the EEO/Civil Rights Officer will notify the complainant and advise them of his or her right to pursue further administrative or legal remedies at that time while the decision is pending. The person filing the complaint may appeal the



decision of the EEO/Civil Rights Officer by writing to the Director of Human Resources within 15 calendar days of receiving the EEO/Civil Rights Officer's decision. The Director of Human Resources shall issue a written decision in response to the appeal no later 30 calendar days after its filing.

The person filing the complaint retains the right to file a grievance with the U.S. Department of Health and Human Services, Office for Civil Rights, regardless of the decision made by the West Virginia Department of Human Services.

The availability and use of this procedure does not prevent a person from pursuing other legal or administrative remedies, including filing a complaint of discrimination on the basis of race, color, national origin, disability, age, sex, sexual orientation, gender identity, religion or creed in court or with the US Department of Health and Human Services, Office for Civil Rights. A person can file a complaint of discrimination electronically through the Office for Civil Rights Complaint portal at: <https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf> or by mail or by phone at:

U.S. Department of Health & Human Services  
Office for Civil Rights  
200 Independence Ave., S.W.  
Room 509F HHH Bldg.  
Washington, D.C. 20201  
800-368-1019 (voice) 800-537-7697 (TDD)  
OCRComplaint@hhs.gov

For complaints to the Office for Civil Rights, complaint forms are available at: <https://www.hhs.gov/ocr/complaints/index.html>. Complaints shall be filed within 180 calendar days of the date of the alleged discrimination.

The Bureau for Social Services will make appropriate arrangements to ensure that individuals with disabilities and individuals with Limited English Proficiency are provided auxiliary aids and services or language assistance services, respectively, if needed, to participate in this process. Such arrangements may include, but are not limited to, providing qualified interpreters, providing recorded material for individuals with low vision, or assuring a barrier-free location for the proceedings. The EEO/Civil Rights Officer will be responsible for such arrangements.

### ***Grievances Regarding the Adult Services Worker or Casework Process***

At any time that the Bureau for Social Services is involved with a client, the client, or the counsel for the vulnerable adult has a right to express a concern about the manner in which they are treated, including the services they are or are not permitted to receive.

Whenever a vulnerable adult or counsel for the vulnerable adult has a complaint about Adult Services or expresses dissatisfaction with Adult Services the worker will:

- Explain to the client the reasons for the action taken or the position of the BSS which may have resulted in the dissatisfaction of the client.

- If the situation cannot be resolved, explain to the client his/her right to a meeting with the supervisor.
- Assist in arranging for a meeting with the supervisor.

The supervisor will:

- Review all reports, records and documentation relevant to the situation.
- Determine whether all actions taken were within the boundaries of the law, policies and guidelines for practice.
- Meet with the client.
- If the problem cannot be resolved, provide the client with the form “Client and Provider Hearing Request”, SS-28.
- Assist the client with completing the SS-28, if requested.
- Submit the form immediately to the Chairman, state board of Review, DHHR, Building 6, Capitol Complex, Charleston, WV 25305.

For more information on Grievance Procedures for Social Services please see Common Chapters Manual, Chapter 700, and Subpart B or see W.Va. Code §29A-5-1.

*Note: Some issues such as the decisions of the Circuit Court cannot be addressed through the Grievance Process. Concerns about or dissatisfaction with the decisions of the court including any approved case plan must be addressed through the appropriate legal channels.*

## **5.4 Reasonable Modification Policy**

### ***Purpose***

In accordance with the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (ADA), the Bureau for Social Services shall not discriminate against qualified individuals with disabilities on the basis of disability in its services, programs, or activities. The BSS shall make reasonable modifications in Adult Services program policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless BSS can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

### ***Policy***

The department is prohibited from establishing policies and practices that categorically limit or exclude qualified individuals with disabilities from participating in the BSS Adult Services program.

The Bureau for Social Services will not exclude any individual with a disability from the full and equal enjoyment of its services, programs, or activities, unless the individual poses a direct threat to the health or safety of themselves or others, that cannot be mitigated by reasonable modifications of policies, practices or procedures, or by the provision of auxiliary aids or services.

The Bureau for Social Services is prohibited from making Adult Services program application and retention decisions based on unfounded stereotypes about what individuals with disabilities can do, or how much assistance they may require. The BSS will conduct individualized assessments of qualified individuals with disabilities before making Adult Services application and retention decisions.

The Bureau for Social Services may ask for information necessary to determine whether an applicant or participant who has requested a reasonable modification has a disability-related need for the modification, when the individual's disability and need for the modification are not readily apparent or known. BSS will confidentially maintain the medical records or other health information of Adult Services program applicants and participants.

