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SENATE BILL NO. 765

Offered January 8, 2025

Prefiled December 16, 2024

A BILL to amend and reenact §§ 24.2-232, 64.2-2000, 64.2-2009, and 64.2-2009.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-2009.2, relating to incapacitated persons; finding of mental incompetence.

Patron—Favola

Referred to Committee on Rehabilitation and Social Services

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-232, 64.2-2000, 64.2-2009, and 64.2-2009.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-2009.2 as follows:

§ 24.2-232. Vacancy occurring when officer determined "mentally incompetent" (incapacitated).

A person who is determined to be incapacitated in a judicial proceeding as provided for in Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 shall be deemed for purposes of Article II, Section 1 of the Constitution of Virginia and this title to be "mentally incompetent." as that term is used in those provisions. The office of any person who is so determined to be incapacitated, shall become vacant and the vacancy filled in the manner provided by law. Notwithstanding the provisions of Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2, however, any officer shall have a jury trial unless it is waived by him or for him by his counsel of record.

§ 64.2-2000. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Advance directive" shall have the same meaning as provided in § 54.1-2982.

"Annual report" means the report required to be filed by a guardian pursuant to § 64.2-2020.

"Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." "Conservator" includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide conservatorial services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Department for Aging and Rehabilitative Services as a public conservator, it may also serve as a conservator for other individuals.

"Estate" includes both real and personal property.

"Facility" means a state or licensed hospital, training center, psychiatric hospital, or other type of residential or outpatient mental health or mental retardation facility. When modified by the word "state," "facility" means a state hospital or training center operated by the Department of Behavioral Health and Developmental Services, including the buildings and land associated with it.

"Guardian" means a person appointed by the court who has the powers and duties set out in § 64.2-2019, or § 63.2-1609 if applicable, and who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public guardian pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide guardian services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Department for Aging and Rehabilitative Services as a public guardian, it may also serve as a guardian for other individuals.

"Guardian ad litem" means an attorney appointed by the court to represent the interests of the respondent and whose duties include evaluation of the petition for guardianship or conservatorship and filing a report with the court pursuant to § 64.2-2003.

"Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic

59 needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide
 60 for his support or for the support of his legal dependents without the assistance or protection of a conservator.
 61 A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the
 62 individual is an incapacitated person within the meaning of this definition. A finding that a person is
 63 incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in
 64 ~~Article II, Section 1 of the Constitution of Virginia and~~ Title 24.2 unless the court order entered pursuant to
 65 this chapter specifically provides otherwise.

66 "Individualized education plan" or "IEP" means a plan or program developed annually to ensure that a
 67 child who has a disability identified under the law and is attending an elementary or secondary educational
 68 institution receives specialized instruction and related services as provided by 20 U.S.C. § 1414.

69 "Individual receiving services" or "individual" means a current direct recipient of public or private mental
 70 health, developmental, or substance abuse treatment, rehabilitation, or habilitation services and includes the
 71 terms "consumer," "patient," "resident," "recipient," or "client."

72 "Limited conservator" means a person appointed by the court who has only those responsibilities for
 73 managing the estate and financial affairs of an incapacitated person as specified in the order of appointment.

74 "Limited guardian" means a person appointed by the court who has only those responsibilities for the
 75 personal affairs of an incapacitated person as specified in the order of appointment.

76 "Mental illness" means a disorder of thought, mood, emotion, perception, or orientation that significantly
 77 impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and
 78 requires care and treatment for the health, safety, or recovery of the individual or for the safety of others.

79 "Petition" means the document filed with a circuit court to initiate a proceeding to appoint a guardian or
 80 conservator.

81 "Power of attorney" has the same meaning ascribed to it in § 64.2-1600.

82 "Property" includes both real and personal property.

83 "Respondent" means an allegedly incapacitated person for whom a petition for guardianship or
 84 conservatorship has been filed.

85 "Supported decision-making agreement" has the same meaning ascribed to it in § 37.2-314.3.

86 "Temporary conservator" means a person appointed by a court for a limited duration of time as specified
 87 in the order of appointment.

88 "Temporary guardian" means a person appointed by a court for a limited duration of time as specified in
 89 the order of appointment.

90 "Transition plan" means the plan that is required as part of the IEP used to help students and families
 91 prepare for the future after the student reaches the age of majority.

