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SENATE BILL NO. 759

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 15, 2013)

(Patron Prior to Substitute—Senator Edwards)

*A BILL to amend and reenact §§ 64.2-719, 64.2-2001, 64.2-2002, 64.2-2007, 64.2-2008, 64.2-2022, and 64.2-2023 of the Code of Virginia, relating to guardianship and conservatorship.***Be it enacted by the General Assembly of Virginia:****1. That §§ 64.2-719, 64.2-2001, 64.2-2002, 64.2-2007, 64.2-2008, 64.2-2022, and 64.2-2023 of the Code of Virginia are amended and reenacted as follows:****§ 64.2-719. Methods of creating trust.**

A trust may be created by:

1. Transfer of property to another person as trustee during the settlor's lifetime by the settlor or by the settlor's agent, acting in accordance with § 64.2-1612, under a power of attorney that expressly authorizes the agent to create a trust on the settlor's behalf; or by will or other disposition taking effect upon the settlor's death;

2. Declaration by the owner of property that the owner holds identifiable property as trustee; or

3. Exercise of a power of appointment in favor of a trustee; or

4. *A conservator acting in accordance with § 64.2-2023.***§ 64.2-2001. Filing of petition; jurisdiction; instructions to be provided.**

A. A petition for the appointment of a guardian or conservator shall be filed with the circuit court of the county or city in which the respondent is a resident or is located or in which the respondent resided immediately prior to becoming a patient, voluntarily or involuntarily, in a hospital, including a hospital licensed by the Department of Health pursuant to § 32.1-123, or a resident in a nursing facility or nursing home, convalescent home, assisted living facility as defined in § 63.2-100, or any other similar institution or, if the petition is for the appointment of a conservator for a nonresident with property in the state, in the city or county in which the respondent's property is located.

B. Article 2 (§ 64.2-2105 et seq.) of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act provides the exclusive jurisdictional basis for a court of the Commonwealth to appoint a guardian or conservator for an adult.

C. Where the petition is brought by a parent or guardian of a respondent who is under the age of 18, or by any other person and there is no living parent or guardian of a respondent who is under the age of 18, the petition may be filed no earlier than six months prior to the respondent's eighteenth birthday. Where the petition is brought by any other person and there is a living parent or guardian of a respondent who is under the age of 18, the petition may be filed no earlier than the respondent's eighteenth birthday.

D. Instructions regarding the duties, powers, and liabilities of guardians and conservators shall be provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court, and the clerk shall provide such information to each guardian and conservator upon notice of appointment.

E. The circuit court in which the proceeding is first commenced may order a transfer of venue if it would be in the best interest of the respondent.

§ 64.2-2002. Who may file petition; contents.

A. Any person may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship, if any, to the respondent and, to the extent known as of the date of filing, shall include the following:

1. The respondent's name, date of birth, place of residence or location, post office address, and the sealed filing of the social security number;

2. *The basis for the court's jurisdiction under the provisions of Article 2 (§ 64.2-2105 et seq.) of Chapter 21;*

3. The names and post office addresses of the respondent's spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including stepchildren. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;

3.4. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody;

4.5. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, or and any

guardian, committee, or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such durable power of attorney ~~or~~, advance directive, *or order appointing the guardian, committee, or conservator*, if available;

5-6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;

6-7. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and treatment plan;

7-8. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;

8-9. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent and that person's relationship to the respondent;

9-10. The native language of the respondent and any necessary alternative mode of communication;

10-11. A statement of the financial resources of the respondent that shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income, other receipts, and debts;

11-12. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and

12-13. A request for appointment of a guardian ad litem.

§ 64.2-2007. Hearing on petition to appoint.

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

B. The court or the jury, if a jury is requested, shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. *The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones it for cause.* The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

C. In determining the need for a guardian or a conservator and the powers and duties of any guardian or conservator, if needed, consideration shall be given to the following factors: (i) the limitations of the respondent; (ii) the development of the respondent's maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including advance directives and durable powers of attorney; (iv) the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; (v) the actions needed to be taken by the guardian or conservator; ~~and~~ (vi) the suitability of the proposed guardian or conservator; *and (vii) the best interests of the respondent.*

D. 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, who may be the spouse of the respondent, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent.

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

§ 64.2-2008. Fees and costs.

