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SENATE BILL NO. 1140

Senate Amendments in [] - February 2, 2023

Prefiled January 10, 2023

A BILL to amend and reenact §§ 51.5-150, 64.2-2019, and 64.2-2020 of the Code of Virginia, relating to Department for Aging and Rehabilitative Services; training; powers and duties of guardian; annual reports by guardians; information required.

Patron Prior to Engrossment—Senator McPike

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

1. That §§ 51.5-150, 64.2-2019, and 64.2-2020 of the Code of Virginia are amended and reenacted as follows:

§ 51.5-150. Powers and duties of the Department with respect to public guardian and conservator program.

A. The Department shall fund from appropriations received for such purpose a statewide system of local or regional public guardian and conservator programs.

B. The Department shall, *with respect to the public guardian and conservator programs:*

1. Make and enter into all contracts necessary or incidental to the performance of its duties and in furtherance of the purposes as specified in this article in conformance with the Public Procurement Act (§ 2.2-4300 et seq.);

2. Contract with local or regional public or private entities to provide services as guardians and conservators operating as local or regional Virginia public guardian and conservator programs in those cases in which a court, pursuant to §§ 64.2-2010 and 64.2-2015, determines that a person is eligible to have a public guardian or conservator appointed;

3. Adopt reasonable regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) as appropriate to implement, administer, and manage the state and local or regional programs authorized by this article, including, but not limited to, the adoption of:

a. Minimum training and experience requirements for volunteers and professional staff of the local and regional programs;

b. An ideal range of staff-to-client ratios for the programs, and adoption of procedures to be followed whenever a local or regional program falls below or exceeds the ideal range of staff-to-client ratios, which shall include, but not be limited to, procedures to ensure that services shall continue to be available to those in need and that appropriate notice is given to the courts; sheriffs, where appropriate; and the Department;

c. Procedures governing disqualification of any program falling below or exceeding the ideal range of staff-to-client ratios, which shall include a process for evaluating any program that has exceeded the ratio to assess the effects falling below or exceeding the ideal range of ratios has, had, or is having upon the program and upon the incapacitated persons served by the program.

The regulations shall require that evaluations occur no less frequently than every six months and shall continue until the staff-to-client ratio returns to within the ideal range; and

d. Person-centered practice procedures that shall:

(1) Focus on the preferences and needs of the individual receiving public guardianship services; and

(2) Empower and support the individual receiving public guardianship services, to the extent feasible, in defining the direction for his life and promoting self-determination and community involvement.

4. Establish procedures and administrative guidelines to ensure the separation of local or regional Virginia public guardian and conservator programs from any other guardian or conservator program operated by the entity with whom the Department contracts, specifically addressing the need for separation in programs that may be fee-generating;

5. Establish recordkeeping and accounting procedures to ensure that each local or regional program (i) maintains confidential, accurate, and up-to-date records of the personal and property matters over which it has control for each incapacitated person for whom it is appointed guardian or conservator and (ii) files with the Department an account of all public and private funds received;

6. Establish criteria for the conduct of and filing with the Department and as otherwise required by law: values history surveys, annual decisional accounting and assessment reports, the care plan designed for the incapacitated person, and such other information as the Department may by regulation require;

7. Establish criteria to be used by the local and regional programs in setting priorities with regard to services to be provided;

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59 8. Take such other actions as are necessary to ensure coordinated services and a reasonable review of
60 all local and regional programs;

61 9. Maintain statistical data on the operation of the programs and report such data to the General
62 Assembly on or before January 1 of each even-numbered year as provided in the procedures of the
63 Division of Legislative Automated Systems for the processing of legislative documents regarding the
64 status of the Virginia Public Guardian and Conservator Program and the identified operational needs of
65 the program. Such report shall be posted on the Department's website. In addition, the Department shall
66 enter into a contract with an appropriate research entity with expertise in gerontology, disabilities, and
67 public administration to conduct an evaluation of local public guardian and conservator programs from
68 funds specifically appropriated and allocated for this purpose, and the evaluator shall provide a report
69 with recommendations to the Department and to the Public Guardian and Conservator Advisory Board
70 established pursuant to § 51.5-149.1. Trends identified in the report, including the need for public
71 guardians, conservators, and other types of surrogate decision-making services, shall be presented to the
72 General Assembly. The Department shall request such a report from an appropriate research entity every
73 four years, provided the General Assembly appropriates funds for that purpose;

74 10. Decennially review the ideal range of staff-to-client ratios for local and regional public guardian
75 and conservator programs in the Commonwealth and make recommendations as to whether the ratio
76 should be revised to ensure that public guardians are able to meet their obligations to incapacitated
77 persons pursuant to this article and report its findings and conclusions to the Governor and the General
78 Assembly by December 1 of each year in which such review is performed; and

79 11. Recommend appropriate legislative or executive actions.