92 **§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.**

93 A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of the
 94 person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the
 95 incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify whether
 96 the appointment of a guardian or conservator is limited to a specified length of time, as the court in its
 97 discretion may determine; (iv) *specify whether the person has been found mentally incompetent for purposes*
 98 *of Article II, Section 1 of the Constitution of Virginia in accordance with the provisions of § 64.2-2009.2 and*
 99 *any specific findings of fact and conclusions of law in support of such finding of mental incompetence;* (v)
 100 specify the other legal disabilities, if any, of the person in connection with the finding of incapacity,
 101 including ~~but not limited to~~ mental competency for purposes of ~~Article II, § 1 of the Constitution of Virginia~~
 102 ~~or~~ Title 24.2; ~~(v)~~ (vi) include any limitations deemed appropriate following consideration of the factors
 103 specified in § 64.2-2007; ~~(vi)~~ (vii) set the bond of the guardian and the bond and surety, if any, of the
 104 conservator; and ~~(vii)~~ (viii) where a petition is brought prior to the incapacitated person's eighteenth birthday,
 105 pursuant to subsection C of § 64.2-2001, *specify* whether the order shall take effect immediately upon entry
 106 or on the incapacitated person's eighteenth birthday.

107 A1. Beginning July 1, 2023, the court shall set a schedule in the order of appointment for periodic review
 108 hearings, to be held no later than one year after the initial appointment and no later than every three years
 109 thereafter, unless the court orders that such hearings are to be waived because they are unnecessary or
 110 impracticable or that such hearings shall be held on such other schedule as the court shall determine. Any
 111 such determination to waive the hearing or use a schedule differing from that prescribed in this subsection
 112 shall be supported in the order and address the reason for such determination, including (i) the likelihood that
 113 the respondent's condition will improve or the respondent will regain capacity, (ii) whether concerns or
 114 questions were raised about the suitability of the person appointed as a guardian or conservator at the time of
 115 the initial appointment, and (iii) whether the appointment of a guardian or conservator or the appointment of
 116 the specifically appointed guardian or conservator was contested by the respondent or another party.

117 The court shall not waive the initial periodic review hearing scheduled pursuant to this subsection where
 118 the petitioner for guardianship or conservatorship is a hospital, convalescent home, or certified nursing
 119 facility licensed by the Department of Health pursuant to § 32.1-123; an assisted living facility, as defined in

120 § 63.2-100, or any other similar institution; or a health care provider other than a family member. If the
 121 petitioner is a hospital, convalescent home, or certified nursing facility licensed by the Department of Health
 122 pursuant to § 32.1-123 or an assisted living facility as defined in § 63.2-100, nothing in this chapter shall
 123 require such petitioner to attend any periodic review hearing.

124 Any person may file a petition, which may be on a form developed by the Office of the Executive
 125 Secretary of the Supreme Court of Virginia, to hold a periodic review hearing prior to the scheduled date set
 126 forth in the order of appointment. The court shall hold an earlier hearing upon good cause shown. *For the*
 127 *purposes of this subsection, "good cause" shall include a petition filed pursuant to subsection C of § 64.2-*
 128 *2009.2.* At such a hearing, the court shall review the schedule set forth in the order of appointment and
 129 determine whether future periodic review hearings are necessary or may be waived.

130 A2. If the court has ordered a hearing pursuant to subsection A1, the court shall appoint a guardian ad
 131 litem, who shall conduct an investigation in accordance with the stated purpose of the hearing and file a
 132 report. The incapacitated person has a right to be represented by counsel, and the provisions of § 64.2-2006
 133 shall apply, mutatis mutandis. The guardian ad litem shall provide notice of the hearing to the incapacitated
 134 person and to all individuals entitled to notice as identified in the court order of appointment. Fees and costs
 135 shall be paid in accordance with the provisions of §§ 64.2-2003 and 64.2-2008. The court shall enter an order
 136 reflecting any findings made during the review hearing and any modification to the guardianship or
 137 conservatorship.

138 B. The court may appoint a limited guardian for an incapacitated person who is capable of addressing
 139 some of the essential requirements for his care for the limited purpose of medical decision making, decisions
 140 about place of residency, or other specific decisions regarding his personal affairs. The court may appoint a
 141 limited conservator for an incapacitated person who is capable of managing some of his property and
 142 financial affairs for limited purposes that are specified in the order.

143 C. Unless the guardian has a professional relationship with the incapacitated person or is employed by or
 144 affiliated with a facility where the person resides, the court's order may authorize the guardian to consent to
 145 the admission of the person to a facility pursuant to § 37.2-805.1, upon finding by clear and convincing
 146 evidence that (i) the person has severe and persistent mental illness that significantly impairs the person's
 147 capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed psychiatrist; (ii)
 148 such condition is unlikely to improve in the foreseeable future; and (iii) the guardian has formulated a plan
 149 for providing ongoing treatment of the person's illness in the least restrictive setting suitable for the person's
 150 condition.

151 D. A guardian need not be appointed for a person who has appointed an agent under an advance directive
 152 executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title 54.1,
 153 unless the court determines that the agent is not acting in accordance with the wishes of the principal or there
 154 is a need for decision making outside the purview of the advance directive. A guardian need not be appointed
 155 for a person where a health care decision is made pursuant to, and within the scope of, the Health Care
 156 Decisions Act (§ 54.1-2981 et seq.).

