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SENATE BILL NO. 738

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Education and Health
on January 30, 2020)

(Patron Prior to Substitute—Senator Deeds)

A BILL to amend and reenact §§ 37.2-808 and 37.2-1104 of the Code of Virginia, relating to temporary detention for observation and treatment.

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-808 and 37.2-1104 of the Code of Virginia are amended and reenacted as follows:

§ 37.2-808. Emergency custody; issuance and execution of order.

A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. Any emergency custody order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

When considering whether there is probable cause to issue an emergency custody order, the magistrate may, in addition to the petition, consider (1) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (2) any past actions of the person, (3) any past mental health treatment of the person, (4) any relevant hearsay evidence, (5) any medical records available, (6) any affidavits submitted, if the witness is unavailable and it so states in the affidavit, and (7) any other information available that the magistrate considers relevant to the determination of whether probable cause exists to issue an emergency custody order.

B. Any person for whom an emergency custody order is issued shall be taken into custody and transported to a convenient location to be evaluated to determine whether the person meets the criteria for temporary detention pursuant to § 37.2-809 and to assess the need for hospitalization or treatment. The evaluation shall be made by a person designated by the community services board who is skilled in the diagnosis and treatment of mental illness and who has completed a certification program approved by the Department.

C. The magistrate issuing an emergency custody order shall specify the primary law-enforcement agency and jurisdiction to execute the emergency custody order and provide transportation. However, the magistrate shall consider any request to authorize transportation by an alternative transportation provider in accordance with this section, whenever an alternative transportation provider is identified to the magistrate, which may be a person, facility, or agency, including a family member or friend of the person who is the subject of the order, a representative of the community services board, or other transportation provider with personnel trained to provide transportation in a safe manner, upon determining, following consideration of information provided by the petitioner; the community services board or its designee; the local law-enforcement agency, if any; the person's treating physician, if any; or other persons who are available and have knowledge of the person, and, when the magistrate deems appropriate, the proposed alternative transportation provider, either in person or via two-way electronic video and audio or telephone communication system, that the proposed alternative transportation provider is available to provide transportation, willing to provide transportation, and able to provide transportation in a safe manner. When transportation is ordered to be provided by an alternative transportation provider, the magistrate shall order the specified primary law-enforcement agency to execute the order, to take the person into custody, and to transfer custody of the person to the alternative transportation provider identified in the order. In such cases, a copy of the emergency custody order shall accompany the person being transported pursuant to this section at all times and shall be delivered by the alternative transportation provider to the community services board or its designee responsible for conducting the evaluation. The community services board or its designee conducting the evaluation shall return a copy of the emergency custody order to the court designated by the magistrate as soon as is practicable. Delivery of an order to a law-enforcement officer or alternative transportation provider and return of an order to the court may be accomplished electronically or by facsimile.

Transportation under this section shall include transportation to a medical facility as may be necessary to obtain emergency medical evaluation or treatment that shall be conducted immediately in

60 accordance with state and federal law. Transportation under this section shall include transportation to a
61 medical facility for a medical evaluation if a physician at the hospital in which the person subject to the
62 emergency custody order may be detained requires a medical evaluation prior to admission.

63 D. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section,
64 the magistrate shall order the primary law-enforcement agency from the jurisdiction served by the
65 community services board that designated the person to perform the evaluation required in subsection B
66 to execute the order and, in cases in which transportation is ordered to be provided by the primary
67 law-enforcement agency, provide transportation. If the community services board serves more than one
68 jurisdiction, the magistrate shall designate the primary law-enforcement agency from the particular
69 jurisdiction within the community services board's service area where the person who is the subject of
70 the emergency custody order was taken into custody or, if the person has not yet been taken into
71 custody, the primary law-enforcement agency from the jurisdiction where the person is presently located
72 to execute the order and provide transportation.

