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## HOUSE BILL NO. 2261

Offered January 12, 2011

Prefiled January 12, 2011

A BILL to amend and reenact §§ 37.2-1002, 37.2-1003, 37.2-1004, 37.2-1005, 37.2-1006, 37.2-1008, and 37.2-1012 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 37.2-1002.1 and 37.2-1002.2, relating to guardianships and conservatorships; appointment; preliminary hearing.

Patron—Morgan

Referred to Committee on Health, Welfare and Institutions

**Be it enacted by the General Assembly of Virginia:**

1. That §§ 37.2-1002, 37.2-1003, 37.2-1004, 37.2-1005, 37.2-1006, 37.2-1008, and 37.2-1012 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 37.2-1002.1 and 37.2-1002.2 as follows:

§ 37.2-1002. Who may file petition; contents.

A. ~~Any~~ An adult member of the respondent's family, an agent designated under a durable power of attorney or advance directive of which the respondent is the principal or any other legal representative of the respondent, or any person interested in the welfare of the respondent 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 nature of his interest in the welfare of 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 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 step-children. 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. 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. 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 any guardian, committee, or conservator currently acting, whether in this state or elsewhere, with a copy of any such documents, if available, attached by the petitioner;

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

6. 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 arrangement and treatment plan;

7. 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. 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. The native language of the respondent and any necessary alternative mode of communication;

10. 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. 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. A request for appointment of a guardian ad litem.

§ 37.2-1002.1. Notice of preliminary hearing.

A. Upon the filing of the petition, the court shall promptly set a date, time, and location for a preliminary hearing. The respondent, whether or not he resides in the Commonwealth, shall be personally served with notice of the hearing at least 15 days prior to the hearing. The respondent may

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59 *not waive notice, and a failure to properly notify the respondent shall be jurisdictional.*

60 *B. The notice to the respondent shall include a brief statement in at least 14-point type of the*  
61 *purpose of the proceedings and shall inform the respondent of the right to be represented by counsel*  
62 *pursuant to § 37.2-1006 and to a preliminary hearing pursuant to § 37.2-1002.2. Additionally, the notice*  
63 *shall include the following statement in conspicuous, bold print:*

64 **WARNING**

65 **AT THE PRELIMINARY HEARING, IT WILL BE DETERMINED WHETHER THERE IS**  
66 **SUFFICIENT EVIDENCE OF YOUR INCAPACITY TO APPOINT A GUARDIAN AD LITEM AND**  
67 **OTHER PROFESSIONALS AND CONDUCT A FULL HEARING TO EVALUATE THE NEED TO**  
68 **APPOINT EITHER A GUARDIAN OR A CONSERVATOR OR BOTH. NEITHER A GUARDIAN NOR A**  
69 **CONSERVATOR MAY BE APPOINTED UNTIL AFTER A FULL HEARING IS CONDUCTED.**

70 *C. The petitioner shall file with the clerk of the circuit court a statement of compliance with*  
71 *subsections A and B.*

72 *§ 37.2-1002.2. Preliminary hearing.*

73 *A. Upon the filing of a petition for the appointment of a guardian or conservator, the court shall*  
74 *conduct a preliminary hearing to determine whether there is sufficient evidence of the respondent's*  
75 *incapacity to justify the appointment of a guardian ad litem for the respondent pursuant to § 37.2-1003*  
76 *and the holding of a hearing on the petition pursuant to § 37.2-1007.*

77 *B. The preliminary hearing may be held at such convenient place as the court directs, including the*  
78 *place where the respondent is located. The respondent is entitled to be present at the hearing and all*  
79 *other stages of the proceedings and shall be present if he so requests. The respondent may compel the*  
80 *attendance of witnesses, present evidence on his own behalf, and confront and cross-examine witnesses.*  
81 *Whether or not present, the respondent shall be regarded as having denied the allegations in the*  
82 *petition.*