157 A conservator need not be appointed for a person (i) who has appointed an agent under a durable power of
 158 attorney, unless the court determines pursuant to the Uniform Power of Attorney Act (§ 64.2-1600 et seq.)
 159 that the agent is not acting in the best interests of the principal or there is a need for decision making outside
 160 the purview of the durable power of attorney or (ii) whose only or major source of income is from the Social
 161 Security Administration or other government program and who has a representative payee.

162 E. All orders appointing a guardian shall include the following statements in conspicuous bold print in at
 163 least 14-point type:

164 1. Pursuant to § 64.2-2009 of the Code of Virginia, (name of guardian), is hereby appointed as guardian of
 165 (name of respondent) with all duties and powers granted to a guardian pursuant to § 64.2-2019 of the Code of
 166 Virginia, including but not limited to: (enter a statement of the rights removed and retained, if any, at the time
 167 of appointment; whether the appointment of a guardian is a full guardianship, public guardianship pursuant to
 168 § 64.2-2010 of the Code of Virginia, limited guardianship pursuant to § 64.2-2009 of the Code of Virginia, or
 169 temporary guardianship; and the duration of the appointment).

170 2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian, to the
 171 extent possible, shall encourage the incapacitated person to participate in decisions, shall consider the
 172 expressed desires and personal values of the incapacitated person to the extent known, and shall not restrict
 173 an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the
 174 incapacitated person has an established relationship, unless such restriction is reasonable to prevent physical,
 175 mental, or emotional harm to or financial exploitation of such incapacitated person and after consideration of
 176 the expressed wishes of the incapacitated person. Such restrictions shall only be imposed pursuant to § 64.2-
 177 2019.1.

178 3. Pursuant to § 64.2-2020 of the Code of Virginia, an annual report shall be filed by the guardian with the
 179 local department of social services for the jurisdiction where the incapacitated person resides.

180 4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition for

181 restoration of the incapacitated person to capacity; modification of the type of appointment or areas of
182 protection, management, or assistance granted; or termination of the guardianship. In lieu of such a petition,
183 if the person subject to the guardianship is not represented by counsel, such person may initiate the process
184 by sending informal written communications to the court. All orders appointing a guardian, conservator, or
185 both shall include the current mailing address, email address, and physical address of the court issuing the
186 order and to which such informal written communication shall be directed.

187 **§ 64.2-2009.1. Periodic review hearings.**

188 A hearing held pursuant to the schedule set forth in subsection A1 of § 64.2-2009 shall include the
189 following assessments by the court: (i) whether the guardian or conservator is fulfilling his duties ~~and~~; (ii)
190 whether continuation of the guardianship or conservatorship is necessary and, if so, whether the scope of such
191 guardianship or conservatorship warrants modification; *and (iii) whether the respondent's mental competency*
192 *status pursuant to § 64.2-2009.2 has changed.*

193 **§ 64.2-2009.2. Finding of mental incompetence.**

194 A. *No person shall be deemed mentally incompetent for purposes of Article II, Section 1 of the*
195 *Constitution of Virginia unless a court makes a specific finding by clear and convincing evidence that such*
196 *person is unable to communicate, with or without accommodations, an interest in participating in the voting*
197 *process. No court shall find a person mentally incompetent pursuant to this section without a showing that*
198 *reasonable accommodation appropriate to such person's diagnosis or condition has been provided for the*
199 *purpose of determining such person's interest in participating in the voting process.*

200 B. *No court shall, in determining mental competence pursuant to this section, consider the results of or*
201 *such person's failure to complete or comply with any test or device that evaluates such person's (i) ability to*
202 *read, write, understand, or interpret any matter; (ii) educational achievement or knowledge of any particular*
203 *subject; or (iii) moral character.*

204 C. *Any person who was deemed mentally incompetent for the purposes of Article II, Section 1 of the*
205 *Constitution of Virginia prior to July 1, 2025, may petition the court that made such determination for the*
206 *limited purpose of a review of such determination in accordance with the provisions of this section.*

207 D. *When a person who has been deemed mentally incompetent for the purposes of Article II, Section 1 of*
208 *the Constitution of Virginia prior to July 1, 2025, either in accordance with the provisions of this section or*
209 *by a finding of incapacity without a court order to the contrary, has not filed a petition for a review of such d*
210 *etermination of mental incompetence, a review of such determination of mental incompetence shall be*
211 *conducted at such person's next periodic review hearing pursuant to § 64.2-2009 in accordance with the*
212 *provisions of this section.*

213 **2. That nothing in the provisions of this act shall be construed to automatically nullify or void any**
214 **determination of mental incompetence made, whether explicitly or construed by a finding of incapacity**
215 **without a court order to the contrary, prior to July 1, 2025.**