

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 53.1-40.1 of the Code of Virginia, relating to medical and mental health*
 3 *treatment of prisoners incapable of giving consent.*

4 [S 350]

5 Approved

6 **Be it enacted by the General Assembly of Virginia:**7 **1. That § 53.1-40.1 of the Code of Virginia is amended and reenacted as follows:**8 **§ 53.1-40.1. Medical and mental health treatment of prisoners incapable of giving consent.**

9 A. The Director or his designee may petition the circuit court or any district court judge or any
 10 special justice, as defined in § 37.2-100, herein referred to as the court, of the county or city in which
 11 the prisoner is located for an order authorizing treatment of a prisoner sentenced and committed to the
 12 Department of Corrections. The court shall authorize such treatment in a facility designated by the
 13 Director upon finding, on the basis of clear and convincing evidence, that the prisoner is incapable,
 14 either mentally or physically, of giving informed consent to such treatment and that the proposed
 15 treatment is in the best interests of the prisoner.

16 B. Prior to the court's authorization of such treatment, the court shall appoint an attorney to represent
 17 the interests of the prisoner. Evidence shall be presented concerning the prisoner's condition and
 18 proposed treatment, which evidence may, in the court's discretion and in the absence of objection by the
 19 prisoner or the prisoner's attorney, be submitted by affidavit.

20 C. Any order authorizing treatment pursuant to subsection A shall describe the treatment authorized
 21 and authorize generally such examinations, tests, medications, and other treatments as are in the best
 22 interests of the prisoner but may not authorize nontherapeutic sterilization, abortion, or psychosurgery.
 23 Such order shall require the licensed physician, psychiatrist ~~or~~, clinical psychologist, *professional*
 24 *counselor, or clinical social worker* acting within his area of expertise who is treating the prisoner to
 25 report to the court and the prisoner's attorney any change in the prisoner's condition resulting in
 26 restoration of the prisoner's capability to consent prior to completion of the authorized treatment and
 27 related services. Upon receipt of such report, the court may enter such order withdrawing or modifying
 28 its prior authorization as it deems appropriate. Any petition or order under this section may be orally
 29 presented or entered, provided a written order is subsequently executed.

30 D. Any order of a judge under subsection A may be appealed de novo within 10 days to the circuit
 31 court for the jurisdiction where the prisoner is located, and any order of a circuit court hereunder, either
 32 originally or on appeal, may be appealed within 10 days to the Court of Appeals, which shall give such
 33 appeal priority and hear the appeal as soon as possible.

34 E. Whenever the director of any hospital or facility reasonably believes that treatment is necessary to
 35 protect the life, health, or safety of a prisoner, such treatment may be given during the period allowed
 36 for any appeal unless prohibited by order of a court of record wherein the appeal is pending.

37 F. Upon the advice of a licensed physician, psychiatrist, or clinical psychologist acting within his
 38 area of expertise who has attempted to obtain consent and upon a finding of probable cause to believe
 39 that a prisoner is incapable, due to any physical or mental condition, of giving informed consent to
 40 treatment and that the medical standard of care calls for testing, observation, or other treatment within
 41 the next 12 hours to prevent death, disability or a serious irreversible condition, the court or, if the court
 42 is unavailable, a magistrate shall issue an order authorizing temporary admission of the prisoner to a
 43 hospital or other health care facility and authorizing such testing, observation, or other treatment. Such
 44 order shall expire after a period of 12 hours unless extended by the court as part of an order authorizing
 45 treatment under subsection A.

46 G. Any licensed health *or mental health* professional or licensed facility providing services pursuant
 47 to the court's or magistrate's authorization as provided in this section shall have no liability arising out
 48 of a claim to the extent it is based on lack of consent to such services. Any such professional or facility
 49 providing services with the consent of the prisoner receiving treatment shall have no liability arising out
 50 of a claim to the extent it is based on lack of capacity to consent if a court or a magistrate has denied a
 51 petition hereunder to authorize such services, and such denial was based on an affirmative finding that
 52 the prisoner was capable of making an informed decision regarding the proposed services.

53 H. Nothing in this section shall be deemed to limit or repeal any common law rule relating to
 54 consent for medical treatment or the right to apply or the authority conferred by any other applicable
 55 statute or regulation relating to consent.