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HOUSE BILL NO. 1260

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 7, 2022)

(Patron Prior to Substitute—Delegate Roem)

A BILL to amend and reenact §§ 64.2-2009 and 64.2-2019 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 64.2-2009.1 and 64.2-2019.1, relating to guardianship; periodic review hearings; restricted communication procedures.

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2009 and 64.2-2019 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 64.2-2009.1 and 64.2-2019.1 as follows:

§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.

A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify whether the appointment of a guardian or conservator is limited to a specified length of time, as the court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity, including but not limited to mental competency for purposes of Article II, Section 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed appropriate following consideration of the factors specified in § 64.2-2007; (vi) set the bond of the guardian and the bond and surety, if any, of the conservator; and (vii) where a petition is brought prior to the incapacitated person's eighteenth birthday, pursuant to subsection C of § 64.2-2001, whether the order shall take effect immediately upon entry or on the incapacitated person's eighteenth birthday.

A1. Beginning July 1, 2022, the court shall set a schedule in the order of appointment for periodic review hearings, to be held no later than one year after the initial appointment and no later than every three years thereafter, unless the court orders that such hearings are to be waived because they are unnecessary or impracticable or that such hearings shall be held on such other schedule as the court shall determine. Any such determination to waive the hearing or use a schedule differing from that prescribed herein shall be supported in the order and address the reason for such determination, including (i) the likelihood that the respondent's condition will improve or the respondent will regain capacity, (ii) whether there were concerns or questions about the suitability of the person appointed as a guardian or conservator at the time of the initial appointment, and (iii) whether the appointment of a guardian or conservator or the appointment of the specifically appointed guardian or conservator was contested by the respondent or another party.

The court shall not waive the initial periodic review hearing scheduled pursuant to this subsection where the petitioner for guardianship or conservatorship is a hospital, convalescent home, or nursing facility licensed by the Department of Health pursuant to § 32.1-123, or an assisted living facility as defined in § 63.2-100, or any other similar institution, or a health care provider other than a family member. If the petitioner is a hospital, nursing facility, or convalescent home licensed by the Department of Health pursuant to § 32.1-123 or an assisted living facility as defined in § 63.2-100, nothing in this chapter shall require such petitioner to attend any periodic review hearing.

Any person may file a petition, which may be on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia, to hold a periodic review hearing prior to the scheduled date set forth in the order of appointment. The court shall hold an earlier hearing upon good cause shown. At such a hearing, the court shall review the schedule set forth in the order of appointment and determine whether future periodic review hearings are necessary or may be waived.

A2. If the court has ordered a hearing pursuant to subsection A1, the court shall appoint a guardian ad litem, who shall conduct an investigation in accordance with the stated purpose of the hearing and file a report. The incapacitated person has a right to be represented by counsel and the provisions of § 64.2-2006 shall apply, mutatis mutandis. The guardian ad litem shall provide notice of the hearing to the incapacitated person and to all individuals entitled to notice as identified in the court order of appointment. Fees and costs shall be paid in accordance with the provisions of §§ 64.2-2003 and 64.2-2008. The court shall enter an order reflecting any findings made during the review hearing and any modification to the guardianship or conservatorship.

B. The court may appoint a limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for his care for the limited purpose of medical decision making, decisions about place of residency, or other specific decisions regarding his personal affairs. The court may appoint a limited conservator for an incapacitated person who is capable of managing

60 some of his property and financial affairs for limited purposes that are specified in the order.

61 C. Unless the guardian has a professional relationship with the incapacitated person or is employed
62 by or affiliated with a facility where the person resides, the court's order may authorize the guardian to
63 consent to the admission of the person to a facility pursuant to § 37.2-805.1, upon finding by clear and
64 convincing evidence that (i) the person has severe and persistent mental illness that significantly impairs
65 the person's capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed
66 psychiatrist; (ii) such condition is unlikely to improve in the foreseeable future; and (iii) the guardian
67 has formulated a plan for providing ongoing treatment of the person's illness in the least restrictive
68 setting suitable for the person's condition.

69 D. A guardian need not be appointed for a person who has appointed an agent under an advance
70 directive executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of
71 Title 54.1, unless the court determines that the agent is not acting in accordance with the wishes of the
72 principal or there is a need for decision making outside the purview of the advance directive.

73 A conservator need not be appointed for a person (i) who has appointed an agent under a durable
74 power of attorney, unless the court determines pursuant to the Uniform Power of Attorney Act
75 (§ 64.2-1600 et seq.) that the agent is not acting in the best interests of the principal or there is a need
76 for decision making outside the purview of the durable power of attorney or (ii) whose only or major
77 source of income is from the Social Security Administration or other government program and who has
78 a representative payee.