A. The petitioner shall pay the filing fee set forth in subdivision A 43 of § 17.1-275 and costs. Service fees and court costs may be waived by the court if it is alleged under oath that the estate of the respondent is unavailable or insufficient. If a guardian or conservator is appointed *and the court finds that the petition is brought in good faith and for the benefit of the respondent*, the court shall order that the petitioner be reimbursed from the estate for all *reasonable* costs and fees if the estate of the incapacitated person is available and sufficient to reimburse the petitioner. If a guardian or conservator is not appointed and the court nonetheless finds that the petition is brought in good faith and for the benefit of the respondent, the court may direct the respondent's estate, if available and sufficient, to reimburse the petitioner for all *reasonable* costs and fees. *The court may require the petitioner to pay or reimburse all or some of the respondent's reasonable costs and fees and any other costs incurred under this chapter if the court finds that the petitioner initiated a proceeding under this chapter that was in bad faith or not for the benefit of the respondent.*

B. In any proceeding filed pursuant to this article, if the adult subject of the petition is determined to be indigent, any fees and costs of the proceeding that are fixed by the court or taxed as costs shall be borne by the Commonwealth.

§ 64.2-2022. Management powers and duties of conservator.

A. A conservator, in managing the estate, shall have the powers set forth in § 64.2-105 as of the date the conservator acts as well as the following powers, which may be exercised without prior court authorization except as otherwise specifically provided in the court's order of appointment:

1. To ratify or reject a contract entered into by an incapacitated person;
2. To pay any sum distributable for the benefit of the incapacitated person or for the benefit of a legal dependent by paying the sum directly to the distributee, to the provider of goods and services, to any individual or facility that is responsible for or has assumed responsibility for care and custody, or to a distributee's custodian under a Uniform Gifts or Transfers to Minors Act of any applicable jurisdiction or by paying the sum to the guardian of the incapacitated person or, in the case of a dependent, to the dependent's guardian or conservator;
3. To maintain life, health, casualty, and liability insurance for the benefit of the incapacitated person or his legal dependents;
4. To manage the estate following the termination of the conservatorship until its delivery to the incapacitated person or successors in interest;
5. To execute and deliver all instruments and to take all other actions that will serve in the best interests of the incapacitated person;
6. To initiate a proceeding (i) to revoke a power of attorney under the provisions of the Uniform Power of Attorney Act (§ 64.2-1600 et seq.) or, (ii) to make an augmented estate election under § 64.2-302, or (iii) to make an election to take a family allowance, exempt property, or a homestead allowance under § 64.2-313; and
7. To borrow money for periods of time and upon terms and conditions for rates, maturities, renewals, and security that to the conservator shall seem advisable, including the power to borrow from the conservator, if the conservator is a bank, for any purpose; to mortgage or pledge the portion of the incapacitated person's estate that may be required to secure the loan or loans; and, as maker or endorser, to renew existing loans.

B. The court may impose requirements to be satisfied by the conservator prior to the conveyance of any interest in real estate, including (i) increasing the amount of the conservator's bond, (ii) securing an appraisal of the real estate or interest, (iii) giving notice to interested parties as the court deems proper, (iv) consulting by the conservator with the commissioner of accounts and, if one has been appointed, with the guardian, and (v) requiring the use of a common source information company, as defined in § 54.1-2130, when listing the property. If the court imposes any such requirements, the conservator shall make a report of his compliance with each requirement, to be filed with the commissioner of accounts. Promptly following receipt of the conservator's report, the commissioner of accounts shall file a report with the court indicating whether the requirements imposed have been met and whether the sale is otherwise consistent with the conservator's duties. The conveyance shall not be closed until a report by the commissioner of accounts is filed with the court and confirmed as provided in §§ 64.2-1212, 64.2-1213, and 64.2-1214.

§ 64.2-2023. Estate planning.

