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HOUSE BILL NO. 97

Offered January 10, 1996

A BILL to amend and reenact §§ 26-4, 37.1-132 and 37.1-135 of the Code of Virginia, relating to guardians of the person or property of persons of impaired health; bonds.

Patron—Morgan

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 26-4, 37.1-132 and 37.1-135 of the Code of Virginia are amended and reenacted as follows:

§ 26-4. When fiduciary may qualify without security.

The several courts in this Commonwealth and the clerks thereof, having jurisdiction to appoint personal representatives, guardians and committees may, in their discretion, when the amount coming into the hands or possession of the personal representative, guardian or committee does not exceed \$5,000, allow any such personal representative, guardian or committee to qualify by giving bond without surety. Any personal representative or trustee serving jointly with a bank or trust company exempted from giving surety on its bond as such under § 6.1-18 shall, unless the court shall otherwise direct, be likewise exempt. *In addition, the court may allow qualification of a guardian for a person pursuant to § 37.1-132 without the necessity of a bond or upon giving a bond without surety in accordance with § 37.1-135.*

§ 37.1-132. Person because of impaired health incapable of taking care of person or property.

On petition of any person to the circuit court of the county or the city in which a person is located or in which such person was a resident immediately prior to becoming a patient, voluntarily or involuntarily, in a nursing facility or nursing home, convalescent home, state hospital for the mentally ill or other similar institution, that such person, by reason of impaired health or physical disability, has become mentally or physically incapable of taking care of himself or his estate, the petitioner shall give reasonable notice to such mentally or physically incapacitated person of the hearing and of his right to be present, and at least five days' notice by first-class mail to an immediate family member, if any is known, the proposed guardian and at least three of the following persons in the following order of priority: a spouse, an adult son or daughter, a parent, an adult brother or sister, or other known relative. The court shall hold a hearing to determine whether a guardian shall be appointed. If three of the above 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. The petition shall state the names and addresses of all persons within the above classes entitled to notice of the proceedings and, where no member from any of those classes can be identified and reasonably located, the names and addresses of other known relatives. The petition shall also state the native language of the alleged incapacitated person and identify any necessary alternative mode of communication of the notice. The notice shall be reasonably calculated to inform the alleged incapacitated person of the time and place of the hearing, of his rights during the hearing as set forth in § 37.1-133.1, and of the legal rights which could be restricted as a result of the hearing. A copy of the petition, of any order directing that a comprehensive evaluation be conducted, and of the order appointing the guardian ad litem shall be attached to the notice. At the hearing, the court shall consider evidence which may consist of comprehensive social and psychological information, as well as appropriate medical or psychiatric data assessing the proposed ward's capabilities.

If, after considering this and any other evidence presented in the hearing, the court or jury, if one is requested, determines on the basis of clear and convincing evidence that the person is incapacitated, the court shall appoint a suitable person to be the guardian of his person or property, or both. Clear and convincing evidence shall be presented in the hearing to support each provision in the court's order of appointment, which order shall: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian so as to permit the incapacitated person to care for himself and manage his property to the extent that he is capable; (iii) specify whether the determination of incapacity is perpetual or limited to a specified length of time, as the court in its discretion may determine; and (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity.

The guardian appointed pursuant to this section shall, unless otherwise limited by the court, have the same rights and duties which pertain to committees, guardians and trustees appointed under §§ 37.1-128.02, 37.1-128.1 or § 37.1-134; shall give such bond, either secured or unsecured, as is required by the court pursuant to § 37.1-135; and shall comply with all applicable provisions of Title 26.

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60 On the hearing of every petition for guardianship, a guardian ad litem shall be appointed to represent
61 the interest of the person for whom a committee or guardian is requested and shall be paid such fee as
62 is fixed by the court to be taxed as part of the costs of the proceeding. The court in which the petition
63 is filed may, at its discretion, waive all fees and court costs in connection with such proceedings. The
64 alleged incapacitated person shall be present at the hearing if the person so requests or if his presence is
65 requested by the guardian ad litem representing the person.

66 If no person is appointed guardian within seven days from the determination of legal incapacity,
67 either wholly or partially, the court, on motion of any interested party, may appoint a guardian, or it
68 may appoint the sheriff pursuant to § 37.1-130.

69 A court determination of incapacity, either wholly or partially, pursuant to the provisions of this
70 section shall not constitute an adjudication of legal incompetency as provided for in § 37.1-128.02 or
71 § 37.1-134.

72 The person may present a petition for an appeal to the Supreme Court if he is determined to be
73 incapacitated, either wholly or partially. In the discretion of the court, a petition for or the pendency of
74 an appeal may suspend the judgment of the court, and the court may require that bond, either secured or
75 unsecured, be given to protect the estate of the person determined to be incapacitated.

76 § 37.1-135. Bond required.

77 The court making an appointment of a fiduciary pursuant to the provisions of this chapter, shall take
78 from such a bond in such penalty and with such surety as it may deem sufficient.

79 *However, in any case in which a parent, spouse, child or sibling is seeking appointment as guardian*
80 *of the person or property of a person who has become mentally or physically incapable of taking care*
81 *of himself or his estate pursuant to § 37.1-132, the court may allow such person to qualify upon giving*
82 *bond without surety and if the family member seeking qualification has acted as a guardian for the*
83 *person for at least two years in a jurisdiction outside of the Commonwealth which does not require the*
84 *posting of a bond, the court may allow qualification without the necessity of a bond.*