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HOUSE BILL NO. 2230

Offered January 13, 2021

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A BILL to amend and reenact §§ 64.2-2000, 64.2-2003, and 64.2-2007 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 37.2 a section numbered 37.2-314.3, relating to supported decision-making agreements. Report.

Patrons—Bell, Kory, Price and Tran

Referred to Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2000, 64.2-2003, and 64.2-2007 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 3 of Title 37.2 a section numbered 37.2-314.3 as follows:

§ 37.2-314.3. Powers and duties of the Department related to supported decision-making agreements; report.

A. As used in this section:

"Principal" means an adult with an intellectual or developmental disability who seeks to enter or has entered into a supported decision-making agreement with a supporter.

"Supported decision-making agreement" means an agreement between a principal and a supporter that sets out the specific terms of support to be provided by the supporter, including (i) helping the principal monitor and manage his medical, financial, and other affairs; (ii) assisting the principal in accessing, obtaining, and understanding information relevant to decisions regarding his affairs; (iii) assisting the principal in understanding information, options, responsibilities, and consequences of decisions; and (iv) ascertaining the wishes and decisions of the principal regarding his affairs, assisting in communicating such wishes and decisions to other persons, and advocating to ensure the wishes and decisions of the principal are implemented.

"Supporter" means a person who has entered into a supported decision-making agreement with a principal.

B. The Department shall develop and implement a program to educate individuals with intellectual and developmental disabilities, their families, and others regarding the availability of supported decision-making agreements, the process by which an individual with an intellectual or developmental disability may enter into a supported decision-making agreement with a supporter, and the rights and responsibilities of principals and supporters who are parties to a supported decision-making agreement. Such program shall include (i) specific training opportunities for individuals with intellectual and developmental disabilities and who seek to enter into supported decision-making agreements, individuals interested in serving as supporters pursuant to supported decision-making agreements, family members of principals and individuals with intellectual and developmental disabilities who seek to enter into supported decision-making agreements, and members of the medical, legal, and financial professions and other individuals who provide services to individuals with intellectual and developmental disabilities who may enter into supported decision-making agreements and (ii) development of model supported decision-making agreements for individuals who seek to enter into supported decision-making agreements. Such program shall also include development of information about and protocols for preventing, identifying, and addressing abuse and exploitation of individuals with intellectual and developmental disabilities who enter into supported decision-making agreements.

C. The Department shall collect data regarding the utilization of supported decision-making agreements in the Commonwealth to guide the development of policies and programs to enhance the use of supported decision-making agreements and shall report such information together with recommendations to enhance the utilization of supported decision-making agreements annually to the Governor and the General Assembly by November 1.

§ 64.2-2000. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Advance directive" shall have the same meaning as provided in § 54.1-2982.

"Annual report" means the report required to be filed by a guardian pursuant to § 64.2-2020.

"Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." "Conservator" includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to

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59 Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt  
60 charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide  
61 conservatorial services to incapacitated persons. Such tax-exempt charitable organization shall not be a  
62 provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been  
63 designated by the Department for Aging and Rehabilitative Services as a public conservator, it may also  
64 serve as a conservator for other individuals.

65 "Estate" includes both real and personal property.

66 "Facility" means a state or licensed hospital, training center, psychiatric hospital, or other type of  
67 residential or outpatient mental health or mental retardation facility. When modified by the word "state,"  
68 "facility" means a state hospital or training center operated by the Department of Behavioral Health and  
69 Developmental Services, including the buildings and land associated with it.

70 "Guardian" means a person appointed by the court who has the powers and duties set out in  
71 § 64.2-2019, or § 63.2-1609 if applicable, and who is responsible for the personal affairs of an  
72 incapacitated person, including responsibility for making decisions regarding the person's support, care,  
73 health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of  
74 involuntary admission, residence. Where the context plainly indicates, the term includes a "limited  
75 guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the  
76 Department for Aging and Rehabilitative Services as a public guardian pursuant to Article 6 (§ 51.5-149  
77 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization  
78 established pursuant to § 501(c)(3) of the Internal Revenue Code to provide guardian services to  
79 incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services  
80 to the incapacitated person. If a tax-exempt charitable organization has been designated by the  
81 Department for Aging and Rehabilitative Services as a public guardian, it may also serve as a guardian  
82 for other individuals.

83 "Guardian ad litem" means an attorney appointed by the court to represent the interests of the  
84 respondent and whose duties include evaluation of the petition for guardianship or conservatorship and  
85 filing a report with the court pursuant to § 64.2-2003.

86 "Incapacitated person" means an adult who has been found by a court to be incapable of receiving  
87 and evaluating information effectively or responding to people, events, or environments to such an  
88 extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care,  
89 safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or  
90 financial affairs or provide for his support or for the support of his legal dependents without the  
91 assistance or protection of a conservator. A finding that the individual displays poor judgment alone  
92 shall not be considered sufficient evidence that the individual is an incapacitated person within the  
93 meaning of this definition. A finding that a person is incapacitated shall be construed as a finding that  
94 the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of  
95 Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides  
96 otherwise.

97 "Individualized education plan" or "IEP" means a plan or program developed annually to ensure that  
98 a child who has a disability identified under the law and is attending an elementary or secondary  
99 educational institution receives specialized instruction and related services as provided by 20 U.S.C.  
100 § 1414.

