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SENATE BILL NO. 1050

Offered January 12, 2005

Prefiled January 12, 2005

A BILL to amend and reenact §§ 2.2-703, 2.2-704, 2.2-705, 2.2-707, 37.1-134.13, and 37.1-134.14 of the Code of Virginia, relating to ombudsmen for incapacitated seniors.

 Patron—Wagner

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-703, 2.2-704, 2.2-705, 2.2-707, 37.1-134.13, and 37.1-134.14 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-703. Powers and duties of Department with respect to aging persons; area agencies on aging.

A. The mission of the Department shall be to improve the quality of life for older Virginians and to act as a focal point among state agencies for research, policy analysis, long-range planning, and education on aging issues. The Department shall also serve as the lead agency in coordinating the work of state agencies on meeting the needs of an aging society. The Department's policies and programs shall be designed to enable older persons to be as independent and self-sufficient as possible. The Department shall promote local participation in programs for older persons, evaluate and monitor the services provided for older Virginians and provide information to the general public. In furtherance of this mission, the Department shall have, without limitation, the following duties to:

1. Study the economic and physical condition of the residents in the Commonwealth whose age qualifies them for coverage under Public Law 89-73 or any law amendatory or supplemental thereto of the Congress of the United States, and the employment, medical, educational, recreational and housing facilities available to them, with the view of determining the needs and problems of such persons;

2. Determine the services and facilities, private and governmental and state and local, provided for and available to older persons and to recommend to the appropriate persons such coordination of and changes in such services and facilities as will make them of greater benefit to older persons and more responsive to their needs;

3. Act as the single state agency, under Public Law 89-73 or any law amendatory or supplemental thereto of the Congress of the United States, and as the sole agency for administering or supervising the administration of such plans as may be adopted in accordance with the provisions of such laws. The Department may prepare, submit and carry out state plans and shall be the agency primarily responsible for coordinating state programs and activities related to the purposes of, or undertaken under, such plans or laws;

4. Apply, with the approval of the Governor, for and expend such grants, gifts or bequests from any source that becomes available in connection with its duties under this section, and may comply with such conditions and requirements as may be imposed in connection therewith;

5. Hold hearings and conduct investigations necessary to pass upon applications for approval of a project under the plans and laws set out in subdivision 3, and shall make reports to the Secretary of the United States Department of Health and Human Services as may be required;

6. Designate area agencies on aging pursuant to Public Law 89-73 or any law amendatory or supplemental thereto of the Congress of the United States and to adopt regulations for the composition and operation of such area agencies on aging;

7. Provide information to consumers and their representatives concerning the recognized features of special care units. Such information shall educate consumers and their representatives on how to choose special care and may include brochures and electronic bulletin board notices;

8. Provide staff support to the Commonwealth Council on Aging;

9. Assist state, local, and nonprofit agencies, including, but not limited to, area agencies on aging, in identifying grant and public-private partnership opportunities for improving services to elderly Virginians;

10. Contract with a not-for-profit Virginia corporation granted tax-exempt status under § 501 (c) (3) of the Internal Revenue Code with statewide experience in Virginia in conducting a state long-term care ombudsman program or designated area agencies on aging for the administration of the ombudsman program. The Department may also contract with such entities for the administration of elder rights programs as authorized under *the Older Americans Act of 1963*, Public Law 89-73 *as amended*, such as insurance counseling and assistance, and to create an elder information/elder rights center, *or to create a system to appoint voluntary ombudsmen to act as an intermediary for older Virginians who are the*

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SB1050

59 *subject of guardianship orders;*

60 11. Serve as the focal point for the rights of older Virginians and their families by establishing,
61 maintaining and publicizing a toll-free number to provide resource and referral information, and to
62 provide such other assistance and advice as may be requested; and

63 12. Develop and maintain a four-year plan for aging services in the Commonwealth, including but
64 not limited to identifying collaborative opportunities with other state and local agencies and programs to
65 better serve the needs of an aging society. This plan shall be developed by the Department in
66 consultation with relevant stakeholders.

67 B. The governing body of any county, city or town may appropriate funds for support of area
68 agencies on aging designated pursuant to subdivision A 6.

69 C. All agencies of the Commonwealth shall assist the Department in effectuating its functions in
70 accordance with its designation as the single state agency as required in subdivision A 3.

71 D. As used in this chapter, "older Virginians" or "older persons" mean persons aged 60 years or
72 older.

73 § 2.2-704. Responsibility of Department for complaints regarding long-term care services.

74 A. The Department or its designee shall investigate complaints regarding community services that are
75 designed to provide long-term care to older persons and are rendered by the Department of Health, the
76 Department of Social Services, the Department of Mental Health, Mental Retardation and Substance
77 Abuse Services, the area agencies on aging or any private nonprofit or proprietary agency.

