VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 17.1-406, 17.1-410, and 37.2-803 of the Code of Virginia and to amend the Code of Virginia by adding in Article 7 of Chapter 3 of Title 53.1 sections numbered 53.1-133.04 and 53.1-133.05, relating to medical and mental health treatment of prisoners incapable of giving consent.

[H 1933]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 17.1-406, 17.1-410, and 37.2-803 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 7 of Chapter 3 of Title 53.1 sections numbered 53.1-133.04 and 53.1-133.05 as follows:

§ 17.1-406. Petitions for appeal; cases over which Court of Appeals does not have jurisdiction.

A. Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to Article 6.1 (§ 18.2-307.1 et seq.) of Chapter 7 of Title 18.2, (iii) any final order of a circuit court involving involuntary treatment of prisoners pursuant to § 53.1-40.1 *or 53.1-133.04*, or (iv) any final order for declaratory or injunctive relief under § 57-2.02. The Commonwealth or any county, city or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398.

B. In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.

§ 17.1-410. Disposition of appeals; finality of decisions.

A. Each appeal of right taken to the Court of Appeals and each appeal for which a petition for appeal has been granted shall be considered by a panel of the court.

When the Court of Appeals has (i) rejected a petition for appeal, (ii) dismissed an appeal in any case in accordance with the Rules of Court, or (iii) decided an appeal, its decision shall be final, without appeal to the Supreme Court, in:

1. Traffic infraction and misdemeanor cases where no incarceration is imposed;

2. Cases originating before any administrative agency or the Virginia Workers' Compensation Commission;

3. Cases involving the affirmance or annulment of a marriage, divorce, custody, spousal or child support or the control or disposition of a juvenile and other domestic relations cases arising under Title 16.1 or Title 20, or involving adoption under Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2;

4. Appeals in criminal cases pursuant to §§ 19.2-398 and 19.2-401. Such finality of the Court of Appeals' decision shall not preclude a defendant, if he is convicted, from requesting the Court of Appeals or Supreme Court on direct appeal to reconsider an issue which was the subject of the pretrial appeal; and

5. Appeals involving involuntary treatment of prisoners pursuant to § 53.1-40.1 *or 53.1-133.04*.

B. Notwithstanding the provisions of subsection A, in any case other than an appeal pursuant to § 19.2-398, in which the Supreme Court determines on a petition for review that the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value, review may be had in the Supreme Court in accordance with the provisions of § 17.1-411.

§ 37.2-803. Special justices to perform duties of judge.

The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by this chapter, Chapter 11 (§ 37.2-1100 et seq.), and §§ 16.1-69.28, 16.1-335 through 16.1-348, 19.2-169.6, 19.2-174.1, 19.2-182.9, 53.1-40.1, 53.1-40.2, ~~and~~ 53.1-40.9*, and 53.1-133.04*. Each special justice shall be a person licensed to practice law in the

Commonwealth or a retired or substitute judge in good standing and shall have all the powers and jurisdiction conferred upon a judge. The special justice shall serve under the supervision and at the pleasure of the chief judge of the judicial circuit for a period of up to six years. The special justice may be reappointed and may serve additional periods of up to six years, at the pleasure of the chief judge. Within six months of appointment, each special justice appointed on or after January 1, 1996, shall complete a minimum training program prescribed by the Executive Secretary of the Supreme Court. Special justices shall collect the fees prescribed in this chapter for their service and shall retain those fees, unless the governing body of the county or city in which the services are performed provides for the payment of an annual salary for the services, in which case the fees shall be collected and paid into the treasury of that county or city.

§ 53.1-133.04. Medical and mental health treatment of prisoners incapable of giving consent.

A. The sheriff or administrator in charge of a local or regional correctional facility or his designee may petition the circuit court or any district court judge or any special justice, as defined in § 37.2-100, herein referred to as the court, of the county or city in which the prisoner is located for an order authorizing treatment of a prisoner confined in the local or regional correctional facility. Upon filing the petition, the petitioner or the court shall serve 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 person's next of kin. The court shall authorize such treatment in a facility designated by the sheriff or administrator upon finding, on the basis of clear and convincing evidence, that the prisoner is incapable, either mentally or physically, of giving informed consent to such treatment; that the prisoner does not have a relevant advanced directive, guardian, or other substitute decision maker; that the proposed treatment is in the best interests of the prisoner; and that the jail has sufficient medical and nursing resources available to safely administer the treatment and respond to any adverse side effects that might arise from the treatment. The facility designated for treatment by the sheriff or administrator may be located within a local or regional correctional facility if such facility is licensed to provide the treatment authorized by the court order.

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

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

D. Prior to authorizing treatment pursuant to this section, the court shall find that there is no available person with legal authority under the Health Care Decisions Act (§ 54.1-2981 et seq.) or under other applicable law to authorize the proposed treatment.

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

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

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

H. Any licensed health or mental health professional or licensed facility providing services pursuant to the court's or magistrate's authorization as provided in this section shall have no liability arising out

of a claim to the extent that it is based on lack of consent to such services, except with respect to injury or death resulting from gross negligence or willful and wanton misconduct. Any such professional or facility providing services with the consent of the prisoner receiving treatment shall have no liability arising out of a claim to the extent that it is based on lack of capacity to consent, except with respect to injury or death resulting from gross negligence or willful and wanton misconduct, if a court or a magistrate has denied a petition hereunder to authorize such services and such denial was based on an affirmative finding that the prisoner was capable of making an informed decision regarding the proposed services.

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

§ 53.1-133.05. Place of hearing on medical or mental health treatment of prisoners incapable of giving consent; fees and expenses.

A. Any hearing held by a court pursuant to § 53.1-133.04 may be held in any courtroom available within the county or city wherein the prisoner is located or any appropriate place that may be made available by the sheriff or administrator in charge of a local or regional correctional facility and approved by the judge. Nothing herein shall be construed as prohibiting holding the hearing on the grounds of a correctional facility or a hospital or a facility for the care and treatment of individuals with mental illness.

B. Any special justice, as defined in § 37.2-100, and any district court substitute judge who presides over hearings pursuant to the provisions of § 53.1-133.04 shall receive a fee as provided in § 37.2-804 for each proceeding under § 53.1-133.04 and his necessary mileage. However, if a commitment hearing under § 19.2-169.6 and the proceeding under § 53.1-133.04 are combined for hearing or are heard on the same day, only one fee shall be allowed.

C. Every physician or clinical psychologist who is not regularly employed by the Commonwealth who is required to serve as a witness for the Commonwealth in any proceeding under § 53.1-133.04 shall receive a fee as provided in § 37.2-804. Other witnesses regularly summoned before a judge shall receive such compensation for their attendance and mileage as is allowed witnesses summoned to testify before grand juries.

D. Every attorney appointed under § 53.1-133.04 shall receive a fee as provided in § 37.2-804 for each proceeding under § 53.1-133.04 for which he is appointed. However, if a commitment hearing under § 19.2-169.6 and the proceeding under § 53.1-133.04 are combined for hearing or are heard on the same day, only one fee shall be allowed.

E. Except as hereinafter provided, all expenses incurred, including the fees, attendance, and mileage aforesaid, shall be paid by the Commonwealth. Any such fees, costs, and expenses incurred in connection with a proceeding under § 53.1-133.04, when paid by the Commonwealth, shall be recoverable by the Commonwealth from the prisoner who is the subject of the examination, hearing, or proceeding or from his estate. No such fees or costs shall be recovered, however, from the prisoner or his estate when no good cause for his admission exists or when the recovery would create an undue financial hardship.