101 "Individual receiving services" or "individual" means a current direct recipient of public or private  
102 mental health, developmental, or substance abuse treatment, rehabilitation, or habilitation services and  
103 includes the terms "consumer," "patient," "resident," "recipient," or "client."

104 "Limited conservator" means a person appointed by the court who has only those responsibilities for  
105 managing the estate and financial affairs of an incapacitated person as specified in the order of  
106 appointment.

107 "Limited guardian" means a person appointed by the court who has only those responsibilities for the  
108 personal affairs of an incapacitated person as specified in the order of appointment.

109 "Mental illness" means a disorder of thought, mood, emotion, perception, or orientation that  
110 significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life  
111 necessities and requires care and treatment for the health, safety, or recovery of the individual or for the  
112 safety of others.

113 "Petition" means the document filed with a circuit court to initiate a proceeding to appoint a guardian  
114 or conservator.

115 "Power of attorney" has the same meaning ascribed to it in § 64.2-1600.

116 "Property" includes both real and personal property.

117 "Respondent" means an allegedly incapacitated person for whom a petition for guardianship or  
118 conservatorship has been filed.

119 "*Supported decision-making agreement*" has the same meaning ascribed to it in § 37.2-314.3.

120 "Temporary conservator" means a person appointed by a court for a limited duration of time as

121 specified in the order of appointment.

122 "Temporary guardian" means a person appointed by a court for a limited duration of time as  
123 specified in the order of appointment.

124 "Transition plan" means the plan that is required as part of the IEP used to help students and  
125 families prepare for the future after the student reaches the age of majority.

126 **§ 64.2-2003. Appointment of guardian ad litem.**

127 A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a  
128 guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee  
129 that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

130 B. Duties of the guardian ad litem include (i) personally visiting the respondent; (ii) advising the  
131 respondent of rights pursuant to §§ 64.2-2006 and 64.2-2007 and certifying to the court that the  
132 respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent,  
133 pursuant to § 64.2-2006, if the guardian ad litem believes that counsel for the respondent is necessary;  
134 (iv) investigating the petition and evidence, requesting additional evaluation if necessary, considering  
135 whether a less restrictive alternative to guardianship or conservatorship is available, including the use of  
136 an advance directive, *supported decision-making agreement*, or durable power of attorney, and filing a  
137 report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences. If  
138 the respondent is between 17 and a half and 21 years of age and has an Individualized Education Plan  
139 (IEP) and transition plan, the guardian ad litem shall review such IEP and transition plan and include  
140 the results of his review in the report required by clause (iv).

141 C. In the report required by clause (iv) of subsection B, the guardian ad litem shall address the  
142 following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or  
143 conservator is needed based on evaluations and reviews conducted pursuant to subsection B; (iii) the  
144 extent of the duties and powers of the guardian or conservator; (iv) the propriety and suitability of the  
145 person selected as guardian or conservator after consideration of the person's geographic location,  
146 familial or other relationship with the respondent, ability to carry out the powers and duties of the  
147 office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of  
148 the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on  
149 the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent.

150 D. A health care provider and local school division shall disclose or make available to the guardian  
151 ad litem, upon request, any information, records, and reports concerning the respondent that the guardian  
152 ad litem determines necessary to perform his duties under this section.

153 **§ 64.2-2007. Hearing on petition to appoint.**

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

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

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

173 D. If, after considering the evidence presented at the hearing, the court or jury determines on the  
174 basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or  
175 conservator, the court shall appoint a suitable person, who may be the spouse of the respondent, to be  
176 the guardian or the conservator or both, giving due deference to the wishes of the respondent. If a  
177 guardian or conservator is appointed, the court shall inform him of his duties and powers pursuant to  
178 Article 2 (§ 64.2-2019 et seq.) and shall further inform the guardian or conservator that, to the extent  
179 feasible, the respondent should be encouraged to participate in decisions, act on his own behalf, and  
180 develop or maintain the capacity to manage his personal affairs if he retains any decision-making rights.  
181 Except for good cause shown, including a determination by the court that there is no acceptable

182 alternative available to serve, the court shall not appoint as guardian or conservator for the respondent  
183 an attorney who has been engaged by the petitioner to represent the petitioner within three calendar  
184 years of the appointment. Such prohibition also applies to all other attorneys and employees of the law  
185 firm with which such attorney is associated. The court shall require the proposed guardian or  
186 conservator to certify at the time of appointment that he has disclosed to the court any such  
187 representation of the petitioner or association with a law firm that represented the petitioner within the  
188 three calendar years preceding the appointment. Compensation paid by a petitioner to an attorney or law  
189 firm for serving as a guardian or conservator shall not constitute representation of the petitioner by such  
190 attorney or law firm. In the case of a petitioner that is a medical care facility as defined in § 32.1-102.1,  
191 the court may, for good cause shown, order that the reasonable costs for the guardian or conservator be  
192 paid by the petitioner during the time the respondent is under the care of such medical care facility.  
193 The court in its order shall make specific findings of fact and conclusions of law in support of each  
194 provision of any orders entered. The order of appointment shall be made in a form that complies with  
195 the requirements set out in § 64.2-2009.