The Bureau for Social Services upon request, will make reasonable modifications for qualified Adult Service program applicants or participants with disabilities unless BSS can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Individuals do not need to reference Section 504 or Title II or use terms of art such as “reasonable modification” in order to make a request. Further, BSS staff are obligated to offer such reasonable accommodations upon the identification of a qualifying disability or to an individual with Limited English Proficiency.

BSS must consider, on a case-by-case basis, individual requests for reasonable modifications in its Adult Services programs, including, but not limited to, requests for substitute caregivers, respite caregivers, more frequent support from a case worker, additional classroom and/or online training, mentorship with an experienced foster/adoptive parent, note takers, and other auxiliary aids and services. When auxiliary aids or language interpretation services to ensure effective communication for individuals with hearing, vision, speech impairments, or Limited English Proficiency (LEP) are needed, they shall be provided to the participant at no additional costs. The department evaluates individuals on a case-by-case basis to provide auxiliary aids and services as necessary to obtain effective communication. This would include but not be limited to:

- Services and devices such as qualified interpreters, assistive listening devices, note takers, and written materials for individuals with hearing impairments.
- And qualified readers, taped texts, and Brailled or large print materials for individuals with vision impairments.
- Access to language and interpretation services.

For more information on obtaining auxiliary aids, contact:

Center for Excellence in Disabilities (CED)  
959 Hartman Run Road  
Morgantown, WV 26505  
Phone: 304-293-4692.  
Toll Free: (888) 829-9426  
TTY: (800) 518- 1448

For language translation and interpretation services Adult Services may Contact 911 Interpreters or the Section 504/ADA Coordinator (see also section 11.5 Limited English Proficiency). To contact 911 Interpreters, utilize the information below:

911 Interpreters Inc.  
1-855-670-2500  
BSS Code: 16233

When requesting language translation services directly through 911 Interpreters, staff must report the accommodation to the Section 504/ADA Coordinator by completing the *Reasonable Accommodation Reporting Form*.

The Bureau for Social Services will not place a surcharge on a particular qualified individual with a disability or any group of qualified individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids and services or program accessibility, that are necessary to provide nondiscriminatory treatment required by Title II of the ADA and Section 504.

To address any violations of this Reasonable Modification Policy, consult the Bureau for Social Services Grievance Procedure. To request reasonable modifications, or if you have questions, please contact:

Children and Adult Services  
Section 504/ADA Coordinator  
350 Capitol St. Rm 691  
Charleston, WV 25301  
(304) 558-7980  
[DHRCivilRights@WV.Gov](mailto:DHRCivilRights@WV.Gov) (email)

Staff who make reasonable accommodations for an individual must be reported to the Section 504/ADA Coordinator utilizing the *Reasonable Accommodation Reporting Form*.

## 5.5 Limited English Proficiency

The Bureau for Social Services (BSS) will take reasonable steps to ensure that persons with Limited English Proficiency (LEP) have meaningful access and an equal opportunity to participate in our services, activities, programs and other benefits. The policy of BSS is to ensure meaningful communication with LEP clients and their authorized representatives involving their case. The policy also provides for communication of information contained in vital documents, including but not limited to, information release consents, service plans, etc. All interpreters, translators and other aids needed to comply with this policy shall be provided without cost to the person being served, and clients and their families will be informed of the availability of such assistance free of charge. Language assistance will be provided through use of contracted vendors, technology, or telephonic interpretation services. All staff will be provided notice of this policy and procedure, and staff that may have direct contact with LEP individuals will be trained in the effective use of an interpreter and the effective use of technology including telephonic interpretation services. The Bureau for Social Services will conduct a regular review of the

language access needs of our population, as well as update and monitor the implementation of this policy and these procedures, as necessary.

***Procedures:***

**1. IDENTIFYING LEP PERSONS AND THEIR LANGUAGE**

The Bureau for Social Services will promptly identify the language and communication needs of the LEP person. If necessary, staff will use a language identification card (or “I speak cards,” available online at [www.lep.gov](http://www.lep.gov)) or posters to determine the language. In addition, when records are kept of past interactions with clients or family members, the language used to communicate with the LEP person will be included as part of the record.

**2. OBTAINING A QUALIFIED INTERPRETER**

911 Interpreters Inc. has agreed to provide qualified interpreter services. The agency’s telephone number is 1-855-670-2500 (BSS Code: 16233). Interpretation services are available 24 hours a day. Some LEP persons may prefer or request to use a family member or friend as an interpreter. However, family members or friends of the LEP person will not be used as interpreters unless specifically requested by that individual and after the LEP person has understood that an offer of an interpreter at no charge to the person has been made by the facility. Such an offer and the response will be documented in the person’s file. If the LEP person chooses to use a family member or friend as an interpreter, issues of competency of interpretation, confidentiality, privacy, and conflict of interest will be considered. If the family member or friend is not competent or appropriate for any of these reasons, BSS will provide qualified interpreter services to the LEP person free of charge. Children and other clients will not be used to interpret, in order to ensure confidentiality of information and accurate communication.

