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SENATE BILL NO. 1051

Offered January 14, 2009

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A BILL to amend and reenact §§ 37.2-801, 37.2-1009, 54.1-2984, and 54.1-2986 of the Code of Virginia, to amend the Code of Virginia by adding in Article 2 of Chapter 8 of Title 37.2 a section numbered 37.2-805.1, relating to admission of incapacitated persons to mental health facilities.

Patron—Whipple

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-801, 37.2-1009, 54.1-2984 and 54.1-2986 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Article 2 of Chapter 8 of Title 37.2 a section numbered 37.2-805.1 as follows:

§ 37.2-801. Admission procedures; forms.

A. Any person alleged to have a mental illness to a degree that warrants treatment in a facility may be admitted to a facility by compliance with one of the following admission procedures:

1. Voluntary admission by the procedure described in § 37.2-805; or;

2. Admission of incapacitated persons pursuant to § 37.2-805.1; or

2.3. Involuntary admission by the procedure described in §§ 37.2-809 through 37.2-820.

B. The Board shall prescribe and the Department shall prepare the forms required in procedures for admission. These forms, which shall be the legal forms used in admissions, shall be approved by the Attorney General and distributed by the Department to the clerks of the general district courts and juvenile and domestic relations district courts of the Commonwealth and to the directors of the state facilities.

§ 37.2-805.1. Admission of incapacitated persons pursuant to advance directives or by guardians.

A. An agent for a person who has been determined to be incapable of making an informed decision may consent to the person's admission to a facility for no more than 10 calendar days if (i) prior to admission, a physician on the staff of or designated by the proposed admitting facility examines the person and states, in writing, that the person (a) has a mental illness, (b) is incapable of making an informed decision regarding admission, and (c) is in need of treatment in a facility; (ii) the proposed admitting facility is willing to admit the person; (iii) the person has executed an advance directive in accordance with the Health Care Decisions Act (§ 54.1-2981 et seq.) authorizing his agent to consent to his admission to a facility; and (iv) the person does not object to such admission. In addition, for admission to a state facility, the person shall first be screened by the community services board that serves the city or county where the person resides or, if impractical, where the person is located.

B. A guardian who has been appointed for an incapacitated person pursuant to Chapter 10 (§ 37.2-1000 et seq.) may consent to admission of that person to a facility for no more than 10 calendar days if (i) prior to admission, a physician on the staff of or designated by the proposed admitting facility examines the person and states, in writing, that the person (a) has a mental illness, (b) is incapable of making an informed decision regarding admission, and (c) is in need of treatment in a facility; (ii) the proposed admitting facility is willing to admit the person; and (iii) the guardianship order specifically authorizes the guardian to consent to the admission of such person to a facility, pursuant to § 37.2-1009. In addition, for admission to a state facility, the person shall first be screened by the community services board that serves the city or county where the person resides or, if impractical, where the person is located.

C. A person admitted to a facility pursuant to this section shall be discharged no later than 10 calendar days after admission unless, within that time, the person's continued admission is authorized under other provisions of law.

§ 37.2-1009. Court order of appointment; limited guardianships and conservatorships.

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 § 37.2-1007; and (vi) set the bond of the

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59 guardian and the bond and surety, if any, of the conservator.

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

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

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

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

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 § 37.2-1018 that the agent is not acting in the  
79 best interests of the principal or there is a need for decision making outside the purview of the durable  
80 power of attorney or (ii) whose only or major source of income is from the Social Security  
81 Administration or other government program and who has a representative payee.

82 § 54.1-2984. Suggested form of written advance directives.

