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SENATE BILL NO. 427

Offered January 22, 1996

A BILL to amend and reenact § 37.1-134.5 of the Code of Virginia, relating to judicial authorization of mental or physical health treatment.

Patron—Norment

Referred to the Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That § 37.1-134.5 of the Code of Virginia is amended and reenacted as follows:

§ 37.1-134.5. Judicial authorization of treatment and detention of certain persons.

A. An appropriate circuit court, or judge as defined in § 37.1-1, may authorize on behalf of an adult person, in accordance with this section, a specific treatment or course of treatment for a mental or physical disorder, 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. For purposes of this section:

"Disorder" shall include any physical or mental disorder or impairment, whether caused by injury, disease, genetics, or other cause.

"Incapable of making an informed decision" shall mean unable to understand the nature, extent or probable consequences of a proposed treatment, or unable to make a rational evaluation of the risks and benefits of the proposed treatment as compared with the risks and benefits of alternatives to that treatment. Persons with dysphasia or other communication disorders who are mentally competent and able to communicate shall not be considered incapable of giving informed consent.

C. Any person may request authorization of a specific treatment, or course of treatment, for an adult person by filing a petition in the circuit court, or with a judge as defined in § 37.1-1, of the county or city in which the allegedly incapable person resides or is located, or in the county or city in which the proposed place of treatment is located. Upon filing such a 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.

D. As soon as reasonably possible after the filing of the petition, the court shall appoint an attorney to represent the interests of the allegedly incapable person at the hearing. However, such 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. In the event that the allegedly incapable person is indigent, his counsel shall be paid by the Commonwealth as provided in § 37.1-89 from funds appropriated to reimburse expenses incurred in the involuntary mental commitment process. However, this provision shall not be construed to prohibit the direct payment of an attorney's fee either by the patient, or by an interested person on his behalf, which fee shall be subject to the review and approval of the court.

E. Following the appointment of an attorney pursuant to subsection D above, the court shall schedule an expedited hearing of the matter. The court shall notify the person who is the subject of the petition, his next of kin, if known, the petitioner, and their respective counsel of the date and time for the hearing. In scheduling such a 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.

F. Notwithstanding the provisions of subsections C and E above regarding delivery or service of the petition and notice of the hearing to the next of kin of any person for whom consent to observation, testing or treatment is sought, if such person is a patient in any hospital at the time the petition is filed, the court, in its discretion, may dispense with the requirement of any notice to the next of kin.

G. Evidence presented at the hearing may be submitted by affidavit in the absence of objection by the person who is the subject of the petition, the petitioner, either of their respective counsel, or by any other interested party. 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.

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

- 1. That there is no legally authorized guardian or committee available to give consent;
2. That the person who is the subject of the petition is incapable either of making an informed

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60 decision regarding a specific treatment or course of treatment or is physically or mentally incapable of
61 communicating such a decision;

62 3. That the person who is the subject of the petition is unlikely to become capable of making an
63 informed decision or of communicating an informed decision within the time required for decision; and

64 4. That the proposed treatment or course of treatment is in the best interest of the patient. However,
65 the court shall not authorize a proposed treatment or course of treatment which is proven by a
66 preponderance of the evidence to be contrary to the person's religious beliefs or basic values unless such
67 treatment is necessary to prevent death or a serious irreversible condition. The court shall take into
68 consideration the right of the person to rely on nonmedical, remedial treatment in the practice of religion
69 in lieu of medical treatment.

70 I. The court may not authorize the following under this section:

71 1. Nontherapeutic sterilization, abortion, or psychosurgery.

72 2. Admission to a mental retardation facility or a psychiatric hospital, as defined in § 37.1-1.
73 However, the court may issue an order under this section authorizing a specific treatment or course of
74 treatment of a person whose admission to such facility has been or is simultaneously being authorized
75 under §§ 37.1-65, 37.1-65.1, 37.1-65.2, 37.1-65.3, or § 37.1-67.1, or of a person who is subject to an
76 order of involuntary commitment previously or simultaneously issued under § 37.1-67.3.

77 3. Administration of antipsychotic medication for a period to exceed 180 days or electroconvulsive
78 therapy for a period to exceed 60 days pursuant to any petition filed under this section. The court may
79 authorize electroconvulsive therapy only if it is demonstrated by clear and convincing evidence, which
80 shall include the testimony of a licensed psychiatrist, that all other reasonable forms of treatment have
81 been considered, and that electroconvulsive therapy is the most effective treatment for the person. Even
82 if the court has authorized administration of antipsychotic medication or electroconvulsive therapy
83 hereunder, these treatments may be administered over the person's objection only if he is subject to an
84 order of involuntary commitment, including outpatient involuntary commitment, previously or
85 simultaneously issued under § 37.1-67.3 or the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter
86 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.

