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SENATE BILL NO. 371

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 23, 2012)

(Patron Prior to Substitute—Senator Barker)

A *BILL to amend and reenact §§ 37.2-1101 and 37.2-1102 of the Code of Virginia, relating to judicial authorization of treatment; advance directives.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-1101 and 37.2-1102 of the Code of Virginia are amended and reenacted as follows:

§ 37.2-1101. Judicial authorization of treatment.

A. An appropriate circuit court or district court judge or special justice may authorize treatment for a mental or physical disorder on behalf of an adult person, in accordance with this section, 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 treatment is in the best interest of the person.

B. Any person may request authorization of treatment for an adult person by filing a petition in the circuit court or district court or with a special justice of the county or city in which the person for whom treatment is sought resides or is located or in the county or city in which the proposed place of treatment is located. Upon filing the petition, the petitioner or the court shall deliver or send a certified copy of the petition to the person for whom treatment is sought and, if the identity and whereabouts of the person's next of kin are known, to the next of kin.

C. As soon as reasonably possible after the filing of the petition, the court shall appoint an attorney to represent the interests of the person for whom treatment is sought at the hearing. However, the 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 person for whom treatment is sought is indigent, his counsel shall be paid by the Commonwealth as provided in § 37.2-804 from funds appropriated to reimburse expenses incurred in the involuntary admission process. However, this provision shall not be construed to prohibit the direct payment of an attorney's fee by the person or an interested person on his behalf, which fee shall be subject to the review and approval of the court.

D. Following the appointment of an attorney pursuant to subsection C, the court shall schedule an expedited hearing of the matter. The court shall notify the person for whom treatment is sought, his next of kin, if known, the petitioner, and their respective counsel of the date and time for the hearing. In scheduling the 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.

E. Notwithstanding the provisions of subsections B and D regarding delivery or service of the petition and notice of the hearing to the next of kin of any person for whom consent to treatment is sought, if the person is a patient in any hospital, including a hospital licensed by the Department of Health pursuant to § 32.1-123 or a resident in any facility operated by the Department of Behavioral Health and Developmental Services and such person has no known guardian or legally authorized representative, at the time the petition is filed, the court may dispense with the requirement of any notice to the next of kin. If treatment is necessary to prevent imminent or irreversible harm, the court in its discretion may dispense with the requirement of providing notice. This subsection shall not be construed to interfere with any decision made pursuant to the Health Care Decisions Act (§ 54.1-2981 et seq.).

F. 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 attorney shall make a reasonable effort to inform the person of this information and to ascertain the person's religious beliefs and basic values and the views and preferences of the person's next of kin. A health care provider shall disclose or make available to the attorney, upon request, any information, records, and reports concerning the person that the attorney determines necessary to perform his duties under this section. Evidence presented at the hearing may be submitted by affidavit in the absence of objection by the person for whom treatment is sought, the petitioner, either of their respective counsel, or by any other interested party.

G. Prior to authorizing treatment pursuant to this section, the court shall find:

1. That there is no available person with legal authority under Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title 54.1, under the regulations promulgated pursuant to § 37.2-400, or under other applicable law to authorize the proposed treatment. A person who would have legal authority to

60 *authorize the proposed treatment shall be deemed to be unavailable if such person (i) cannot be*
61 *contacted within a reasonable period of time in light of the immediacy of the need for treatment for the*
62 *person for whom treatment is sought, (ii) is incapable of making an informed decision, or (iii) is unable*
63 *or unwilling to make a decision regarding authorization of the proposed treatment or to serve as the*
64 *legally authorized representative available to give consent of the person for whom treatment is sought;*

65 2. That the person for whom treatment is sought is incapable of making an informed decision
66 regarding treatment or is physically or mentally incapable of 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 treatment is in the best interest of the person and is medically and ethically
70 appropriate with respect to (i) the medical diagnosis and prognosis and (ii) any other information
71 provided by the attending physician of the person for whom treatment is sought. However, the court
72 shall not authorize a proposed treatment that is *contrary to the provisions of an advance directive*
73 *executed by the person pursuant to § 54.1-2983 or is proven by a preponderance of the evidence to be*
74 *contrary to the person's religious beliefs or basic values or to specific preferences stated by the person*
75 *before becoming incapable of making an informed decision*, unless the treatment is necessary to prevent
76 death or a serious irreversible condition. The court shall take into consideration the right of the person
77 to rely on nonmedical, remedial treatment in the practice of religion in lieu of medical treatment.