**3. PROVIDING WRITTEN TRANSLATIONS**

When translation of vital documents is needed, BSS will submit documents for translation to 911 Translators Inc. or the Section 504/ADA Coordinator. BSS will generally provide language services in accordance with the following guidelines:

- A. BSS will provide written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or
- B. If there are fewer than 50 persons in a language group that reaches the five percent threshold in (a), BSS will not translate vital written materials but will provide written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

Additionally, when making a determination as to what languages services will provided, BSS may consider the following factors: (1) the number and or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in

contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.

Documents being submitted for translation will be in final, approved form with updated and accurate information. Staff who utilize 911 Translators must report the utilization using the *Reasonable Modification Reporting Form* to the Section 504/ADA Coordinator.

Documents being submitted for translation will be in final, approved form with updated and accurate information. Staff who utilize 911 Translators must report the utilization using the *Reasonable Modification Reporting Form* to the Section 504/ADA Coordinator.

#### **4. PROVIDING NOTICE TO LEP PERSONS**

The Bureau for Social Services will inform LEP persons of the availability of language assistance, free of charge, by providing written notice in languages LEP persons will understand. At a minimum, notices and signs will be posted and provided in the department's lobbies and waiting areas. Notification will also be provided through one or more of the following: outreach documents and program brochures.

#### **5. MONITORING LANGUAGE NEEDS AND IMPLEMENTATION**

On an ongoing basis, BSS will assess changes in demographics, types of services or other needs that may require reevaluation of this policy and its procedures. In addition, BSS will regularly assess the efficacy of these procedures, including but not limited to mechanisms for securing interpreter services, equipment used for the delivery of language assistance, complaints filed by LEP persons, feedback from clients and community organizations, etc.

**APPENDIX A DoHS CIVIL RIGHTS DISCRIMINATION COMPLAINT FORM**

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STATE OF WEST VIRGINIA  
DEPARTMENT OF HUMAN SERVICES  
BUREAU FOR SOCIAL SERVICES

**Civil Rights Discrimination Complaint Form**

Complainant First Name		Complainant Last Name
Home Phone <i>(include area code)</i>		Work Phone <i>(include area code)</i>
Street Address		City
State	Zip Code	Email <i>(if available)</i>

Is this complaint being completed by someone other than the complainant?  Yes  No

If yes, please provide your information below:

First Name	Last Name	Telephone Number (include area code)
------------	-----------	--------------------------------------

The complainant feels they have been discriminated against on the basis of:

- Race/Color/National Origin     
  Religion/Creed     
  Sexual Orientation/Gender Identity  
 Disability     
  Age     
  Sex

Who or what bureau within the West Virginia Department of Health and Human Resources is believed to have been discriminatory?

Name/Bureau/Office		
Street Address	City	County
Zip Code	Telephone	

Date(s) discriminatory action is believed to have occurred:

Which program(s) is the complainant alleging the discriminatory action took place in?

- Child Welfare *(includes CPS, Youth Services, Foster Care, Adoption, home finding, and Legal Guardianship)*     
  Adult Welfare *(includes APS, Guardianship, Health Care Surrogate, Residential Services Request to Receive and Request to Provide)*     
  Low Income Energy Assistance Program (LIEAP)  
 Temporary Assistance for Needy Families (TANF)     
  School Clothing Voucher     
  Indigent Burial

*Complaints involving the Supplemental Nutrition Assistance Program (SNAP) must be sent directly to the U.S. Department of Agriculture. See below for more information.*



Describe briefly what happened. How and why does the complainant believe they have been discriminated against? What is the relief or remedy sought by the complainant?

(Attach additional pages as needed.)

Please sign and date this form. If submitting by email, you may type your name and date. Your email will represent your signature.

<b>Signature</b>	<b>Date (mm/dd/yyyy)</b>
------------------	--------------------------

The West Virginia Department of Human Services shall not retaliate against, intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title VI, Section 504 or the Age Act, or because she or he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.

EEO/Civil Rights Officer shall conduct an investigation of the complaint. This investigation may be informal, but it must be thorough, affording all interested persons an opportunity to submit evidence relevant to the complaint. EEO/Civil Rights Officer will maintain the files and records of DoHS relating to such grievances. The EEO/Civil Rights Officer shall issue a written decision on the complaint no later than thirty (30) calendar days after its filing, unless the Coordinator documents exigent circumstances requiring additional time to issue a decision. To submit this complaint or request additional information, please contact:

West Virginia Department of Human Services  
Office of Human Resource Management  
EEO/Civil Rights Officer  
(304) 558-3313 (voice)  
(304) 558-6051 (fax)  
[DHHRCivilRights@WV.Gov](mailto:DHHRCivilRights@WV.Gov) (email)