83 *C. In determining the need to appoint a guardian ad litem and the need to hold a hearing on the*  
84 *appointment of a guardian or conservator, consideration shall be given to the following factors: the*  
85 *limitations of the respondent; whether the appointment of a guardian or conservator may be necessary*  
86 *to protect the respondent from neglect, exploitation, or abuse; the current circumstances and care of the*  
87 *respondent; and the interest of the petitioner in the appointment of a guardian or conservator for the*  
88 *respondent.*

89 *D. If, after considering the evidence presented at the preliminary hearing, the court determines that*  
90 *there is sufficient evidence to justify the appointment of a guardian ad litem and the holding of a*  
91 *hearing on the petition, the court shall make such appointment and proceed in accordance with*  
92 *§ 37.2-1007. The court in its order shall make specific findings of fact and conclusions of law in support*  
93 *of each provision of any orders entered.*

94 *§ 37.2-1003. Appointment of guardian ad litem.*

95 *A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a*  
96 *guardian ad litem to represent the interests of the respondent if the court determines at the preliminary*  
97 *hearing held pursuant to § 37.2-1002.2 that the appointment of a guardian or conservator may be*  
98 *necessary. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the*  
99 *petitioner or taxed as costs, as the court directs.*

100 *B. Duties of the guardian ad litem include: (i) personally visiting the respondent; (ii) advising the*  
101 *respondent of rights pursuant to §§ 37.2-1006 and 37.2-1007, and certifying to the court that the*  
102 *respondent has been so advised; (iii) recommending that legal counsel should be appointed for the*  
103 *respondent, pursuant to § 37.2-1006, if the guardian ad litem believes that counsel for the respondent is*  
104 *necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, and*  
105 *filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and*  
106 *conferences.*

107 *C. In the report required by clause (iv) of subsection B ~~(iv)~~, the guardian ad litem shall address the*  
108 *following major areas of concern: (i) whether the court has jurisdiction; (ii) whether or not a guardian or*  
109 *conservator is needed; (iii) the extent of the duties and powers of the guardian or conservator, such as*  
110 *personal supervision, financial management, or medical consent only; (iv) the propriety and suitability of*  
111 *the person selected as guardian or conservator, after consideration of geographic location, familial or*  
112 *other relationship with the respondent, ability to carry out the powers and duties of the office,*  
113 *commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the*  
114 *respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the*  
115 *conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent.*

116 *D. A health care provider shall disclose or make available to the guardian ad litem, upon request,*  
117 *any information, records, and reports concerning the respondent that the guardian ad litem determines*  
118 *necessary to perform his duties under this section.*

119 *§ 37.2-1004. Notice of hearing; jurisdictional.*

120 *A. ~~Upon the filing of the petition~~ If, after considering the evidence presented at the preliminary*

hearing, the court determines that a hearing on the petition pursuant to § 37.2-1007 is necessary, at the conclusion of the preliminary hearing, the court shall promptly set a date, time, and location for a hearing; however, the hearing shall be held no less than 60 days after the preliminary hearing unless the court finds that good cause exists to hold an expedited hearing. ~~The~~ At the conclusion of the preliminary hearing, the respondent shall be given reasonable notice of the hearing by the court. The respondent may not waive notice, and a failure to properly notify the respondent shall be jurisdictional.

B. A respondent, whether or not he resides in the Commonwealth, shall be personally served with the notice, a copy of the petition, and a copy of the order appointing a guardian ad litem pursuant to § 37.2-1003. A certification, in the guardian ad litem's report required by subsection B of § 37.2-1003, that the guardian ad litem personally served the respondent with the notice, a copy of the petition, and a copy of the order appointing a guardian ad litem shall constitute valid personal service for purposes of this section.

C. A copy of the notice, together with a copy of the petition, shall be mailed by first class mail by the petitioner at least seven days before the hearing to all adult individuals and to all entities whose names and post office addresses appear in the petition. For good cause shown, the court may waive the advance notice required by this subsection. If the advance notice is waived, the petitioner shall promptly mail by first class mail a copy of the petition and any order entered to those individuals and entities.