83 An advance directive executed pursuant to this article may, but need not, be in the following form,  
84 and may (i) direct a specific procedure or treatment to be provided, such as artificially administered  
85 hydration and nutrition; (ii) direct a specific procedure or treatment to be withheld; or (iii) appoint an  
86 agent to make health care decisions for the declarant as specified in the advance directive if the  
87 declarant is determined to be incapable of making an informed decision, including *the authorization to*  
88 *admit the declarant to a mental health facility pursuant to § 37.2-805.1 and the decision to make, after*  
89 *the declarant's death, an anatomical gift of all of the declarant's body or an organ, tissue or eye donation*  
90 *pursuant to Article 2 (§ 32.1-289.2 et seq.) of Chapter 8 of Title 32.1 and in compliance with any*  
91 *directions of the declarant. Should any other specific directions be held to be invalid, such invalidity*  
92 *shall not affect the advance directive. If the declarant appoints an agent in an advance directive, that*  
93 *agent shall have the authority to make health care decisions for the declarant as specified in the advance*  
94 *directive if the declarant is determined to be incapable of making an informed decision and shall have*  
95 *decision-making priority over any individuals authorized under § 54.1-2986 to make health care*  
96 *decisions for the declarant. In no case shall the agent refuse or fail to honor the declarant's wishes in*  
97 *relation to anatomical gifts or organ, tissue or eye donation.*

98 ADVANCE MEDICAL DIRECTIVE

99 I, ....., willfully and voluntarily make known my desire and do hereby  
100 declare:

101 If at any time my attending physician should determine that I have a terminal  
102 condition where the application of life-prolonging procedures would serve only  
103 to artificially prolong the dying process, I direct that such procedures be  
104 withheld or withdrawn, and that I be permitted to die naturally with only the  
105 administration of medication or the performance of any medical procedure

106 deemed necessary to provide me with comfort care or to alleviate pain (OPTION:

107 I specifically direct that the following procedures or treatments be provided  
108 to me: .....)

109 In the absence of my ability to give directions regarding the use of such life-prolonging procedures,  
110 it is my intention that this advance directive shall be honored by my family and physician as the final  
111 expression of my legal right to refuse medical or surgical treatment and accept the consequences of such  
112 refusal.

113 OPTION: APPOINTMENT OF AGENT (CROSS THROUGH IF YOU DO NOT WANT TO  
114 APPOINT AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU.)

115 I hereby appoint ..... (primary agent), of ..... (address and telephone  
116 number), as my agent to make health care decisions on my behalf as authorized  
117 in this document. If ..... (primary agent) is not reasonably available or  
118 is unable or unwilling to act as my agent, then I appoint ..... (successor

119 agent), of ..... (address and telephone number), to serve in that capacity.

120 I hereby grant to my agent, named above, full power and authority to make health care decisions on  
121 my behalf as described below whenever I have been determined to be incapable of making an informed  
122 decision about providing, withholding or withdrawing medical treatment. The phrase "incapable of  
123 making an informed decision" means unable to understand the nature, extent and probable consequences  
124 of a proposed medical decision or unable to make a rational evaluation of the risks and benefits of a  
125 proposed medical decision as compared with the risks and benefits of alternatives to that decision, or  
126 unable to communicate such understanding in any way. My agent's authority hereunder is effective as  
127 long as I am incapable of making an informed decision.

128 The determination that I am incapable of making an informed decision shall be made by my  
129 attending physician and a second physician or licensed clinical psychologist after a personal examination  
130 of me and shall be certified in writing. Such certification shall be required before treatment is withheld  
131 or withdrawn, and before, or as soon as reasonably practicable after, treatment is provided, and every  
132 180 days thereafter while the treatment continues.

133 In exercising the power to make health care decisions on my behalf, my agent shall follow my  
134 desires and preferences as stated in this document or as otherwise known to my agent. My agent shall  
135 be guided by my medical diagnosis and prognosis and any information provided by my physicians as to  
136 the intrusiveness, pain, risks, and side effects associated with treatment or nontreatment. My agent shall  
137 not authorize a course of treatment which he knows, or upon reasonable inquiry ought to know, is  
138 contrary to my religious beliefs or my basic values, whether expressed orally or in writing. If my agent  
139 cannot determine what treatment choice I would have made on my own behalf, then my agent shall  
140 make a choice for me based upon what he believes to be in my best interests.

