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HOUSE BILL NO. 2027

Offered January 11, 2023

Prefiled January 10, 2023

A BILL to amend and reenact §§ 64.2-2009 and 64.2-2019 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-2019.1, relating to guardianship; restricted communication procedures.

 Patron—Roem

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2009 and 64.2-2019 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-2019.1 as follows:

§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.

A. 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, § 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed appropriate following consideration of the factors specified in § 64.2-2007; (vi) set the bond of the guardian and the bond and surety, if any, of the conservator; and (vii) where a petition is brought prior to the incapacitated person's eighteenth birthday, pursuant to subsection C of § 64.2-2001, whether the order shall take effect immediately upon entry or on the incapacitated person's eighteenth birthday.

B. 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. 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 that are specified in the order.

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

D. 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. A guardian need not be appointed for a person where a health care decision is made pursuant to, and within the scope of, the Health Care Decisions Act (§ 54.1-2981 et seq.).

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 the Uniform Power of Attorney Act (§ 64.2-1600 et seq.) 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.

E. All orders appointing a guardian shall include the following statements in conspicuous bold print in at least 14-point type:

"1. Pursuant to § 64.2-2009 of the Code of Virginia, _____ (name of guardian), is hereby appointed as guardian of _____ (name of respondent) with all duties and powers granted to a guardian pursuant to § 64.2-2019 of the Code of Virginia, including but not limited to: (enter a statement of the rights removed and retained, if any, at the time of appointment; whether the appointment of a guardian is a full guardianship, public guardianship pursuant to § 64.2-2010 of the Code of Virginia, limited guardianship pursuant to § 64.2-2009 of the Code of Virginia, or temporary

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HB2027

59 guardianship; and the duration of the appointment).

60 2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian, to
61 the extent possible, shall encourage the incapacitated person to participate in decisions, shall consider the
62 expressed desires and personal values of the incapacitated person to the extent known, and shall not
63 ~~unreasonably~~ restrict an incapacitated person's ability to communicate with, visit, or interact with other
64 persons with whom the incapacitated person has an established relationship, *unless such restriction is*
65 *reasonable to prevent harm to or financial exploitation of such incapacitated person and after*
66 *consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be*
67 *imposed pursuant to § 64.2-2019.1.*

68 3. Pursuant to § 64.2-2020 of the Code of Virginia, an annual report shall be filed by the guardian
69 with the local department of social services for the jurisdiction where the incapacitated person resides.

70 4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition for
71 restoration of the incapacitated person to capacity; modification of the type of appointment or areas of
72 protection, management, or assistance granted; or termination of the guardianship."

73 **§ 64.2-2019. Duties and powers of guardian.**

74 A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was
75 appointed guardian and may be held personally liable for a breach of any fiduciary duty to the
76 incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the
77 guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of
78 the incapacitated person.

79 B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance
80 directive or durable power of attorney previously executed by the incapacitated person. A guardian may
81 seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as
82 provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of
83 the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of
84 § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an
85 advance directive, but the modification shall not in any way affect the incapacitated person's directives
86 concerning the provision or refusal of specific medical treatments or procedures.

87 C. A guardian shall maintain sufficient contact with the incapacitated person to know of his
88 capabilities, limitations, needs, and opportunities. The guardian shall visit the incapacitated person as
89 often as necessary.

90 D. A guardian shall be required to seek prior court authorization to change the incapacitated person's
91 residence to another state, to terminate or consent to a termination of the person's parental rights, or to
92 initiate a change in the person's marital status.

93 E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in
94 decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A
95 guardian, in making decisions, shall consider the expressed desires and personal values of the
96 incapacitated person to the extent known and shall otherwise act in the incapacitated person's best
97 interest and exercise reasonable care, diligence, and prudence. A guardian shall not ~~unreasonably~~
98 an incapacitated person's ability to communicate with, visit, or interact with other persons with whom
99 the incapacitated person has an established relationship, *unless such restriction is reasonable to prevent*
100 *harm to or financial exploitation of such incapacitated person and after consideration of the expressed*
101 *wishes of the incapacitated person. Such restrictions shall only be imposed pursuant to § 64.2-2019.1.*

102 F. A guardian shall have authority to make arrangements for the funeral and disposition of remains,
103 including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains,
104 or some combination thereof, if the guardian is not aware of any person that has been otherwise
105 designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to
106 make arrangements for the funeral and disposition of remains after the death of an incapacitated person
107 if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to
108 determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make
109 the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next
110 of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral
111 service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune
112 from civil liability for any act, decision, or omission resulting from acceptance of any dead body for
113 burial, cremation, or other disposition when the provisions of this section are met, unless such acts,
114 decisions, or omissions resulted from bad faith or malicious intent.

115 **§ 64.2-2019.1. Procedures to restrict communication, visitation, or interaction.**

116 A. A guardian may restrict the ability of a person with whom the incapacitated person has an
117 established relationship to communicate with, visit, or interact with such incapacitated person only when
118 such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation
119 of such incapacitated person and after consideration of the expressed wishes of such incapacitated
120 person. Any such restriction may include (i) limitations on time, duration, location, or method of visits

121 or communication, (ii) supervised visitation, or (iii) prohibition of in-person visitation, and shall be the
122 least restrictive means possible to prevent any such harm or exploitation.

123 B. The guardian shall provide written notice to the restricted person, on a form developed by the
124 Office of the Executive Secretary of the Supreme Court of Virginia, stating (i) the nature and terms of
125 the restriction, (ii) the reasons why the guardian believes the restriction is necessary, and (iii) how the
126 restricted person may challenge such restriction in court. The guardian shall also inform the
127 incapacitated person of such restriction, unless the guardian has a good faith belief that such
128 information would be detrimental to the health or safety of such incapacitated person; shall provide a
129 copy of such written notice to the incapacitated person and the local department of social services of
130 the jurisdiction where the incapacitated person resides; and shall file a copy of such written notice with
131 the court that appointed the guardian.

132 C. Any restricted person or incapacitated person may move to terminate or modify any such
133 restriction. A hearing shall be held within 45 days of return of the written notice filed with the court
134 pursuant to subsection B.

135 D. If the court finds that a restriction is reasonable to prevent harm to or financial exploitation of
136 such incapacitated person, the court may continue or modify such restriction in its discretion.

137 E. If the court does not find that a restriction is reasonable to prevent harm to or financial
138 exploitation of such incapacitated person, the court may issue an order terminating, continuing, or
139 modifying any restriction the guardian imposed on the person challenging such restriction.

140 F. If the court finds that a guardian imposed a restriction in bad faith, primarily for the purposes of
141 harassment, or that was clearly frivolous or vexatious, the court may require the guardian to pay or
142 reimburse all or some of the costs and fees, including attorney fees, incurred by the restricted person in
143 connection with such motion.

144 G. If the court finds that the claim of a restricted person who filed a motion pursuant to this section
145 was made in bad faith, was brought primarily for the purposes of harassment, or was clearly frivolous
146 or vexatious, the court may require such restricted person to pay or reimburse the guardian all or some
147 of the costs and fees, including attorney fees, incurred by the guardian in connection with such motion.

148 H. Any court order issued pursuant to the provisions of this section shall be provided to the local
149 department of social services of the jurisdiction where the incapacitated person resides.