D. The notice to the respondent shall include a brief statement in at least 14-point type of the purpose of the proceedings and shall inform the respondent of the right to be represented by counsel pursuant to § 37.2-1006 and to a hearing pursuant to § 37.2-1007. Additionally, the notice shall include the following statement in conspicuous, bold print.

**WARNING**

**AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. A GUARDIAN MAY BE APPOINTED TO MAKE PERSONAL DECISIONS FOR YOU. A CONSERVATOR MAY BE APPOINTED TO MAKE DECISIONS CONCERNING YOUR PROPERTY AND FINANCES. THE APPOINTMENT MAY AFFECT CONTROL OF HOW YOU SPEND YOUR MONEY, HOW YOUR PROPERTY IS MANAGED AND CONTROLLED, WHO MAKES YOUR MEDICAL DECISIONS, WHERE YOU LIVE, WHETHER YOU ARE ALLOWED TO VOTE, AND OTHER IMPORTANT RIGHTS.**

E. The petitioner shall file with the clerk of the circuit court a statement of compliance with subsections subsection B, C and D.

§ 37.2-1005. Evaluation report.

A. A report evaluating the condition of the respondent shall be filed with the court and provided to the guardian ad litem within a reasonable time prior to the hearing on the petition. The report shall be prepared by one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the respondent as alleged in the petition. If a report is not available, the court may proceed to hold the hearing without the report for good cause shown and absent objection by the guardian ad litem or may order a report and delay the hearing until the report is prepared, filed, and provided to the guardian ad litem.

B. The report shall evaluate the condition of the respondent and shall contain, to the best information and belief of its signatory:

1. A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;

2. A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;

3. A description of the examination, evaluation, and assessment procedures employed in diagnosing the respondent's mental and physical condition, including a description of all diagnostic tests administered to the respondent;

4. The date or dates of the examinations, evaluations, and assessments upon which the report is based; and

5. The signature of the person conducting the evaluation and the nature of the professional license held by that person.

C. In the absence of bad faith or malicious intent, a person performing the evaluation shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section.

D. A report prepared pursuant to this section shall be admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein, unless counsel for the respondent or the guardian ad litem objects.

§ 37.2-1006. Counsel for respondent.

182 The respondent has the right to be represented by counsel of the respondent's choice, *and such*  
183 *counsel may also be chosen by the respondent's agent designated under a durable power of attorney or*  
184 *advance directive of which the respondent is the principal or by any other legal representative of the*  
185 *respondent.* If the respondent is not represented by counsel, the court may appoint legal counsel, upon  
186 the filing of the petition or at any time prior to the entry of the order upon request of the respondent or  
187 the guardian ad litem, if the court determines that counsel is needed to protect the respondent's interest.  
188 Counsel appointed by the court shall be paid a fee that is fixed by the court to be taxed as part of the  
189 costs of the proceeding.

190 A health care provider shall disclose or make available to the attorney, upon request, any  
191 information, records, and reports concerning the respondent that the attorney determines necessary to  
192 perform his duties under this section, including a copy of the evaluation report required under  
193 § 37.2-1005.

194 § 37.2-1008. Fees and costs.

195 The petitioner shall pay the filing fee, as provided in subdivision A 43 of § 17.1-275, and costs.  
196 Service fees and court costs may be waived by the court if it is alleged under oath that the estate of the  
197 respondent is unavailable or insufficient. If a guardian or conservator is appointed and the estate of the  
198 incapacitated person is available and sufficient therefor, the court shall order that the petitioner be  
199 reimbursed from the estate for all costs and fees. ~~If a guardian or conservator is not appointed and the~~  
200 ~~court nonetheless finds that the petition is brought in good faith and for the benefit of the respondent,~~  
201 ~~the court may direct the respondent's estate, if available and sufficient, to reimburse the petitioner for all~~  
202 ~~costs and fees.~~

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

206 § 37.2-1012. Petition for restoration, modification or termination; effects.

