

# Representation of Protected and Incapacitated Persons

**Incapacitated** means the person is incapable of handling his or her medical, financial or personal affairs.

A **protected person** is someone who, through a legal process, has been deemed to be incapacitated.

## Appointed by Court

### **Conservator**

(W. Va. Code §44A-1-8)

- Manages the estate and financial affairs of a protected person.
- May be “limited” (W. Va. Code §44A-2-12) or “temporary” (W. Va. Code §44A-2-14).
- Pays bills; responsible for bank account(s); may buy and/or sell real and/or personal property.
- Cannot be held personally responsible by creditors for the protected person’s debts, such as medical bills.
- Must file periodic reports with the court unless the court waives the reporting requirement.

Provided By:



## **Guardian**

(W. Va. Code §44A-1-8)

- Responsible for the personal affairs of a protected person.
- May be “limited” (W. Va. Code §44A-2-11) or “temporary” (W. Va. Code §44A-2-14)
- Makes financial, medical and other miscellaneous decisions, such as residency.
- Cannot be held personally responsible by creditors for the protected person’s debts, such as medical bills.
- Court may appoint separate Conservator.
- Must file periodic reports with the court unless the court waives the reporting requirement.

## **Guardian Ad Litem**

(W. Va. Code §56-4-10)

- Attorney appointed by the court to represent a minor child or an individual who is mentally disabled.
- May be appointed temporarily until another more permanent resolution is decided upon, such as Guardian and/or Conservator.
- Duty to faithfully represent the interests of the individual for whom he or she is appointed.
- Cannot be held personally responsible by creditors for the protected person’s debts, such as medical bills.
- If appointment lasts for an extended period of time, must file periodic reports with the court unless the court waives the reporting requirement.

## Appointed by the Individual (Principal)

### General Power of Attorney (POA)

(W. Va. Code §39B-1-101)

- A notarized, or otherwise acknowledged, written document.
- Takes effect immediately unless the document clearly states otherwise.
- May be “durable” or “non-durable”; however, POA presumed to be “durable” (i.e., not terminated by the principal’s incapacity) unless the document clearly states otherwise.
- POA may make financial, medical and other miscellaneous decisions on behalf of the principal as specified in the document of appointment.
- POA is a mechanism that may be easily exploited to take advantage of the principal.
- Important that the POA is someone in whom the principal has complete trust.
- Cannot be held personally responsible by creditors for the principal’s debts, such as medical bills.
- Existence of a POA “may eliminate, limit or supersede the need for the assistance or protection of a Guardian or Conservator, and any person so appointed [POA] is to be the first preferred nominee for Guardian or Conservator.”  
(W. Va. Code §44A-1-3)

## **Living Will**

(W. Va. Code §16-30-6)

- A written document which must be witnessed when signed.
- Dictates decisions about the principal's health care if he or she is unable to communicate those decisions to health care personnel.
- May be a good option for a principal who believes that no one else can be trusted to carry out his or her wishes.
- Cannot take into account all of the circumstances that may exist at the time the Living Will is needed, including advancements in medicine since its signing.
- A Living Will “may eliminate, limit or supersede the need for the assistance or protection of a Guardian or Conservator, and any person so appointed [by the Living Will] is to be the first preferred nominee for Guardian or Conservator.” (W. Va. Code §44A-1-3)

## **Medical Power of Attorney (MPOA)**

(W. Va. Code §16-30-6)

- A written document which must be witnessed when signed.
- If the principal becomes incapacitated, grants authority to

another person to make health care decisions on behalf of the principal.

- MPOA has the right of access to the principal's medical information and the right to discuss that information with the principal's health care providers.
- Cannot be held personally responsible by creditors for the principal's debts, such as medical bills.
- Existence of a MPOA "may eliminate, limit or supersede the need for the assistance or protection of a Guardian or Conservator, and any person so appointed [MPOA] is to be the first preferred nominee for Guardian or Conservator." (W. Va. Code §44A-1-3)
- The following persons may not serve as MPOA or successor MPOA:
  - the principal's treating health care provider;
  - an employee of the treating health care provider who is not related to the principal;
  - the operator of a health care facility serving the principal; or
  - an employee of the operator of a health care facility serving the principal who is not related to the principal. (W. Va. Code §16-30-4(c))

## Appointed by Medical Provider

### Medical Surrogate (W. Va. Code §16-30-8)

- Must first inquire as to the existence and availability of a MPOA or Guardian.
- Statute includes list of priorities regarding who may serve.
- Selected by the attending physician or advanced nurse practitioner to make health care decisions on behalf of an incapacitated person.
- Least favored form of making health care decisions because the individual does not choose the surrogate, rather the attending medical provider does.
- Cannot be held personally responsible for the incapacitated person's debts, such as medical bills.
- The existence of a Medical Surrogate “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.” (W. Va. Code §44A-1-3)

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