

SENATE BILL NO. 345
AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee for Courts of Justice
on _____)
(Patron Prior to Substitute—Senator Roem)

A BILL to amend and reenact §§ 64.2-2006 and 64.2-2007 of the Code of Virginia, relating to guardianship or conservatorship of incapacitated adult; right to request counsel; right to a jury trial.

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2006 and 64.2-2007 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2006. Counsel for respondent.

The respondent has the right to be represented by counsel of the respondent's choice. If the respondent is not represented by counsel, the court may appoint legal counsel upon the filing of the petition or at any time prior to the entry of the order upon request of the respondent or the guardian ad litem, if the court determines that counsel is needed to protect the respondent's interest. *Where the respondent is unable to communicate verbally, in writing, or with the assistance of any device to the extent that he is incapable of receiving and evaluating information effectively or responding to people, events, or environments and is therefore unable to request that he be represented by counsel, the court may upon the request of (i) the respondent's immediate family member or (ii) an agent under a power of attorney authorized to act on behalf of the respondent, provided that such family member or agent has become a party to the proceedings in accordance with subsection D of § 64.2-2004, appoint counsel for the respondent. In making such determination, the court shall consider whether the guardian ad litem has made the recommendation that no counsel for the respondent be appointed in his report as required by § 64.2-2003. Counsel appointed by the court shall be paid a fee that is fixed by the court to be taxed as part of the costs of the proceeding.*

A health care provider shall disclose or make available to the attorney, upon request, any information, records, and reports concerning the respondent that the attorney determines necessary to perform his duties under this section, including a copy of the evaluation report required under § 64.2-2005.

For the purposes of this section, "immediate family member" shall include any relative listed in subdivision B 3 of § 64.2-2002.

§ 64.2-2007. Hearing on petition to appoint.

A. The respondent is entitled to a jury trial upon request, and may compel the attendance of witnesses, present evidence on his own behalf, and confront and cross-examine witnesses. *If the respondent is unable to communicate verbally, in writing, or with the assistance of any device to the extent that he is incapable of*

receiving and evaluating information effectively or responding to people, events, or environments and is therefore unable to make such request, an immediate family member of the respondent or an agent under a power of attorney authorized to act on behalf of the respondent may request a jury trial on behalf of the respondent only if such immediate family member or respondent has become a party to the proceedings in accordance with subsection D of § 64.2-2004.

For the purposes of this subsection, "immediate family member" shall include any relative listed in subdivision B 3 of § 64.2-2002.

B. The court or the jury, if a jury is requested, shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones it for cause. The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

C. In determining the need for a guardian or a conservator and the powers and duties of any guardian or conservator, if needed, consideration shall be given to the following factors: (i) the limitations of the respondent; (ii) the development of the respondent's maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including advance directives, supported decision-making agreements, and durable powers of attorney; (iv) the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; (v) the actions needed to be taken by the guardian or conservator; (vi) the suitability of the proposed guardian or conservator; and (vii) the best interests of the respondent.

D. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person, who may be the spouse of the respondent, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent. If a guardian or conservator is appointed, the court shall inform him of his duties and powers pursuant to Article 2 (§ 64.2-2019 et seq.) and shall further inform the guardian or conservator that, to the extent feasible, the respondent should be encouraged to participate in decisions, act on his own behalf, and develop or maintain the capacity to manage

his personal affairs if he retains any decision-making rights. Except for good cause shown, including a determination by the court that there is no acceptable alternative available to serve, the court shall not appoint as guardian or conservator for the respondent an attorney who has been engaged by the petitioner to represent the petitioner within three calendar years of the appointment. Such prohibition also applies to all other attorneys and employees of the law firm with which such attorney is associated. The court shall require the proposed guardian or conservator to certify at the time of appointment that he has disclosed to the court any such representation of the petitioner or association with a law firm that represented the petitioner within the three calendar years preceding the appointment. Compensation paid by a petitioner to an attorney or law firm for serving as a guardian or conservator shall not constitute representation of the petitioner by such attorney or law firm. In the case of a petitioner that is a medical care facility as defined in § 32.1-3, the court may, for good cause shown, order that the reasonable costs for the guardian or conservator be paid by the petitioner during the time the respondent is under the care of such medical care facility.

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered. The order of appointment shall be made in a form that complies with the requirements set out in § 64.2-2009.