207 A. Upon petition by the incapacitated person, the guardian or conservator, *an adult member of the*  
208 *incapacitated person's family, an agent designated under a durable power of attorney or advance*  
209 *directive of which the incapacitated person is the principal or any other legal representative of the*  
210 *incapacitated person, or any other person interested in the welfare of the incapacitated person, or upon*  
211 motion of the court, the court may declare the incapacitated person restored to capacity; modify the type  
212 of appointment or the areas of protection, management, or assistance previously granted or require a new  
213 bond; terminate the guardianship or conservatorship; order removal of the guardian or conservator as  
214 provided in § 26-3; or order other appropriate relief. The fee for filing the petition shall be as provided  
215 in subdivision A 43 of § 17.1-275.

216 B. In the case of a petition for modification to expand the scope of a guardianship or  
217 conservatorship, the incapacitated person shall be entitled to a jury, upon request. Notice of the hearing  
218 and a copy of the petition shall be personally served on the incapacitated person and mailed to other  
219 persons entitled to notice pursuant to § 37.2-1004. The court shall appoint a guardian ad litem for the  
220 incapacitated person and may appoint one or more licensed physicians or psychologists or licensed  
221 professionals skilled in the assessment and treatment of the physical or mental conditions of the  
222 incapacitated person, as alleged in the petition, to conduct an evaluation. Upon the filing of any other  
223 such petition or upon the motion of the court and after reasonable notice to the incapacitated person, any  
224 guardian or conservator, any attorney of record, any person entitled to notice of the filing of an original  
225 petition as provided in § 37.2-1004, and any other person or entity as the court may require, the court  
226 shall hold a hearing.

227 C. Revocation, modification, or termination may be ordered upon a finding that it is in the best  
228 interests of the incapacitated person and that:

229 1. The incapacitated person is no longer in need of the assistance or protection of a guardian or  
230 conservator;

231 2. The extent of protection, management, or assistance previously granted is either excessive or  
232 insufficient considering the current need therefor;

233 3. The incapacitated person's understanding or capacity to manage the estate and financial affairs or  
234 to provide for his health, care, or safety has so changed as to warrant such action; or

235 4. Circumstances are such that the guardianship or conservatorship is no longer necessary or is  
236 insufficient.

237 D. If, on the basis of evidence offered at the hearing, the court finds by a preponderance of the  
238 evidence that the incapacitated person has, in the case of a guardianship, substantially regained his  
239 ability to care for his person or, in the case of a conservatorship, to manage and handle his estate, it  
240 shall declare the person restored to capacity and discharge the guardian or conservator.

241 In the case of a petition for modification of a guardianship or conservatorship, if the court finds by a  
242 preponderance of the evidence that it is in the best interests of the incapacitated person to limit or  
243 reduce the powers of the guardian or conservator, it shall so order; if the court finds by clear and

244 convincing evidence that it is in the best interests of the incapacitated person to increase or expand the  
245 powers of the guardian or conservator, it shall so order.

246 The court may order a new bond or other appropriate relief upon finding by a preponderance of the  
247 evidence that the guardian or conservator is not acting in the best interests of the incapacitated person or  
248 of the estate.

249 E. The powers of a guardian or conservator shall terminate upon the death, resignation, or removal of  
250 the guardian or conservator or upon the termination of the guardianship or conservatorship.

251 A guardianship or conservatorship shall terminate upon the death of the incapacitated person or, if  
252 ordered by the court, following a hearing on the petition of any interested person.

253 F. The court may allow reasonable compensation from the estate of the incapacitated person to any  
254 guardian ad litem, attorney, or evaluator appointed pursuant to this section. Any compensation allowed  
255 shall be taxed as costs of the proceeding.