78 *B. The entity with whom the Department contracts shall establish a system for voluntary ombudsman*
79 *services who may be appointed to act as intermediaries for older Virginians who are the subject of*
80 *guardianship orders issued pursuant to § 37.1-134.13.*

81 Nothing in this section shall affect the services provided by local departments of welfare or social
82 services pursuant to § 63.2-1605.

83 § 2.2-705. Access to residents, facilities and patients' records by Office of State Long-Term Care
84 Ombudsman.

85 The entity designated by the Department to operate the programs of the Office of the State
86 Long-Term Care Ombudsman pursuant to the Older Americans Act, Public Law 100-175 *as amended by*
87 *other public laws*, shall, in the investigation of complaints referred to the program, have the same access
88 to (i) residents, facilities and patients' records of licensed adult care residences in accordance with
89 § 63.2-1706 and (ii) patients, facilities and patients' records of nursing facilities or nursing homes in
90 accordance with § 32.1-25, and shall have access to the patients, residents and patients' records of state
91 hospitals operated by the Department of Mental Health, Mental Retardation and Substance Abuse
92 Services. However, if a patient is unable to consent to the review of his medical and social records and
93 has no legal guardian, *or pursuant to a court order of guardianship an ombudsman has been appointed*
94 *to serve as an intermediary for older Virginians who are the subject of guardianship orders issued*
95 *pursuant to § 37.1-134.13*, such representatives shall have appropriate access to ~~such~~ *medical, social,*
96 *and court records in accordance with this section.* Notwithstanding the provisions of ~~§ 32.1-125.1~~ *any*
97 *other law or regulation to the contrary*, the entity designated by the Department to operate the programs
98 of the Office of the State Long-Term Care Ombudsman shall have access to nursing facilities and
99 nursing homes and state hospitals in accordance with this section. Access to residents, facilities and
100 patients' records shall be during normal working hours except in emergency situations.

101 § 2.2-707. Protection for representatives of the Office of the State Long-Term Care Ombudsman.

102 Any designated representative of the Office of the State Long-Term Care Ombudsman who, in good
103 faith with reasonable cause and without malice, performs the official duties of ombudsman, including
104 acting to report, investigate or cause any investigation to be made regarding a long-term care provider *or*
105 *while acting as an intermediary for an older Virginian who is the subject of a guardianship order*
106 *issued pursuant to § 37.1-134.13*, shall be immune from any civil liability that might otherwise be
107 incurred or imposed as the result of the making of the report or investigation.

108 § 37.1-134.13. Hearing on petition to appoint.

109 The respondent is entitled to a jury trial, upon request, and may compel the attendance of witnesses,
110 present evidence on his own behalf and confront and cross-examine witnesses.

111 The court or, if one is requested, the jury shall hear the petition for the appointment of a guardian or
112 conservator. The hearing may be held at such convenient place as the court directs, including the place
113 where the respondent is located. The proposed guardian or conservator shall attend the hearing except
114 for good cause shown and, where appropriate, shall provide the court with a recommendation as to
115 living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at
116 the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or
117 if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be
118 regarded as having denied the allegations in the petition.

119 In determining the need for a guardian or a conservator, and the powers and duties of any needed
120 guardian or conservator, consideration shall be given to the following factors: the limitations of the

respondent; the development of the respondent's maximum self-reliance and independence; the availability of less restrictive alternatives including advance directives and durable powers of attorney; the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; the actions needed to be taken by the guardian or conservator; and the suitability of the proposed guardian or conservator.

If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person to be the guardian or the conservator, or both, giving due deference to the wishes of the respondent. *Further, if a respondent is aged 60 years or older, the court may authorize the appointment of an ombudsman who shall serve as an intermediary to protect the interests of such persons who are the subject of a guardianship order.*

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered.

§ 37.1-134.14. Court order of appointment; limited guardianships and conservatorships.

The court's order appointing a guardian or conservator, *or authorizing the appointment of an ombudsman* shall: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator, *or ombudsman* so as to permit the incapacitated person to care for himself or herself and manage property to the extent he or she is capable; (iii) specify whether the appointment of a guardian or conservator, *or ombudsman* 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 § 37.1-134.13; and (vi) set the bond of the guardian, and the bond and surety, if any, of the conservator.

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.

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

The court may appoint a limited conservator for an incapacitated person who is capable of managing some of his property and financial affairs, for limited purposes specified in the order.

A conservator need not be appointed for a person (i) who has appointed an agent under a durable power of attorney, unless the court determines pursuant to § 37.1-134.22 that the agent is not acting in the best interests of the principal or there is a need for decision-making outside the purview of the durable power of attorney, or (ii) whose only or major source of income is from the Social Security Administration or other government program and who has a representative payee.