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**SENATE BILL NO. 25**

Offered January 14, 2004

Prefiled December 12, 2003

*A BILL to amend and reenact § 37.1-134.21 of the Code of Virginia, relating to temporary detention orders.*

\_\_\_\_\_  
Patron—Marsh

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Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:****1. That § 37.1-134.21 of the Code of Virginia is amended and reenacted as follows:**

§ 37.1-134.21. Judicial authorization of treatment and detention of certain persons.

A. An appropriate circuit court, or judge as defined in § 37.1-1, may authorize on behalf of an adult person, in accordance with this section, the provision, withholding or withdrawal of a specific treatment or course of treatment for a mental or physical disorder, if it finds upon clear and convincing evidence that (i) the person is either incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder and (ii) the proposed action is in the best interest of the person.

B. For purposes of this section:

"Disorder" includes any physical or mental disorder or impairment, whether caused by injury, disease, genetics, or other cause.

"Incapable of making an informed decision" means unable to understand the nature, extent or probable consequences of a proposed treatment, or unable to make a rational evaluation of the risks and benefits of the proposed treatment as compared with the risks and benefits of alternatives to that treatment. Persons with dysphasia or other communication disorders who are mentally competent and able to communicate shall not be considered incapable of giving informed consent.

C. Any person may request authorization of the provision, withholding or withdrawal of a specific treatment, or course of treatment, for an adult person by filing a petition in the circuit court, or with a judge as defined in § 37.1-1, of the county or city in which the allegedly incapable person resides or is located, or in the county or city in which the proposed place of treatment is located. Upon filing such a petition, the petitioner or the court shall deliver or send a certified copy of the petition to the person who is the subject of such petition and, if the identity and whereabouts of the person's next of kin are known, to the next of kin.

D. As soon as reasonably possible after the filing of the petition, the court shall appoint an attorney to represent the interests of the allegedly incapable person at the hearing. However, such appointment shall not be required in the event that the person, or another interested person on behalf of the person, elects to retain private counsel at his own expense to represent the interests of the person at the hearing. If the allegedly incapable person is indigent, his counsel shall be paid by the Commonwealth as provided in § 37.1-89 from funds appropriated to reimburse expenses incurred in the involuntary mental commitment process. However, this provision shall not be construed to prohibit the direct payment of an attorney's fee either by the patient or by an interested person on his behalf, which fee shall be subject to the review and approval of the court.

E. Following the appointment of an attorney pursuant to subsection D above, the court shall schedule an expedited hearing of the matter. The court shall notify the person who is the subject of the petition, his next of kin, if known, the petitioner, and their respective counsel of the date and time for the hearing. In scheduling such a hearing, the court shall take into account the type and severity of the alleged physical or mental disorder, as well as the need to provide the person's attorney with sufficient time to adequately prepare his client's case.

F. Notwithstanding the provisions of subsections C and E above regarding delivery or service of the petition and notice of the hearing to the next of kin of any person who is the subject of such petition, if such person is a patient in any hospital at the time the petition is filed, the court, in its discretion, may dispense with the requirement of any notice to the next of kin. This subsection shall not, however, be construed to interfere with any decision made pursuant to the Health Care Decisions Act (§ 54.1-2981 et seq.).

G. Evidence presented at the hearing may be submitted by affidavit in the absence of objection by the person who is the subject of the petition, the petitioner, either of their respective counsel, or by any other interested party. Prior to the hearing, the attorney shall investigate the risks and benefits of the treatment decision for which authorization is sought and of alternatives to the proposed decision. The

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59 attorney shall make a reasonable effort to inform the person of this information and to ascertain the  
60 person's religious beliefs and basic values and the views and preferences of the person's next of kin.

61 H. Prior to authorizing the provision, withholding or withdrawal of treatment pursuant to this section,  
62 the court shall find:

63 1. That there is no legally authorized person available to give consent;

64 2. That the person who is the subject of the petition is incapable either of making an informed  
65 decision regarding a specific treatment or course of treatment or is physically or mentally incapable of  
66 communicating such a decision;

67 3. That the person who is the subject of the petition is unlikely to become capable of making an  
68 informed decision or of communicating an informed decision within the time required for decision; and

69 4. That the proposed course of treatment is in the best interest of the patient. However, the court  
70 shall not authorize a proposed course of treatment which is proven by a preponderance of the evidence  
71 to be contrary to the person's religious beliefs or basic values unless such treatment is necessary to  
72 prevent death or a serious irreversible condition. The court shall take into consideration the right of the  
73 person to rely on nonmedical, remedial treatment in the practice of religion in lieu of medical treatment.