141 OPTION: POWERS OF MY AGENT (CROSS THROUGH ANY LANGUAGE YOU DO NOT  
142 WANT AND ADD ANY LANGUAGE YOU DO WANT.)

143 The powers of my agent shall include the following:

144 A. To consent to or refuse or withdraw consent to any type of medical care, treatment, surgical  
145 procedure, diagnostic procedure, medication and the use of mechanical or other procedures that affect  
146 any bodily function, including, but not limited to, artificial respiration, artificially administered nutrition  
147 and hydration, and cardiopulmonary resuscitation. This authorization specifically includes the power to  
148 consent to the administration of dosages of pain-relieving medication in excess of recommended dosages  
149 in an amount sufficient to relieve pain, even if such medication carries the risk of addiction or  
150 inadvertently hastens my death;

151 B. To request, receive, and review any information, verbal or written, regarding my physical or  
152 mental health, including but not limited to, medical and hospital records, and to consent to the  
153 disclosure of this information;

154 C. To employ and discharge my health care providers;

155 D. To authorize my admission to or discharge (including transfer to another facility) from any  
156 hospital, hospice, nursing home, adult home or other medical care facility for services other than those  
157 for treatment of mental illness requiring admission procedures provided in Article 1 (§ 37.2-800 et seq.)  
158 of Chapter 8 of Title 37.2; and

159 E. To authorize my admission to or discharge (including transfer to another facility) from a mental  
160 health facility pursuant to § 37.2-805.1; and

161 F. To take any lawful actions that may be necessary to carry out these decisions, including the  
162 granting of releases of liability to medical providers.

163 Further, my agent shall not be liable for the costs of treatment pursuant to his authorization, based  
164 solely on that authorization.

165 OPTION: APPOINTMENT OF AN AGENT TO MAKE AN ANATOMICAL GIFT OR ORGAN,  
166 TISSUE OR EYE DONATION (CROSS THROUGH IF YOU DO NOT WANT TO APPOINT AN  
167 AGENT TO MAKE AN ANATOMICAL GIFT OR ANY ORGAN, TISSUE OR EYE DONATION  
168 FOR YOU.)

169 Upon my death, I direct that an anatomical gift of all of my body or certain  
170 organ, tissue or eye donations may be made pursuant to Article 2 (§ 32.1-289.2  
171 et seq.) of Chapter 8 of Title 32.1 and in accordance with my directions, if  
172 any. I hereby appoint ..... as my agent, of ..... (address and telephone  
173 number), to make any such anatomical gift or organ, tissue or eye donation  
174 following my death. I further direct that: ..... (declarant's directions  
175 concerning anatomical gift or organ, tissue or eye donation).

176 This advance directive shall not terminate in the event of my disability.

177 By signing below, I indicate that I am emotionally and mentally competent to make this advance  
178 directive and that I understand the purpose and effect of this document.

179

180 \_\_\_\_\_ (Date) \_\_\_\_\_ (Signature of Declarant)

181 The declarant signed the foregoing advance directive in my presence.

182 (Witness) \_\_\_\_\_

183 (Witness) \_\_\_\_\_

184 § 54.1-2986. Procedure in absence of an advance directive; procedure for advance directive without  
 185 agent; no presumption; persons who may authorize treatment for patients incapable of informed  
 186 decisions; applicability restricted to nonprotesting patients.

187 A. Whenever (i) the attending physician of an adult patient has determined after personal  
 188 examination that such patient, because of mental illness, mental retardation, or any other mental  
 189 disorder, or a physical disorder which precludes communication or impairs judgment, is incapable of  
 190 making an informed decision about providing, withholding or withdrawing a specific medical treatment  
 191 or course of treatment and such adult patient has not made an advance directive in accordance with this  
 192 article or (ii) the attending physician of an adult patient has determined after personal examination that  
 193 such patient, because of mental illness, mental retardation, or any other mental disorder, or a physical  
 194 disorder which precludes communication or impairs judgment, is incapable of making an informed  
 195 decision about providing, withholding or withdrawing a specific medical treatment or course of treatment  
 196 and the adult patient has made an advance directive in accordance with this article which does not  
 197 indicate his wishes with respect to the specific course of treatment at issue and does not appoint an  
 198 agent to make health care decisions upon his becoming incapable of making an informed decision, the  
 199 attending physician may, upon compliance with the provisions of this section, provide to, withhold or  
 200 withdraw from such patient medical or surgical care or treatment, including, but not limited to,  
 201 life-prolonging procedures, upon the authorization of any of the following persons, in the specified order  
 202 of priority, if the physician is not aware of any available, willing and competent person in a higher  
 203 class:

204 1. A guardian or committee for the patient. This subdivision shall not be construed to require such  
 205 appointment in order that a treatment decision can be made under this section; or

206 2. The patient's spouse except where a divorce action has been filed and the divorce is not final; or

207 3. An adult child of the patient; or

208 4. A parent of the patient; or

209 5. An adult brother or sister of the patient; or

210 6. Any other relative of the patient in the descending order of blood relationship.

211 If two or more of the persons listed in the same class in subdivisions A 3 through A 6 with equal  
 212 decision-making priority inform the attending physician that they disagree as to a particular treatment  
 213 decision, the attending physician may rely on the authorization of a majority of the reasonably available  
 214 members of that class.

215 Any person authorized to consent to the providing, withholding or withdrawing of treatment pursuant  
 216 to this article shall (i) prior to giving consent, make a good faith effort to ascertain the risks and  
 217 benefits of and alternatives to the treatment and the religious beliefs and basic values of the patient  
 218 receiving treatment, and to inform the patient, to the extent possible, of the proposed treatment and the  
 219 fact that someone else is authorized to make a decision regarding that treatment and (ii) base his  
 220 decision on the patient's religious beliefs and basic values and any preferences previously expressed by  
 221 the patient regarding such treatment to the extent they are known, and if unknown or unclear, on the  
 222 patient's best interests. Regardless of the absence of an advance directive, if the patient has expressed his  
 223 intent to be an organ donor in any written document, no person noted in this section shall revoke, or in  
 224 any way hinder, such organ donation.

225 B. The absence of an advance directive by an adult patient shall not give rise to any presumption as  
 226 to his intent to consent to or refuse life-prolonging procedures.

227 C. The provisions of this article shall not apply to authorization of nontherapeutic sterilization,  
 228 abortion, or psychosurgery; or admission to a facility, as defined in § 37.2-100; however, the provisions  
 229 of this article, if otherwise applicable, may be employed to authorize a specific treatment or course of  
 230 treatment for a person who has been lawfully admitted to such a facility.

231 Further, the provisions of this article shall not authorize providing, continuing, withholding or  
 232 withdrawing of treatment if the provider of the treatment knows that such an action is protested by the  
 233 patient. No person shall authorize treatment, or a course of treatment, pursuant to this article, that such  
 234 person knows, or upon reasonable inquiry ought to know, is contrary to the religious beliefs or basic  
 235 values of the patient unable to make a decision, whether expressed orally or in writing.

236 D. Prior to withholding or withdrawing treatment for which authorization has been obtained or will  
 237 be sought pursuant to this article and prior to, or as soon as reasonably practicable thereafter, the  
 238 initiation of treatment for which authorization has been obtained or will be sought pursuant to this  
 239 article, and no less frequently than every 180 days while the treatment continues, the attending physician

240 shall obtain written certification that the patient is incapable of making an informed decision regarding  
241 the treatment from a licensed physician or clinical psychologist which shall be based on a personal  
242 examination of the patient. Whenever the authorization is being sought for treatment of a mental illness,  
243 the second physician or licensed clinical psychologist shall not be otherwise currently involved in the  
244 treatment of the person assessed. The cost of the assessment shall be considered for all purposes a cost  
245 of the patient's treatment.

246 E. On petition of any person to the circuit court of the county or city in which any patient resides or  
247 is located for whom treatment will be or is currently being provided, withheld or withdrawn pursuant to  
248 this article, the court may enjoin such action upon finding by a preponderance of the evidence that the  
249 action is not lawfully authorized by this article or by other state or federal law. <title>