73 E. The law-enforcement agency or alternative transportation provider providing transportation
74 pursuant to this section may transfer custody of the person to the facility or location to which the person
75 is transported for the evaluation required in subsection B, G, or H if the facility or location (i) is
76 licensed to provide the level of security necessary to protect both the person and others from harm, (ii)
77 is actually capable of providing the level of security necessary to protect the person and others from
78 harm, and (iii) in cases in which transportation is provided by a law-enforcement agency, has entered
79 into an agreement or memorandum of understanding with the law-enforcement agency setting forth the
80 terms and conditions under which it will accept a transfer of custody, provided, however, that the
81 facility or location may not require the law-enforcement agency to pay any fees or costs for the transfer
82 of custody.

83 F. A law-enforcement officer may lawfully go or be sent beyond the territorial limits of the county,
84 city, or town in which he serves to any point in the Commonwealth for the purpose of executing an
85 emergency custody order pursuant to this section.

86 G. A law-enforcement officer who, based upon his observation or the reliable reports of others, has
87 probable cause to believe that a person meets the criteria for emergency custody as stated in this section
88 may take that person into custody and transport that person to an appropriate location to assess the need
89 for hospitalization or treatment without prior authorization. A law-enforcement officer who takes a
90 person into custody pursuant to this subsection or subsection H may lawfully go or be sent beyond the
91 territorial limits of the county, city, or town in which he serves to any point in the Commonwealth for
92 the purpose of obtaining the assessment. Such evaluation shall be conducted immediately. The period of
93 custody shall not exceed eight hours from the time the law-enforcement officer takes the person into
94 custody.

95 H. A law-enforcement officer who is transporting a person who has voluntarily consented to be
96 transported to a facility for the purpose of assessment or evaluation and who is beyond the territorial
97 limits of the county, city, or town in which he serves may take such person into custody and transport
98 him to an appropriate location to assess the need for hospitalization or treatment without prior
99 authorization when the law-enforcement officer determines (i) that the person has revoked consent to be
100 transported to a facility for the purpose of assessment or evaluation, and (ii) based upon his
101 observations, that probable cause exists to believe that the person meets the criteria for emergency
102 custody as stated in this section. The period of custody shall not exceed eight hours from the time the
103 law-enforcement officer takes the person into custody.

104 I. Nothing herein shall preclude a law-enforcement officer or alternative transportation provider from
105 obtaining emergency medical treatment or further medical evaluation at any time for a person in his
106 custody as provided in this section.

107 J. A representative of the primary law-enforcement agency specified to execute an emergency
108 custody order or a representative of the law-enforcement agency employing a law-enforcement officer
109 who takes a person into custody pursuant to subsection G or H shall notify the community services
110 board responsible for conducting the evaluation required in subsection B, G, or H as soon as practicable
111 after execution of the emergency custody order or after the person has been taken into custody pursuant
112 to subsection G or H.

113 K. The person shall remain in custody until (i) a temporary detention order is issued *in accordance*
114 *with § 37.2-809, until* (ii) *an order for temporary detention for observation, testing, or treatment is*
115 *entered in accordance with § 37.2-1104, ending law enforcement custody,* (iii) the person is released, or
116 ~~until~~ (iv) the emergency custody order expires. An emergency custody order shall be valid for a period
117 not to exceed eight hours from the time of execution.

118 L. Nothing in this section shall preclude the issuance of an order for temporary detention for testing,
119 observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an emergency
120 custody order issued pursuant to this section. In any case in which an order for temporary detention for
121 testing, observation, or treatment is issued for a person who is also the subject of an emergency custody

order, the person may be detained by a hospital emergency room or other appropriate facility for testing, observation, and treatment for a period not to exceed 24 hours, unless extended by the court as part of an order pursuant to § 37.2-1101, in accordance with subsection A C of § 37.2-1104. Upon completion of testing, observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or other appropriate facility in which the person is detained shall notify the nearest community services board, and the designee of the community services board shall, as soon as is practicable and prior to the expiration of the order for temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809.