80 C. Nothing in this article shall prohibit the Department from contracting pursuant to subdivision B 2
81 with an entity that may also provide privately funded surrogate decision-making services, including
82 guardian and conservator services funded with fees generated by the estates of incapacitated persons,
83 provided such private programs are administered by the contracting entity entirely separately from the
84 local or regional Virginia public guardian and conservator programs, in conformity with regulations
85 established by the Department in that respect.

86 D. In accordance with the Public Procurement Act (§ 2.2-4300 et seq.) and recommendations of the
87 Public Guardian and Conservator Advisory Board, the Department may contract with a not-for-profit
88 private entity that does not provide services to incapacitated persons as guardian or conservator to
89 administer the program, and, if it does, the term "Department" when used in this article shall refer to the
90 contract administrator.

91 *E. The Department shall develop and provide training for guardians pursuant to Chapter 20*
92 *(§ 64.2-2000 et seq.) of Title 64.2, which shall include training on the responsibilities and duties of*
93 *guardians, how to complete annual guardianship reports, how to involve and encourage participation of*
94 *incapacitated adults in decisions made by such guardians, medical advocacy, and decision-making on*
95 *behalf of other persons.*

96 **§ 64.2-2019. Duties and powers of guardian.**

97 A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was
98 appointed guardian and may be held personally liable for a breach of any fiduciary duty to the
99 incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the
100 guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of
101 the incapacitated person.

102 B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance
103 directive or durable power of attorney previously executed by the incapacitated person. A guardian may
104 seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as
105 provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of
106 the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of
107 § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an
108 advance directive, but the modification shall not in any way affect the incapacitated person's directives
109 concerning the provision or refusal of specific medical treatments or procedures.

110 C. A guardian shall maintain sufficient contact with the incapacitated person to know of his
111 capabilities, limitations, needs, and opportunities. The guardian shall visit the incapacitated person as
112 often as necessary.

113 D. A guardian shall be required to seek prior court authorization to change the incapacitated person's
114 residence to another state, to terminate or consent to a termination of the person's parental rights, or to
115 initiate a change in the person's marital status.

116 E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in
117 decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A
118 guardian, in making decisions, shall consider the expressed desires and personal values of the
119 incapacitated person to the extent known and shall otherwise act in the incapacitated person's best
120 interest and exercise reasonable care, diligence, and prudence. A guardian shall not unreasonably restrict

an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.

E1. A guardian [, except a guardian who is licensed to practice law in the Commonwealth,] and any staff employed or contracted by such guardian to perform guardianship duties on behalf of the guardian shall complete the training developed by the Department for Aging and Rehabilitative Services pursuant to subsection E of § 51.5-150 within four months of the date of entry of the initial order of appointment pursuant to § 64.2-2009, unless such training was completed [~~within the past 12 months~~] in conjunction with another guardianship appointment made pursuant to § 64.2-2009. [~~No guardian shall be required to complete such training more frequently than once every 36 months.~~]

F. A guardian shall have authority to make arrangements for the funeral and disposition of remains, including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains, or some combination thereof, if the guardian is not aware of any person that has been otherwise designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to make arrangements for the funeral and disposition of remains after the death of an incapacitated person if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune from civil liability for any act, decision, or omission resulting from acceptance of any dead body for burial, cremation, or other disposition when the provisions of this section are met, unless such acts, decisions, or omissions resulted from bad faith or malicious intent.

§ 64.2-2020. Annual reports by guardians.

A. A guardian shall file an annual report in compliance with the filing deadlines in § 64.2-1305 with the local department of social services for the jurisdiction where the incapacitated person then resides. The annual report shall be on a form prepared by the Office of the Executive Secretary of the Supreme Court and shall be accompanied by a filing fee of \$5. To the extent practicable, the annual report shall be formatted in a manner to encourage standardized and detailed responses from guardians. The local department shall retain the fee in the jurisdiction where the fee is collected for use in the provision of services to adults in need of protection. Within 60 days of receipt of the annual report, the local department shall file a copy of the annual report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case. Twice each year the local department shall file with the clerk of the circuit court a list of all guardians who are more than 90 days delinquent in filing an annual report as required by this section. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 64.2-1305.