79 E. All orders appointing a guardian shall include the following statements in conspicuous bold print
80 in at least 14-point type:

81 "1. Pursuant to § 64.2-2009 of the Code of Virginia, _____ (name of guardian), is hereby
82 appointed as guardian of _____ (name of respondent) with ~~all~~ duties and powers granted to a
83 guardian pursuant to § 64.2-2019 of the Code of Virginia, including ~~but not limited to or limited as~~
84 *follows: (enter a statement of the rights removed and retained, if any, at the time of appointment;*
85 *whether the appointment of a guardian is a full guardianship, public guardianship pursuant to*
86 *§ 64.2-2010 of the Code of Virginia, limited guardianship pursuant to § 64.2-2009 of the Code of*
87 *Virginia, or temporary guardianship; and the duration of the appointment).*

88 2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian, to
89 the extent possible, shall encourage the incapacitated person to participate in decisions, shall consider the
90 expressed desires and personal values of the incapacitated person to the extent known, and shall not
91 ~~unreasonably~~ restrict an incapacitated person's ability to communicate with, visit, or interact with other
92 persons with whom the incapacitated person has an established relationship *unless such restriction is*
93 *reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such*
94 *incapacitated person and shall take into account the expressed wishes of the incapacitated person. Such*
95 *restrictions shall only be imposed pursuant to § 64.2-2019.1 of the Code of Virginia.*

96 3. Pursuant to § 64.2-2020 of the Code of Virginia, an annual report shall be filed by the guardian
97 with the local department of social services for the jurisdiction where the incapacitated person resides.

98 4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition for
99 restoration of the incapacitated person to capacity; modification of the type of appointment or areas of
100 protection, management, or assistance granted; or termination of the guardianship."

101 **§ 64.2-2009.1. Periodic review hearings.**

102 A hearing held pursuant to the schedule set forth in subsection A1 of § 64.2-2009 shall include the
103 following assessments by the court: (i) whether the guardian or conservator is fulfilling his duties and
104 (ii) whether continuation of the guardianship or conservatorship is necessary and, if so, whether the
105 scope of such guardianship or conservatorship warrants modification.

106 **§ 64.2-2019. Duties and powers of guardian.**

107 A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was
108 appointed guardian and may be held personally liable for a breach of any fiduciary duty to the
109 incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the
110 guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of
111 the incapacitated person.

112 B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance
113 directive or durable power of attorney previously executed by the incapacitated person. A guardian may
114 seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as
115 provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of
116 the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of
117 § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an
118 advance directive, but the modification shall not in any way affect the incapacitated person's directives
119 concerning the provision or refusal of specific medical treatments or procedures.

120 C. A guardian shall maintain sufficient contact with the incapacitated person to know of his
121 capabilities, limitations, needs, and opportunities. The guardian shall visit the incapacitated person as

often as necessary.

D. A guardian shall be required to seek prior court authorization to change the incapacitated person's residence to another state, to terminate or consent to a termination of the person's parental rights, or to initiate a change in the person's marital status.

E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall not ~~unreasonably~~ restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship, *unless such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and shall take into account the expressed wishes of the incapacitated person. Such restrictions shall only be imposed pursuant to § 64.2-2019.1.*

F. A guardian shall have authority to make arrangements for the funeral and disposition of remains, including cremation, interment, entombment, memorialization, inurnment, or scattering of the remains, or some combination thereof, if the guardian is not aware of any person that has been otherwise designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to make arrangements for the funeral and disposition of remains after the death of an incapacitated person if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune from civil liability for any act, decision, or omission resulting from acceptance of any dead body for burial, cremation, or other disposition when the provisions of this section are met, unless such acts, decisions, or omissions resulted from bad faith or malicious intent.

§ 64.2-2019.1. Procedures to restrict communication, visitation, or interaction.

A. A guardian may restrict the ability of a person with whom the incapacitated person has an established relationship to communicate with, visit, or interact with such incapacitated person only when such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and shall take into account the expressed wishes of such incapacitated person. Any such restrictions imposed shall be the least restrictive means possible to prevent any such harm or exploitation.

B. The guardian shall provide written notice to the restricted person, on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia, stating (i) the nature and terms of the restriction, (ii) the reasons why the guardian believes the restriction is necessary, and (iii) how the restricted person may challenge such restriction in court. The guardian shall inform the incapacitated person of such restriction, unless the guardian has a good faith belief that such information would be detrimental to the health or safety of such incapacitated person; shall forward a copy of such written notice to the incapacitated person subject to the guardianship and the local department of social services of the jurisdiction where the incapacitated person resides; and shall file a copy of such notice with the court.

C. Any restricted person may move to terminate or modify any such restriction. A hearing held pursuant to this subsection shall be held within 45 days of return of such form to the court or filing of such motion with the court.

D. If the court finds that a restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person, the court may continue or modify such restriction in its discretion.

E. If the court does not find that a restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person, the court may issue an order terminating, continuing, or modifying any restriction the guardian imposed on the person challenging such restriction.

F. If the court finds that a guardian imposed restrictions or filed a motion under this section in bad faith, primarily for the purposes of harassment, or that was clearly frivolous or vexatious, the court may require the guardian to pay or reimburse all or some of the costs and fees, including attorney fees, incurred by the restricted person in connection with such motion.

G. If the court finds that the claim of a restricted person who filed a motion pursuant to this section was brought in bad faith, was brought primarily for the purposes of harassment, or was clearly frivolous or vexatious, the court may require such restricted person to pay or reimburse the guardian all of some of the costs and fees, including attorney fees, incurred by the guardian in connection with such

183 *motion.*

184 *H. Any court order issued pursuant to the provisions of this section shall be forwarded to the*
185 *incapacitated person subject to the guardianship and the local department of social services of the*
186 *jurisdiction where the incapacitated person resides.*