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HOUSE BILL NO. 2378

Offered January 8, 2003

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A *BILL to amend and reenact §§ 16.1-250, 16.1-250.1, 16.1-266, 16.1-267, and 16.1-268 of the Code of Virginia, relating to the appointment of counsel for a child charged with a delinquent act and in custody.*

Patron—Moran

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 16.1-250, 16.1-250.1, 16.1-266, 16.1-267, and 16.1-268 of the Code of Virginia are amended and reenacted as follows:

§ 16.1-250. Procedure for detention hearing.

A. When a child has been taken into immediate custody and not released as provided in § 16.1-247 or § 16.1-248.1, such child shall appear before a judge on the next day on which the court sits within the county or city wherein the charge against the child is pending. In the event the court does not sit within the county or city on the following day, such child shall appear before a judge within a reasonable time, not to exceed ~~seventy-two~~ 72 hours, after he has been taken into custody. If the ~~seventy-two~~ 72-hour period expires on a Saturday, Sunday or other legal holiday, the ~~seventy-two~~ 72 hours shall be extended to the next day which is not a Saturday, Sunday or legal holiday.

B. The appearance of the child may be by (i) personal appearance before the judge or (ii) use of ~~two~~ 2-way electronic video and audio communication. If ~~two~~ 2-way electronic video and audio communication is used, a judge may exercise all powers conferred by law and all communications and proceedings shall be conducted in the same manner as if the appearance were in person, and any documents filed may be transmitted by electronically transmitted facsimile process. The facsimile may be served or executed by the officer or person to whom sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures thereon shall be treated as original signatures. Any ~~two~~ 2-way electronic video and audio communication system used for an appearance shall meet the standards as set forth in subsection B of § 19.2-3.1.

C. Notice of the detention hearing, either oral or written, stating the time, place and purpose of the hearing shall be given to the parent, guardian, legal custodian or other person standing in loco parentis if he can be found, *to the child's attorney*, to the child if ~~twelve~~ 12 years of age or over and to the attorney for the Commonwealth.

D. During the detention hearing, the judge shall advise the parties of the right to counsel pursuant to § 16.1-266. The parties shall be informed of the child's right to remain silent with respect to any allegation of delinquency and of the contents of the petition. The attorney for the *child and the attorney for the Commonwealth* shall be given the opportunity to be heard.

E. If the judge finds that there is not probable cause to believe that the child committed the delinquent act alleged, the court shall order his release. If the judge finds that there is probable cause to believe that the child committed the delinquent act alleged but that the full-time detention of a child who is alleged to be delinquent is not required, the court shall order his release, and in so doing, the court may impose ~~one~~ 1 or more of the following conditions singly or in combination:

1. Place the child in the custody of a parent, guardian, legal custodian or other person standing in loco parentis under their supervision, or under the supervision of an organization or individual agreeing to supervise him;

2. Place restrictions on the child's travel, association or place of abode during the period of his release;

3. Impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children specified in § 16.1-248.1; or

4. Release the child on bail or recognizance in accordance with the provisions of Chapter 9 (§ 19.2-119 et seq.) of Title 19.2.

F. An order releasing a child on any of the conditions specified in this section may, at any time, be amended to impose additional or different conditions of release or to return the child who is alleged to be delinquent to custody for failure to conform to the conditions previously imposed.

G. All relevant and material evidence helpful in determining probable cause under this section or the need for detention may be admitted by the court even though not competent in a hearing on the petition.

H. If the child is not released and a parent, guardian, legal custodian or other person standing in loco

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parentis is not notified and does not appear or does not waive appearance at the hearing, upon the request of such person, the court shall rehear the matter on the next day on which the court sits within the county or city wherein the charge against the child is pending. If the court does not sit within the county or city on the following day, such hearing shall be held before a judge within a reasonable time, not to exceed ~~seventy-two~~ 72 hours, after the request. *Notice of the rehearing, either oral or written, stating the time, place and purpose of the rehearing shall be given to the parent, guardian, legal custodian or other person standing in loco parentis if he can be found, to the child's attorney, to the child if 12 years of age or older and to the attorney for the Commonwealth.*

I. In considering probable cause under this section, if the court deems it necessary to summon witnesses to assist in such determination then the hearing may be continued and the child remain in detention, but in no event longer than ~~three~~ 3 consecutive days, exclusive of Saturdays, Sundays, and legal holidays.

