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SENATE BILL NO. 293

Offered January 10, 2024

Prefiled January 9, 2024

A BILL to amend and reenact §§ 64.2-2019 and 64.2-2021 of the Code of Virginia, relating to guardianship and conservatorship; duties and powers of guardian and conservator; self-dealing prohibited.

Patron—Roem

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2019 and 64.2-2021 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2019. Duties and powers of guardian.

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

A1. A guardian shall avoid all conflicts of interest and self-dealing, including all appearances of conflicts of interest and self-dealing, when addressing the needs of the incapacitated person to whom the guardian owes a fiduciary duty. For the purposes of this subsection (i) a conflict of interest arises when the guardian has a personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the incapacitated person, and (ii) self-dealing arises when the guardian seeks to take advantage of his position as guardian and acts for his own interests rather than for the interests of the incapacitated person.

Any sale or transaction that constitutes self-dealing shall be voidable by the court. A guardian may seek court authorization of a sale or transaction by filing a petition with the court.

For the purposes of this subsection, a sale or transaction entered into (i) prior to the appointment of such guardian or (ii) after a court authorizes such sale or transaction shall not constitute self-dealing.

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

C. A guardian shall maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities and as needed to comply with the duties imposed upon him pursuant to the order of appointment and this section and any other provision of law. The guardian shall visit the incapacitated person as often as necessary and at least three times per year, with at least one visit occurring every 120 days. Except as otherwise provided in subsection C1, of the three required visits, at least two visits shall be conducted by the guardian. The guardian shall conduct at least one of such visits in person; the second such visit may be conducted by the guardian via virtual conference or video call between the guardian and incapacitated person, provided that the technological means by which such conference or call can take place are readily available.

The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. If a person other than the guardian conducts any such visit, he shall provide a written report to the guardian regarding any visit conducted by such person.

A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

C1. If for reasons outside the guardian's control the guardian cannot make an in-person visit to an incapacitated person, then such visit may be conducted in person by an individual designated by the guardian pursuant to subsection C. If either the guardian or such individual designated by the guardian is unable to conduct an in-person visit, then such visit may be conducted virtually through electronic means such as a

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59 virtual conference or video call, or, if such technological means are not readily available, by telephone.

60 C2. In the event of a state of emergency or public health crisis in which a facility in which the  
61 incapacitated person resides is not allowing in-person visitation, visitation requirements required pursuant to  
62 subsection C may be met via a virtual conference or video call between the guardian and incapacitated  
63 person, to the extent feasible for the facility to provide the technological means by which such conference or  
64 call can take place. A telephone call shall meet the requirements of this subsection only if such technological  
65 means are not readily available.

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

69 E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions,  
70 to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in  
71 making decisions, shall consider the expressed desires and personal values of the incapacitated person to the  
72 extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care,  
73 diligence, and prudence. A guardian shall not restrict an incapacitated person's ability to communicate with,  
74 visit, or interact with other persons with whom the incapacitated person has an established relationship,  
75 unless such restriction is reasonable to prevent physical, mental, or emotional harm to or financial  
76 exploitation of such incapacitated person and after consideration of the expressed wishes of the incapacitated  
77 person. Such restrictions shall only be imposed pursuant to § 64.2-2019.1.

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

91 **§ 64.2-2021. General duties and liabilities of conservator.**

92 A. At all times the conservator shall exercise reasonable care, diligence, and prudence and shall act in the  
93 best interest of the incapacitated person. To the extent known to him, a conservator shall consider the  
94 expressed desires and personal values of the incapacitated person.

95 B. Subject to any conditions or limitations set forth in the conservatorship order, the conservator shall take  
96 care of and preserve the estate of the incapacitated person and manage it to the best advantage. The  
97 conservator shall apply the income from the estate, or so much as may be necessary, to the payment of the  
98 debts of the incapacitated person, including payment of reasonable compensation to himself and to any  
99 guardian appointed, and to the maintenance of the person and of his legal dependents, if any, and, to the  
100 extent that the income is not sufficient, he shall so apply the corpus of the estate.

101 C. A conservator shall, to the extent feasible, encourage the incapacitated person to participate in  
102 decisions, to act on his own behalf, and to develop or regain the capacity to manage the estate and his  
103 financial affairs. A conservator also shall consider the size of the estate, the probable duration of the  
104 conservatorship, the incapacitated person's accustomed manner of living, other resources known to the  
105 conservator to be available, and the recommendations of the guardian.

106 D. A conservator stands in a fiduciary relationship to the incapacitated person for whom he was appointed  
107 conservator and may be held personally liable for a breach of any fiduciary duty. Unless otherwise provided  
108 in the contract, a conservator is personally liable on a contract entered into in a fiduciary capacity in the  
109 course of administration of the estate, unless he reveals the representative capacity and identifies the estate in  
110 the contract. Claims based upon contracts entered into by a conservator in a fiduciary capacity, obligations  
111 arising from ownership or control of the estate, or torts committed in the course of administration of the estate  
112 may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or  
113 not the conservator is personally liable therefor. A successor conservator is not personally liable for the  
114 contracts or actions of a predecessor.

115 *D1. A conservator shall avoid all conflicts of interest and self-dealing, including all appearances of*  
116 *conflicts of interest and self-dealing, when addressing the needs of the incapacitated person to whom the*  
117 *conservator owes a fiduciary duty. For the purposes of this subsection (i) a conflict of interest arises when*  
118 *the conservator has a personal or agency interest that can be perceived as self-serving or adverse to the*  
119 *position or best interest of the incapacitated person, and (ii) self-dealing arises when the conservator seeks to*

120 *take advantage of his position as guardian and acts for his own interests rather than for the interests of the*  
121 *incapacitated person.*

122 *Any sale or transaction that constitutes self-dealing shall be voidable by the court. A conservator may*  
123 *seek court authorization of a sale or transaction by filing a petition with the court.*

124 *For the purposes of this subsection, a sale or transaction entered into (i) prior to the appointment of such*  
125 *conservator or (ii) after a court authorizes such sale or transaction shall not constitute self-dealing.*

126 E. A conservator shall comply with and be subject to the requirements imposed upon fiduciaries generally  
127 under Part A (§ 64.2-1200 et seq.) of this subtitle, specifically including the duty to account set forth in §  
128 64.2-1305.

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