B. The annual report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person, including any change in diagnosis or assessment of any such condition of such incapacitated person by any medical provider since the last report;

2. A description of the incapacitated person's living arrangements during the reported period, including a specific assessment of the adequacy of such living arrangement;

3. The medical, educational, vocational, social, recreational, and any other professional services and activities provided to the incapacitated person and the guardian's opinion as to the adequacy of the incapacitated person's care. The information required by this subdivision shall include (i) the specific names of the medical providers that have treated the incapacitated person and a description of the frequency or number of times the incapacitated person was seen by such providers; (ii) the date and location of and reason for any hospitalization of such incapacitated person; and (iii) a description of the educational, vocational, social, and recreational activities in which such incapacitated person participated;

4. A statement of whether the guardian agrees with the current treatment or habilitation plan;

5. A statement of whether the incapacitated person has been an alleged victim in a report of abuse, neglect, or exploitation made pursuant to Article 2 (§ 63.2-1603 et seq.) of Chapter 16 of Title 63.2, to the extent known, and whether there are any other indications of abuse, neglect, or exploitation of such incapacitated person;

6. A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship;

7. The name of any persons whose access to communicate, visit, or interact with the incapacitated person has been restricted and the reasons for such restriction;

8. A self-assessment by the guardian as to whether he feels he is able to continue to carry out the powers and duties imposed upon him by § 64.2-2019 and as specified in the court's order of appointment pursuant to § 64.2-2009;

182 9. *A statement as to whether the guardian and any staff employed or contracted by such guardian to*
183 *perform guardianship duties on behalf of the guardian have completed the training required by*
184 *subsection E1 of § 64.2-2019;*

185 10. Unless the incapacitated person resides with the guardian, a statement of the frequency and
186 nature of any (i) in-person visits from the guardian with the incapacitated person over the course of the
187 previous year and (ii) visits over the course of the previous year from a designee who is directly
188 supervised or contracted by the guardian, including the name of the designee performing such visit. If
189 any visit described in this section is made virtually, the guardian shall include such information in the
190 annual report;

191 ~~10.~~ 11. If no visit is made within a six-month period, the guardian shall describe any challenges or
192 limitations in completing such visit;

193 ~~11.~~ 12. A general description of the activities taken on by the guardian for the benefit of the
194 incapacitated person during the past year;

195 ~~12.~~ 13. Any other information deemed necessary by the Office of the Executive Secretary of the
196 Supreme Court of Virginia or the Department for Aging and Rehabilitative Services to understand the
197 condition, treatment, and well-being of the incapacitated person;

198 ~~13.~~ 14. Any other information useful in the opinion of the guardian; and

199 ~~14.~~ 15. The compensation requested and the reasonable and necessary expenses incurred by the
200 guardian.

201 The guardian shall certify by signing under oath that the information contained in the annual report
202 is true and correct to the best of his knowledge. If a guardian makes a false entry or statement in the
203 annual report, he shall be subject to a civil penalty of not more than \$500. Such penalty shall be
204 collected by the attorney for the Commonwealth or the county or city attorney, and the proceeds shall
205 be deposited into the general fund.

206 C. If the local department of social services files notice that the annual report has not been timely
207 filed in accordance with subsection A with the clerk of the circuit court, the court may issue a summons
208 or rule to show cause why the guardian has failed to file such annual report.

209 **2. That the Department for Aging and Rehabilitative Services shall develop and implement the**
210 **training specified by § 51.5-150 of the Code of Virginia, as amended by this act, by July 1, 2024.**

211 **3. That guardians appointed pursuant to § 64.2-2009 of the Code of Virginia prior to July 1, 2024,**
212 **shall complete the training required by § 64.2-2019 of the Code of Virginia, as amended by this**
213 **act, by January 1, 2026.**

214 **[4. That the Office of the Executive Secretary of the Supreme Court of Virginia shall prepare the**
215 **annual report form specified by § 64.2-2020 of the Code of Virginia, as amended by this act, by**
216 **July 1, 2024.]**