§ 16.1-250.1. Detention review hearing.

When a child is not released after a detention hearing held pursuant to § 16.1-250 ~~and, at the time of the detention hearing, the child was not represented by legal counsel, then~~ the child shall be afforded the opportunity to be represented by counsel prior to ~~entitled to~~ a detention review hearing.

The court shall, upon request of counsel, rehear the matter as soon as is practicable but in no event later than seventy-two hours after the request for the review hearing. If the seventy-two hour period expires on a Saturday, Sunday, legal holiday or day on which the court is lawfully closed, the seventy-two hours shall be extended to the next day that is not a Saturday, Sunday, legal holiday or day on which the court is lawfully closed. During the hearing, the court shall evaluate the need for continued detention of the child.

Notice of the detention review hearing, either oral or written, stating the time, place and purpose of the hearing shall be given to the parent, guardian, legal custodian or other person standing in loco parentis if he can be found, to the child's attorney, to the child if twelve years of age or over, and to the attorney for the Commonwealth ~~who~~ . *The attorney for the child and the attorney for the Commonwealth shall be given an opportunity to be heard.*

§ 16.1-266. Appointment of counsel.

A. Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is otherwise before the court pursuant to subdivision A 4 of § 16.1-241 or § 63.2-1230, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child pursuant to § 16.1-266.1.

B. *Prior to the detention hearing held pursuant to § 16.1-250, the court shall appoint a qualified and competent attorney-at-law to represent the child unless an attorney has been retained and appears on behalf of the child. A child may waive the right to representation by an attorney only after consultation with an attorney and the court determines that the child's waiver is free and voluntary; the waiver shall be in writing, signed by both the child and the child's attorney and shall be filed with the court records of the case. For the purposes of appointment of counsel for the detention hearing held pursuant to § 16.1-250 only, a child's indigence shall be presumed. Nothing in this subsection shall prohibit a judge from releasing a child from detention prior to appointment of counsel.*

~~BC. Prior~~ Subsequent to the detention ~~review~~ hearing ~~or~~ , if any, and prior to the adjudicatory or transfer hearing by the court of any case involving a child who is alleged to be in need of services, in need of supervision or delinquent, such child and his parent, guardian, legal custodian or other person standing in loco parentis shall be informed by a judge, clerk or probation officer of the child's right to counsel and of the liability of the parent, guardian, legal custodian or other person standing in loco parentis for the costs of such legal services pursuant to § 16.1-267 and be given an opportunity to:

1. Obtain and employ counsel of the child's own choice; ~~or~~

2. If the court determines that the child is indigent within the contemplation of the law pursuant to the guidelines set forth in ~~§ 19.2-159~~ and his parent, guardian, legal custodian or other person standing in loco parentis does not retain an attorney for the child, a statement of indigence substantially in the form provided by ~~§ 19.2-159~~ and a financial statement shall be executed by such child, and the court shall appoint an attorney-at-law to represent him *Request that the court appoint counsel, provided that before counsel is appointed or the court continues any appointment previously made pursuant to subsection B, the court shall determine that the child is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159 by requiring the child's parent, guardian, legal custodian or other person standing in loco parentis to complete a statement of indigence substantially in the form provided by § 19.2-159 and a financial statement, and upon determination of indigence the court shall appoint an attorney-at-law to represent the child; or*

3. Waive the right to representation by an attorney, if the court finds the child and the parent, guardian, legal custodian or other person standing in loco parentis of the child consent, in writing, to such waiver and that the interests of the child and the parent, guardian, legal custodian or other person

standing in loco parentis in the proceeding are not adverse. Such written waiver shall be in accordance with law provided, a child may waive the right to representation by an attorney only after consultation with an attorney and the court determines that the child's waiver is free and voluntary; the waiver shall be in writing, signed by both the child and the child's attorney and shall be filed with the court records of the case.

