

HOUSE BILL NO. 1260

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on _____)

(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

27 or impracticable or that such hearings shall be held on such other schedule as the court shall determine.
28 Any such determination to waive the hearing or use a schedule differing from that prescribed herein shall
29 be supported in the order and address the reason for such determination, including (i) the likelihood that
30 the respondent's condition will improve or the respondent will regain capacity, (ii) whether there were
31 concerns or questions about the suitability of the person appointed as a guardian or conservator at the time
32 of the initial appointment, and (iii) whether the appointment of a guardian or conservator or the
33 appointment of the specifically appointed guardian or conservator was contested by the respondent or
34 another party.

35 The court shall not waive the initial periodic review hearing scheduled pursuant to this subdivision
36 where the petitioner for guardianship or conservatorship is a hospital, convalescent home, or nursing
37 facility licensed by the Department of Health pursuant to § 32.1-123, or an assisted living facility as
38 defined in § 63.2-100, or any other similar institution, or a health care provider other than a family
39 member. If the petitioner is a hospital, nursing facility, or convalescent home licensed by the Department
40 of Health pursuant to § 32.1-123 or an assisted living facility as defined in § 63.2-100, nothing in this
41 chapter shall require such petitioner to attend any periodic review hearing as it relates to its role as
42 petitioner. However, such petitioner shall be required to cooperate with and respond to any questions
43 relating to any investigation conducted by the guardian ad litem in preparation for such hearing and shall
44 disclose or make available to the guardian ad litem, upon request, any information, records, and reports
45 concerning the respondent that the guardian ad litem determines is necessary to conduct such
46 investigation.

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

52 A2. If the court has ordered a hearing pursuant to subsection A1, the court shall appoint a guardian
53 ad litem, who shall conduct an investigation in accordance with the stated purpose of the hearing and file

54 a report. The incapacitated person has a right to be represented by counsel and the provisions of § 64.2-
55 2006 shall apply, mutatis mutandis. The guardian ad litem shall provide notice of the hearing to the
56 incapacitated person and to all individuals entitled to notice as identified in the court order of appointment.
57 Fees and costs shall be paid in accordance with the provisions of § 64.2-2008. The court shall enter an
58 order reflecting any findings made during the review hearing and any modification to the guardianship or
59 conservatorship.

60 B. The court may appoint a limited guardian for an incapacitated person who is capable of
61 addressing some of the essential requirements for his care for the limited purpose of medical decision
62 making, decisions about place of residency, or other specific decisions regarding his personal affairs. The
63 court may appoint a limited conservator for an incapacitated person who is capable of managing some of
64 his property and financial affairs for limited purposes that are specified in the order.

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

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

77 A conservator need not be appointed for a person (i) who has appointed an agent under a durable
78 power of attorney, unless the court determines pursuant to the Uniform Power of Attorney Act (§ 64.2-
79 1600 et seq.) that the agent is not acting in the best interests of the principal or there is a need for decision
80 making outside the purview of the durable power of attorney or (ii) whose only or major source of income

81 is from the Social Security Administration or other government program and who has a representative
82 payee.

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

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

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

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

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

105 **§ 64.2-2009.1. Periodic review hearings.**

106 A hearing held pursuant to the schedule set forth in subsection A1 of § 64.2-2009 shall include the
107 following assessments by the court: (i) whether the guardian or conservator is fulfilling his duties and (ii)

108 whether continuation of the guardianship or conservatorship is necessary and, if so, whether the scope of
109 such guardianship or conservatorship warrants modification.

110 **§ 64.2-2019. Duties and powers of guardian.**

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

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

124 C. A guardian shall maintain sufficient contact with the incapacitated person to know of his
125 capabilities, limitations, needs, and opportunities. The guardian shall visit the incapacitated person as often
126 as necessary.

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

130 E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in
131 decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A
132 guardian, in making decisions, shall consider the expressed desires and personal values of the
133 incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest
134 and exercise reasonable care, diligence, and prudence. A guardian shall not ~~unreasonably~~ restrict an

135 incapacitated person's ability to communicate with, visit, or interact with other persons with whom the
136 incapacitated person has an established relationship, unless such restriction is reasonable to prevent
137 physical, mental, or emotional harm to or financial exploitation of such incapacitated person and shall
138 take into account the expressed wishes of the incapacitated person. Such restrictions shall only be imposed
139 pursuant to § 64.2-2019.1.

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

153 **§ 64.2-2019.1. Procedures to restrict communication, visitation, or interaction.**

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

160 B. The guardian shall provide written notice to the restricted person, on a form developed by the
161 Office of the Executive Secretary of the Supreme Court of Virginia, stating (i) the nature and terms of the

162 restriction, (ii) the reasons why the guardian believes the restriction is necessary, and (iii) how the
163 restricted person may challenge such restriction in court. The guardian shall inform the incapacitated
164 person of such restriction, unless the guardian has a good faith belief that such information would be
165 detrimental to the health or safety of such incapacitated person; shall forward a copy of such written notice
166 to the incapacitated person subject to the guardianship and the local department of social services of the
167 jurisdiction where the incapacitated person resides; and shall file a copy of such notice with the court.

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

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

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

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

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

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

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