78 H. Any order authorizing treatment pursuant to subsection A shall describe any treatment authorized
79 and may authorize generally such related examinations, tests, or services as the court may determine to
80 be reasonably related to the treatment authorized. Treatment authorized by such order may include
81 palliative care as defined in § 32.1-162.1, if appropriate. The order shall require the treating physician to
82 review and document the appropriateness of the continued administration of antipsychotic medications
83 not less frequently than every 30 days. The order shall require the treating physician or other service
84 provider to report to the court and the person's attorney any change in the person's condition resulting in
85 probable restoration or development of the person's capacity to make and to communicate an informed
86 decision prior to completion of any authorized treatment and related services. The order may further
87 require the treating physician or other service provider to report to the court and the person's attorney
88 any change in circumstances regarding any authorized treatment or related services that may indicate
89 that such authorization is no longer in the person's best interests. Upon receipt of such report or upon
90 the petition of any interested party, the court may enter an order withdrawing or modifying its prior
91 authorization as it deems appropriate. Any petition or order under this section may be orally presented
92 or entered, provided a written order shall be subsequently executed.

93 *I. Nothing in this section shall be construed to limit the authority of a treating physician or other*
94 *service provider to administer treatment without judicial authorization when necessary to stabilize the*
95 *condition of the person for whom treatment is sought in an emergency.*

96 § 37.2-1102. Certain actions may not be authorized.

97 The following actions may not be authorized under this chapter:

98 1. Nontherapeutic sterilization, abortion, or psychosurgery.

99 2. Admission to a training center or a hospital. However, the court may issue an order under
100 § 37.2-1101 authorizing treatment of a person whose admission to a training center or hospital has been
101 or is simultaneously being authorized under § 37.2-805, 37.2-806, 37.2-807, or §§ 37.2-809 through
102 37.2-813, or of a person who is subject to an order of involuntary admission previously or
103 simultaneously issued under §§ 37.2-814 through 37.2-819 or of Chapter 9 (§ 37.2-900 et seq.) of ~~this~~
104 ~~title~~.

105 3. Administration of antipsychotic medication for a period to exceed 180 days or electroconvulsive
106 therapy for a period to exceed 60 days pursuant to any petition filed under this section. The court may
107 authorize electroconvulsive therapy only if it is demonstrated by clear and convincing evidence, which
108 shall include the testimony of a licensed psychiatrist, that all other reasonable forms of treatment have
109 been considered and that electroconvulsive therapy is the most effective treatment for the person. Even
110 if the court has authorized administration of antipsychotic medication or electroconvulsive therapy
111 hereunder, these treatments may be administered over the person's objection only if he is subject to an
112 order of involuntary admission, including involuntary outpatient treatment, previously or simultaneously
113 issued under §§ 37.2-814 through 37.2-819 or Chapter 9 (§ 37.2-900 et seq.) of ~~this title~~, or the
114 provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.

115 4. Restraint or transportation of the person, unless ~~it~~ *the court* finds upon clear and convincing
116 evidence that restraint or transportation is necessary to the administration of an authorized treatment for
117 a physical disorder *or for a mental disorder if the person is subject to an order of involuntary admission*
118 *issued previously or simultaneously under Chapter 11 (§ 19.2-167 et seq.) or 11.1 (§ 19.2-182.2 et seq.)*
119 *of Title 19.2, §§ 37.2-814 through 37.2-819, or Chapter 9 (§ 37.2-900 et seq.).*