74 I. The court may not authorize the following under this section:

75 1. Nontherapeutic sterilization, abortion, or psychosurgery.

76 2. Admission to a mental retardation facility or a psychiatric hospital, as defined in § 37.1-1.  
77 However, the court may issue an order under this section authorizing the provision, withholding or  
78 withdrawal of a specific treatment or course of treatment of a person whose admission to such facility  
79 has been or is simultaneously being authorized under §§ 37.1-65, 37.1-65.1, 37.1-65.2, 37.1-65.3, or  
80 § 37.1-67.1, or of a person who is subject to an order of involuntary commitment previously or  
81 simultaneously issued under § 37.1-67.3 or Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of this title.

82 3. Administration of antipsychotic medication for a period to exceed 180 days or electroconvulsive  
83 therapy for a period to exceed 60 days pursuant to any petition filed under this section. The court may  
84 authorize electroconvulsive therapy only if it is demonstrated by clear and convincing evidence, which  
85 shall include the testimony of a licensed psychiatrist, that all other reasonable forms of treatment have  
86 been considered and that electroconvulsive therapy is the most effective treatment for the person. Even  
87 if the court has authorized administration of antipsychotic medication or electroconvulsive therapy  
88 hereunder, these treatments may be administered over the person's objection only if he is subject to an  
89 order of involuntary commitment, including outpatient involuntary commitment, previously or  
90 simultaneously issued under § 37.1-67.3 or Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of this title, or  
91 the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.

92 4. Restraint or transportation of the person, unless it finds upon clear and convincing evidence that  
93 restraint or transportation is necessary to the provision of an authorized treatment for a physical disorder.

94 J. Any order authorizing the provision, withholding or withdrawal of treatment pursuant to subsection  
95 A shall describe any treatment or course of treatment authorized and may authorize generally such  
96 related examinations, tests, or services as the court may determine to be reasonably related to the  
97 treatment authorized. The order shall require the treating physician to review and document the  
98 appropriateness of the continued administration of antipsychotic medications not less frequently than  
99 every 30 days. Such order shall require the treating physician or other service provider to report to the  
100 court and the person's attorney any change in the person's condition resulting in probable restoration or  
101 development of the person's capacity to make and to communicate an informed decision prior to  
102 completion of any authorized course of treatment and related services. The order may further require the  
103 treating physician or other service provider to report to the court and the person's attorney any change in  
104 circumstances regarding any authorized course of treatment or related services or the withholding or  
105 withdrawal of treatment or services which may indicate that such authorization is no longer in the  
106 person's best interests. Upon receipt of such report, or upon the petition of any interested party, the court  
107 may enter such order withdrawing or modifying its prior authorization as it deems appropriate. Any  
108 petition or order under this section may be orally presented or entered, provided a written order shall be  
109 subsequently executed.

110 K. Any order hereunder of a judge, or of a judge or magistrate under subsection M/V, may be  
111 appealed de novo within 10 days to the circuit court for the jurisdiction where the order was entered,  
112 and any such order of a circuit court hereunder, either originally or on appeal, may be appealed within  
113 10 days to the Court of Appeals.

114 L. Any licensed health professional or licensed hospital providing, withholding or withdrawing  
115 treatment, testing or detention pursuant to the court's or magistrate's authorization as provided in this  
116 section shall have no liability arising out of a claim to the extent such claim is based on lack of consent  
117 to such course of treatment, testing or detention or the withholding or withdrawal of such treatment,  
118 testing or detention. Any such professional or hospital providing, withholding or withdrawing treatment  
119 with the consent of the person receiving or being offered treatment shall have no liability arising out of  
120 a claim to the extent it is based on lack of capacity to consent if a court or a magistrate has denied a

petition hereunder to authorize such treatment, and such denial was based on an affirmative finding that the person was capable of making and communicating an informed decision regarding the proposed provision, withholding or withdrawal of treatment.