CD. A judge, clerk or probation officer shall inform the parent or guardian of his right to counsel prior to the adjudicatory hearing of a petition in which a child is alleged to be abused or neglected or at risk of abuse or neglect as provided in subdivision A 2a of § 16.1-241 and prior to a hearing at which a parent could be subjected to the loss of residual parental rights. In addition, prior to the hearing by the court of any case involving any other adult charged with abuse or neglect of a child, this adult shall be informed of his right to counsel. This adult and the parent or guardian shall be given an opportunity to:

1. Obtain and employ counsel of the parent's, guardian's or other adult's own choice; or
2. If the court determines that the parent, guardian or other adult is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159, a statement substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such parent, guardian or other adult and the court shall appoint an attorney-at-law to represent him; or
3. Waive the right to representation by an attorney in accordance with the provisions of § 19.2-160.

If the identity or location of a parent or guardian is not reasonably ascertainable or a parent or guardian fails to appear, the court shall consider appointing an attorney-at-law to represent the interests of the absent parent or guardian, and the hearing may be held.

Prior to a hearing at which a child is the subject of an initial foster care plan filed pursuant to § 16.1-281, a foster care review hearing pursuant to § 16.1-282 and a permanency planning hearing pursuant to § 16.1-282.1, the court shall consider appointing counsel to represent the child's parent or guardian.

DE. In all other cases which in the discretion of the court require counsel or a guardian ad litem to represent the interests of the child or children or the parent or guardian, a discreet and competent attorney-at-law may be appointed by the court. However, in cases where the custody of a child or children is the subject of controversy or requires determination and each of the parents or other persons claiming a right to custody is represented by counsel, the court shall not appoint counsel or a guardian ad litem to represent the interests of the child or children unless the court finds, at any stage in the proceedings in a specific case, that the interests of the child or children are not otherwise adequately represented.

EF. Any state or local agency, department, authority or institution and any school, hospital, physician or other health or mental health care provider shall permit a guardian ad litem appointed pursuant to this section to inspect and copy, without the consent of the child or his parents, any records relating to the child whom the guardian represents upon presentation by him of a copy of the court order appointing him or a court order specifically allowing him such access. Upon request therefor by the guardian ad litem made at least ~~seventy-two~~ 72 hours in advance, a mental health care provider shall make himself available to conduct a review and interpretation of the child's treatment records which are specifically related to the investigation. Such a request may be made in lieu of or in addition to inspection and copying of the records.

§ 16.1-267. Compensation of appointed counsel.

A. When the court appoints counsel to represent a child pursuant to § 16.1-266 A and, after an investigation by the court services unit, finds that the parents are financially able to pay for the attorney and refuse to do so, the court shall assess costs against the parent for such legal services in the amount awarded the attorney by the court under the circumstances of the case, considering such factors as the ability of the parents to pay and the nature and extent of the counsel's duties in the case. Such amount shall not exceed \$100 if the action is in circuit court or the maximum amount specified in subdivision 1 of § 19.2-163 if the action is in district court.

When the court appoints counsel to represent a child pursuant to *subsection B or C of § 16.1-266 B* and, after an investigation by the court services unit, finds that the parents are financially able to pay for the attorney in whole or in part and refuse to do so, the court shall assess costs in whole or in part against the parents for such legal services in the amount awarded the attorney by the court. Such amount shall not exceed \$100 if the action is in circuit court or the maximum amount specified in subdivision 1 of § 19.2-163 if the action is in district court. In determining the financial ability of the parents to pay for an attorney to represent the child, the court shall utilize the financial statement required by § 19.2-159.

In all other cases, except as provided in § 16.1-343, counsel appointed to represent a child shall be compensated for his services pursuant to § 19.2-163.

B. When the court appoints counsel to represent a parent, guardian or other adult pursuant to § 16.1-266, such counsel shall be compensated for his services pursuant to § 19.2-163.

182 § 16.1-268. Order of appointment.

183 The order of appointment of counsel pursuant to § 16.1-266 shall be filed with and become a part of
184 the record of such proceeding. The attorney so appointed shall represent the child or parent, guardian or
185 other adult at any such hearing and at all other stages of the proceeding, *including appeals taken*
186 *pursuant to § 16.1-296*, unless relieved or replaced in the manner provided by law.