The person filing the grievance retains the right to file a grievance with the U.S. Department of Health and Human Services, Office for Civil Rights, regardless of the decision made by the West Virginia Department of Human Services. The availability and use of this grievance procedure does not prevent a person from filing a private lawsuit in Federal court or a complaint of discrimination on the basis of being a member of a protected class, with the:

U.S. Department of Health & Human Services  
200 Independence Ave., S.W.  
Room 509F HHS Bldg.  
Washington, D.C. 20201  
800-368-1019 (voice)  
202-619-3818 (fax)  
800-537-7697 (TDD)  
[OCRComplaint@hhs.gov](mailto:OCRComplaint@hhs.gov) (email)  
The complaint form may be found at <https://www.hhs.gov/ocr/complaints/index.html>

For SNAP complaints, please contact the U.S. Department of Agriculture.

The USDA Program Discrimination Complaint Form, can be found online at: <https://www.ocio.usda.gov/document/ad-3027>, or at any USDA office. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form by mail, email, or fax to:

U.S. Department of Agriculture  
Office of the Assistant Secretary for Civil Rights  
1400 Independence Avenue, SW Washington, D.C. 20250-9410  
(202) 690-7442 (fax)  
(866) 632-9992 (telephone)  
[program.intake@usda.gov](mailto:program.intake@usda.gov) (email)

The following appendices are samples only. If the form is available to the public the title of the document has been linked to the [WV Supreme Court](#) - or in the case of the Health Care Surrogate Selection Form the [WV Center for End of Life Care](#) - website. Otherwise, contact Adult Services legal counsel for forms.

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## APPENDIX B PETITION FOR ATTACHMENT

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA	
West Virginia Department of Health and Human Resources, by _____	_____
VS.	
_____ Adult Protective Services Worker, PETITIONER	_____ RESPONDENT
IN THE INTEREST OF: _____, CASE NO: _____ AN ALLEGED INCAPACITATED ADULT	

### PETITION FOR ATTACHMENT TO ABATE AN EMERGENCY SITUATION

I, the undersigned Adult Protective Service Worker for the \_\_\_\_\_ County Department of the 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 the above named alleged incapacitated adult is \_\_\_\_\_ years old and is believed to be an incapacitated adult as defined by law, (9-6-1) (4) by reason of the following:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ (here document what the client is doing to be in a possible life threatening situation)
3. That the above named alleged incapacitated adult is presently in the actual care, custody and control of no one.
4. That the above named alleged incapacitated adult 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.
6. WHEREFORE, the 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:

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Prosecuting Attorney

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# APPENDIX C NOTARIZED STATEMENT FOR PETITION OF ATTACHMENT

STATE OF WEST VIRGINIA

COUNTY OF \_\_\_\_\_ TO-WIT:

I, \_\_\_\_\_, 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

The foregoing 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: \_\_\_\_\_

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## APPENDIX D ORDER OF ATTACHMENT

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA	
IN RE: _____ AN ALLEGED INCAPACITATED ADULT	CASE NUMBER _____

### ATTACHMENT ORDER

To the Sheriff of \_\_\_\_\_ County:

On this \_\_\_\_\_ date, the Court found probable cause to believe that the above named adult 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 this County, or his authorized agent, shall immediately secure the above named incapacitated adult and forthwith have the County Sheriff's Department transfer him/her to \_\_\_\_\_ Hospital for an immediate medical evaluation. The Court further DECREES that a representative of the West Virginia Department of Health and Human Resources (WVDHHR) shall accompany the County Sheriff's Department, or his agent, and WVDHHR representative shall enter the abode of the above named incapacitated adult 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 County Sheriff, or his authorized agent, or any ambulance service to provide transportation for the above named incapacitated adult to the previously mentioned Hospital by ambulance, if necessary. The Court further ORDERS that the above named incapacitated adult's assets will pay for any and all charges to the extent of assets or insurance coverage allows. If the above named incapacitated adult 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 \_\_\_\_\_ M [time] on the above incapacitated adult or any other person having the care, custody and control of him/her.

Attorney, \_\_\_\_\_, a competent and active member of the \_\_\_\_\_ County Bar is hereby appointed to act as Guardian Ad Litem for the above named incapacitated adult.

Entered this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Circuit Court Judge Signature

## APPENDIX E ADMINISTRATIVE SUBPOENA

### 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 Human Services 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 Adult Protective Services Program Manager for the West Virginia Department of Human Services located at **ADDRESS**.

Upon receipt of this subpoena, please contact **NAME** Program Manager at **TELEPHONE NUMBER**.

Note: In accordance with §9-16-16 *et seq.*, failure to provide such information may result in circuit court proceedings.

## Acknowledgement

Special thanks to Dr. Alvin Woody Moss with the [WV Center for End of Life Care](#) for the availability of medical forms and website.

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