M. Based upon the opinion of a licensed physician that an adult person is incapable of making an informed decision as a result of a physical injury or illness and that the medical standard of care indicates that testing, observation and treatment are necessary to prevent imminent and irreversible harm, a magistrate may issue, for good cause shown, an emergency custody order for such adult person to be taken into custody and transported to a hospital emergency room for such testing, observation or treatment.

Prior to issuance of an emergency custody order pursuant to this subsection, the magistrate shall ascertain that there is no legally authorized person available to give consent to necessary treatment for the adult person and that the adult person (i) is incapable of making an informed decision regarding obtaining necessary treatment, (ii) has refused transport to obtain such necessary treatment, (iii) has indicated an intention to resist such transport, and (iv) is unlikely to become capable of making an informed decision regarding obtaining necessary treatment within the time required for such decision.

An opinion by the licensed physician that an adult person is incapable of making an informed decision as a result of physical injury or illness shall only be rendered after such licensed physician has communicated electronically or personally with the emergency medical services personnel on the scene and has attempted to communicate electronically or personally with the adult person to obtain information and medical data concerning the cause of the adult person's incapacity, has attempted to obtain consent from the adult person and has failed to obtain such consent.

If there is a change in the person's condition, the emergency medical services personnel shall contact the licensed physician. If at any time the licensed physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, such physician shall rely on the person's decision on whether to consent to further observation, testing or treatment.

Upon reaching the emergency room, the person shall be evaluated by a licensed physician. If the physician determines that the person meets the requirements of subsection N, the physician may apply for a temporary detention order pursuant to that subsection. If the physician determines that the person does not meet the requirements of subsection N, the person shall be released from custody immediately. The person shall remain in custody until this evaluation is performed, but in no event shall the period of custody under this subsection exceed four hours.

The law-enforcement officer may lawfully go to or be sent beyond the territorial limits of the county, city or town in which he serves to any point in the Commonwealth for the purpose of executing an order for emergency custody pursuant to this subsection. Nothing herein shall preclude a law-enforcement officer from obtaining emergency medical treatment or further medical evaluation at any time for a person in his custody as provided in this subsection.

If an order of emergency custody is not executed within four hours of its issuance, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if such office is not open, to any judge or magistrate thereof.

N. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding of probable cause to believe that an adult person within the court's or a magistrate's jurisdiction is incapable of making an informed decision regarding treatment of a physical or mental disorder, or is incapable of communicating such a decision due to a physical or mental disorder, and that the medical standard of care calls for testing, observation or treatment of the disorder within the next 24 hours to prevent death, disability, or a serious irreversible condition, the court or, if the court is unavailable, a magistrate may issue an order authorizing temporary detention of the person by a hospital emergency room or other appropriate facility and authorizing such testing, observation or treatment. The detention may not be for a period exceeding 24 hours unless extended by the court as part of an order authorizing treatment under subsection A. If before completion of authorized testing, observation or treatment, the physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, the physician shall rely on the person's decision on whether to consent to further observation, testing or treatment. If before issuance of an order under this subsection or during its period of effectiveness, the physician learns of an objection by a member of the person's immediate family to the testing, observation or treatment, he shall so notify the court or magistrate, who shall consider the objection in determining whether to issue, modify or terminate the order.

O. The provisions of § 37.1-89 relating to payment by the Commonwealth shall not apply to the cost of detention, testing or treatment under this section.

P. Nothing in this section shall be deemed to affect the right to use, and the authority conferred by, any other applicable statutory or regulatory procedure relating to consent, or to diminish any common

182 law authority of a physician or other treatment provider to provide, withhold or withdraw services to a  
183 person unable to give or to communicate informed consent to those actions, with or without the consent  
184 of the person's relative, including but not limited to common law or other authority to provide treatment  
185 in an emergency situation; nor shall anything in this section be construed to affect the law defining the  
186 conditions under which consent shall be obtained for medical treatment, or the nature of the consent  
187 required.

188 Q. Judicial authorization pursuant to this section for providing, withholding or withdrawing treatment  
189 need not be obtained for a person for whom consent or authorization has been granted or issued or may  
190 be obtained in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title  
191 54.1 or other applicable statutes or common law of this Commonwealth.