M. Any person taken into emergency custody pursuant to this section shall be given a written summary of the emergency custody procedures and the statutory protections associated with those procedures.

N. If an emergency custody order is not executed within eight hours of its issuance, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if such office is not open, to any magistrate serving the jurisdiction of the issuing court.

O. In addition to the eight-hour period of emergency custody set forth in subsection G, H, or K, if the individual is detained in a state facility pursuant to subsection E of § 37.2-809, the state facility and an employee or designee of the community services board as defined in § 37.2-809 may, for an additional four hours, continue to attempt to identify an alternative facility that is able and willing to provide temporary detention and appropriate care to the individual.

P. Payments shall be made pursuant to § 37.2-804 to licensed health care providers for medical screening and assessment services provided to persons with mental illnesses while in emergency custody.

Q. No person who provides alternative transportation pursuant to this section shall be liable to the person being transported for any civil damages for ordinary negligence in acts or omissions that result from providing such alternative transportation.

§ 37.2-1104. Temporary detention in hospital for testing, observation, or treatment.

A. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding of probable cause to believe that an adult person within the court's jurisdiction is incapable of making an informed decision regarding treatment of a physical or mental condition or is incapable of communicating such a decision due to a physical or mental condition and that the medical standard of care calls for testing, observation, or treatment within the next 24 hours to prevent death or disability, or to treat an emergency medical condition that requires immediate action to avoid harm, injury, or death, the As used in this section, "mental or physical condition" includes intoxication.

B. The court or, if the court is unavailable, a magistrate serving the jurisdiction where the respondent is located may, with the advice of a licensed physician who has attempted to obtain informed consent of an adult person to treatment of a mental or physical condition, issue an order authorizing temporary detention of the adult person ~~by~~ in a hospital emergency room department or other appropriate facility and authorizing such for testing, observation, or treatment upon a finding that (i) probable cause exists to believe the person is incapable of making or communicating an informed decision regarding treatment of a physical or mental condition due to a mental or physical condition and (ii) the medical standard of care calls for observation, testing, or treatment within the next 24 hours to prevent injury, disability, death, or other harm to the person resulting from such mental or physical condition.

C. The duration of temporary detention ~~may~~ pursuant to this section shall not be for a period exceeding ~~exceed~~ 24 hours, unless extended by the court as part of an order authorizing treatment under § 37.2-1101. If, before completion of authorized testing, observation, or treatment, the physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, the physician shall rely on the person's decision on whether to consent to further testing, observation, or treatment. If, before issuance of an order under this subsection or during its period of effectiveness, the physician learns of an objection by a member of the person's immediate family to the testing, observation, or treatment, he shall so notify the court or magistrate, who shall consider the objection in determining whether to issue, modify, or terminate the order.

~~B-~~ D. A court or, if the court is unavailable, a magistrate serving the jurisdiction may issue an order authorizing temporary detention for testing, observation, or treatment for a person who is also the subject of an emergency custody order issued pursuant to § 37.2-808, if such person meets the criteria set forth in subsection A B. In any case in which an order for temporary detention for testing, observation, or treatment is issued for a person who is also the subject of an emergency custody order pursuant to § 37.2-808, the hospital emergency room or other appropriate facility in which the person is detained for testing, observation, or treatment shall notify the nearest community services board when such testing, observation, or treatment is complete, and the designee of the community services board shall, as soon as is practicable and prior to the expiration of the order for temporary detention issued pursuant to subsection A B, conduct an evaluation of the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809.

183 2. That the Department of Behavioral Health and Developmental Services shall convene a work
184 group to include representatives from the Virginia College of Emergency Physicians, the Virginia
185 Hospital and Healthcare Association, the Virginia Sheriff's Association, and the Office of the
186 Executive Secretary of the Supreme Court of Virginia to develop standard policies and procedures
187 regarding medical temporary detention orders. The work group shall complete its work no later
188 than July 1, 2020.