A. In the order appointing a conservator entered pursuant to § 64.2-2009 or in a separate proceeding brought on petition, the court may *for good cause shown* authorize a conservator to (i) make gifts from income and principal of the incapacitated person's estate not necessary for the incapacitated person's maintenance to those persons to whom the incapacitated person would, in the judgment of the court, have made gifts if he had been of sound mind or, (ii) disclaim property as provided in Chapter 26 (§ 64.2-2600 et seq.), or (iii) *create a revocable or irrevocable trust on behalf of an incapacitated person with terms approved by the court or transfer assets of an incapacitated person or an incapacitated person's estate to a trust.*

~~A B. In a proceeding under this section, a guardian ad litem shall be appointed to represent the interest of the incapacitated person, and reasonable notice of the hearing shall be given to the incapacitated person and to all persons who would be heirs or distributees of the incapacitated person if he were dead as of the date of the filing of the petition or beneficiaries under any known will of the incapacitated person. The court may authorize the hearing to proceed without notice to any heir, distributee, or beneficiary who would not be substantially affected by the proposed gift or disclaimer. Notice of a proceeding under this section shall be given pursuant to Chapter 8 (§ 8.01-285 et seq.) of Title 8.01 and the Rules of Supreme Court of Virginia to: (i) the incapacitated person and the incapacitated person's spouse and children, (ii) all beneficiaries named in any known will of the incapacitated person, (iii) the incapacitated person's intestate heirs determined as if the incapacitated person had died intestate on the date of the filing of the petition, and (iv) all other interested persons. The court may authorize the hearing to proceed without notice to any person who would not be substantially affected by the proceedings. For the purposes of this section, the beneficiaries and intestate heirs shall be deemed possessed of inchoate property rights. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not~~

183 *reasonably ascertainable, may with the approval of the court be represented and bound by another*
184 *having a substantially identical interest with respect to the will proceeding under this section, but only*
185 *to the extent that there is no conflict of interest between the representative and the person represented.*

186 C. The court shall determine the amounts, recipients, and proportions of any gifts of the estate ~~and,~~
187 the advisability of any disclaimer, *whether good cause exists to create a trust or transfer assets, and*
188 *whether to approve the trust terms* after considering ~~(a)~~ (i) the size and composition of the estate; ~~(b)~~
189 (ii) the nature and probable duration of the incapacity; ~~(c)~~ (iii) the effect of the gifts ~~or,~~ disclaimers,
190 trusts, or transfers on the estate's financial ability to meet the incapacitated person's foreseeable health,
191 medical care, and maintenance needs; ~~(d)~~ (iv) the incapacitated person's estate plan *and the effect of the*
192 *gifts, disclaimers, trusts, or transfers on the estate plan;* ~~(e)~~ (v) prior patterns of assistance or gifts to the
193 proposed donees; ~~(f)~~ (vi) the tax effect of the proposed gifts ~~or,~~ disclaimers, trusts, or transfers; ~~(g)~~ (vii)
194 the effect of any transfer of assets or disclaimer on the establishment or retention of eligibility for
195 medical assistance services; (viii) *whether to require, during the lifetime of the incapacitated person,*
196 *that the trustee of any trust created or funded pursuant to this section post bond, with or without surety,*
197 *or provide an accounting as set forth in § 64.2-1305; and* ~~(h)~~ (ix) other factors that the court may deem
198 relevant.

199 B.D. If the gifts by the conservator under *clause (i) of subsection A* do not exceed \$100 to each
200 donee in a calendar year and do not exceed a total of \$500 in a calendar year, the conservator may
201 make such gifts without a hearing under ~~subsection A~~ *this section*, the appointment of a guardian ad
202 litem, or giving ~~notification to the incapacitated person or any heir, distributee, or beneficiary~~ *notice to*
203 *any person.* Prior to the making of such a gift, the conservator shall consider clauses ~~(a)~~ (i) through ~~(h)~~
204 (ix) set forth in subsection A C and shall also find that the incapacitated person has shown a history of
205 giving the same or a similar gift to a specific donee for the previous three years prior to the
206 appointment of the conservator.

207 C.E. The conservator may transfer assets of an incapacitated person or an incapacitated person's
208 estate into an irrevocable trust where the transfer has been designated solely for burial of the
209 incapacitated person or spouse of the incapacitated person in accordance with conditions set forth in
210 subdivision A 2 of § 32.1-325. The conservator also may contractually bind an incapacitated person or
211 an incapacitated person's estate by executing a preneed funeral contract, described in Chapter 28
212 (§ 54.1-2800 et seq.) of Title 54.1, for the benefit of the incapacitated person.

213 D.F. A conservator may exercise the incapacitated person's power to revoke or amend a trust or to
214 withdraw or demand distribution of trust assets only with the approval of the court for good cause
215 shown, unless the trust instrument expressly provides otherwise.