87 4. Restraint or transportation of the person, unless it finds upon clear and convincing evidence that
88 restraint or transportation is necessary to the provision of an authorized treatment for a physical disorder.

89 J. Any order authorizing treatment pursuant to subsection A shall describe the treatment or course of
90 treatment authorized and may authorize generally such related examinations, tests, or services as the
91 court may determine to be reasonably related to the treatment authorized. The order shall require the
92 treating physician to review and document the appropriateness of the continued admission of
93 antipsychotic medications not less frequently than every thirty days. Such order shall require the treating
94 physician or other service provider to report to the court and the person's attorney any change in the
95 person's condition resulting in probable restoration or development of the person's capacity to make and
96 to communicate an informed decision prior to completion of the authorized treatment and related
97 services. The order may further require the treating physician or other service provider to report to the
98 court and the person's attorney any change in circumstances regarding the authorized treatment or related
99 services which may indicate that such authorization is no longer in the person's best interests. Upon
100 receipt of such report, or upon the petition of any interested party, the court may enter such order
101 withdrawing or modifying its prior authorization as it deems appropriate. Any petition or order under
102 this section may be orally presented or entered, provided a written order shall be subsequently executed.

103 K. Any order hereunder of a judge, or of a judge or magistrate under subsection M, may be appealed
104 de novo within ten days to the circuit court for the jurisdiction where the order was entered, and any
105 such order of a circuit court hereunder, either originally or on appeal, may be appealed within ten days
106 to the Court of Appeals.

107 L. Any licensed health professional or licensed hospital providing treatment, testing or detention
108 pursuant to the court's or magistrate's authorization as provided in this section shall have no liability
109 arising out of a claim to the extent it is based on lack of consent to such treatment, testing or detention.
110 Any such professional or hospital providing, withholding or withdrawing treatment with the consent of
111 the person receiving or being offered treatment shall have no liability arising out of a claim to the extent
112 it is based on lack of capacity to consent if a court or a magistrate has denied a petition hereunder to
113 authorize such treatment, and such denial was based on an affirmative finding that the person was
114 capable of making and communicating an informed decision regarding the proposed provision,
115 withholding or withdrawal of treatment.

116 M. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding
117 of probable cause to believe that an adult person within the court's or a magistrate's jurisdiction is
118 incapable of making an informed decision regarding treatment of a physical or mental disorder, or is
119 incapable of communicating such a decision due to a physical or mental disorder, and that the medical
120 standard of care calls for testing, observation or treatment of the disorder within the next twenty-four
121 hours to prevent death, disability or a serious irreversible condition, the court or, if the court is

122 unavailable, a magistrate may issue an order authorizing temporary detention of the person by a hospital
123 emergency room or other appropriate facility and authorizing such testing, observation or treatment. The
124 detention may not be for a period exceeding twenty-four hours unless extended by the court as part of
125 an order authorizing treatment under subsection A. If before completion of authorized testing,
126 observation or treatment, the physician determines that a person subject to an order under this subsection
127 has become capable of making and communicating an informed decision, the physician shall rely on the
128 person's decision on whether to consent to further observation, testing or treatment. If before issuance of
129 an order under this subsection or during its period of effectiveness, the physician learns of objection by
130 a member of the person's immediate family to the testing, observation or treatment, he shall so notify
131 the court or magistrate, who shall consider the objection in determining whether to issue, modify or
132 terminate the order.

133 N. The provisions of § 37.1-89 relating to payment by the Commonwealth shall not apply to the cost
134 of detention, testing or treatment under this section.

135 O. Nothing in this section shall be deemed to affect the right to use, and the authority conferred by,
136 any other applicable statutory or regulatory procedure relating to consent, or to diminish any common
137 law authority of a physician or other treatment provider to provide, withhold or withdraw services to a
138 person unable to give or to communicate informed consent to those actions, with or without the consent
139 of the person's relative, including but not limited to common law or other authority to provide treatment
140 in an emergency situation; nor shall anything in this section be construed to affect the law defining the
141 conditions under which consent shall be obtained for medical treatment, or the nature of the consent
142 required.