

HOUSE BILL NO. 2027

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on \_\_\_\_\_)

(Patron Prior to Substitute--Delegate Roem)

A BILL to amend and reenact §§ 54.1-2986.1, 64.2-2009, and 64.2-2019 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-2019.1, relating to guardianship; restricted communication procedures.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 54.1-2986.1, 64.2-2009, and 64.2-2019 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-2019.1 as follows:**

**§ 54.1-2986.1. Duties and authority of agent or person identified in § 54.1-2986.**

A. If the declarant appoints an agent in an advance directive, that agent shall have (i) the authority to make health care decisions for the declarant as specified in the advance directive if the declarant is determined to be incapable of making an informed decision and (ii) decision-making priority over any person identified in § 54.1-2986. In no case shall the agent refuse or fail to honor the declarant's wishes in relation to anatomical gifts or organ, tissue or eye donation. Decisions to restrict visitation of the patient may be made by an agent only if the declarant has expressly included provisions for visitation in his advance directive; such visitation decisions shall be subject to physician orders and policies of the institution to which the declarant is admitted. No person authorized to make decisions for a patient under § 54.1-2986 shall have authority to restrict visitation of the patient, unless such visitation was restricted by a guardian pursuant to the procedures prescribed by § 64.2-2019.1.

B. Any agent or person authorized to make health care decisions pursuant to this article shall (i) undertake a good faith effort to ascertain the risks and benefits of, and alternatives to any proposed health care, (ii) make a good faith effort to ascertain the religious values, basic values, and previously expressed

26 preferences of the patient, and (iii) to the extent possible, base his decisions on the beliefs, values, and  
27 preferences of the patient, or if they are unknown, on the patient's best interests.

28 **§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.**

29 A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of  
30 the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the  
31 incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify  
32 whether the appointment of a guardian or conservator is limited to a specified length of time, as the court  
33 in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in connection with  
34 the finding of incapacity, including but not limited to mental competency for purposes of Article II, § 1  
35 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed appropriate following  
36 consideration of the factors specified in § 64.2-2007; (vi) set the bond of the guardian and the bond and  
37 surety, if any, of the conservator; and (vii) where a petition is brought prior to the incapacitated person's  
38 eighteenth birthday, pursuant to subsection C of § 64.2-2001, whether the order shall take effect  
39 immediately upon entry or on the incapacitated person's eighteenth birthday.

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

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

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

59 A conservator need not be appointed for a person (i) who has appointed an agent under a durable  
 60 power of attorney, unless the court determines pursuant to the Uniform Power of Attorney Act (§ 64.2-  
 61 1600 et seq.) that the agent is not acting in the best interests of the principal or there is a need for decision  
 62 making outside the purview of the durable power of attorney or (ii) whose only or major source of income  
 63 is from the Social Security Administration or other government program and who has a representative  
 64 payee.

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

67 "1. Pursuant to § 64.2-2009 of the Code of Virginia, \_\_\_\_\_ (name of guardian), is hereby  
 68 appointed as guardian of \_\_\_\_\_ (name of respondent) with all duties and powers granted to a  
 69 guardian pursuant to § 64.2-2019 of the Code of Virginia, including but not limited to: (enter a statement  
 70 of the rights removed and retained, if any, at the time of appointment; whether the appointment of a  
 71 guardian is a full guardianship, public guardianship pursuant to § 64.2-2010 of the Code of Virginia,  
 72 limited guardianship pursuant to § 64.2-2009 of the Code of Virginia, or temporary guardianship; and the  
 73 duration of the appointment).

74 2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian,  
 75 to the extent possible, shall encourage the incapacitated person to participate in decisions, shall consider  
 76 the expressed desires and personal values of the incapacitated person to the extent known, and shall not  
 77 ~~unreasonably~~ restrict an incapacitated person's ability to communicate with, visit, or interact with other  
 78 persons with whom the incapacitated person has an established relationship, unless such restriction is  
 79 reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated

80 person and after consideration of the expressed wishes of the incapacitated person. Such restrictions shall  
81 only be imposed pursuant to § 64.2-2019.1.

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

84 4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition  
85 for restoration of the incapacitated person to capacity; modification of the type of appointment or areas of  
86 protection, management, or assistance granted; or termination of the guardianship."

87 **§ 64.2-2019. Duties and powers of guardian.**

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

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

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

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

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

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

130 **§ 64.2-2019.1. Procedures to restrict communication, visitation, or interaction.**

131 A. A guardian may restrict the ability of a person with whom the incapacitated person has an  
132 established relationship to communicate with, visit, or interact with such incapacitated person only when  
133 such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation

134 of such incapacitated person and after consideration of the expressed wishes of such incapacitated person.  
135 Any such restriction may include (i) limitations on time, duration, location, or method of visits or  
136 communication, (ii) supervised visitation, or (iii) prohibition of in-person visitation, and shall be the least  
137 restrictive means possible to prevent any such harm or exploitation.

138 B. The guardian shall provide written notice to the restricted person, on a form developed by the  
139 Office of the Executive Secretary of the Supreme Court of Virginia, stating (i) the nature and terms of the  
140 restriction, (ii) the reasons why the guardian believes the restriction is necessary, and (iii) how the  
141 restricted person may challenge such restriction in court. The guardian shall also inform the incapacitated  
142 person of such restriction and provide a copy of such written notice to the incapacitated person, unless the  
143 guardian has a good faith belief that such information would be detrimental to the health or safety of such  
144 incapacitated person. The guardian shall provide a copy of such written notice to the local department of  
145 social services of the jurisdiction where the incapacitated person resides and shall file a copy of such  
146 written notice with the circuit court that appointed the guardian. If the incapacitated person is in a hospital,  
147 convalescent home, or certified nursing facility licensed by the Department of Health pursuant to § 32.1-  
148 123, an assisted living facility as defined in § 63.2-100, or any other similar institution, the guardian shall  
149 also inform such hospital, home, facility, or institution of such restriction.

150 C. Any restricted person or incapacitated person may move to terminate or modify any such  
151 restriction. Any incapacitated person may move to terminate or modify any such restriction pursuant to §  
152 64.2-2012. A hearing shall be held within 45 days of return of the written notice filed with the court  
153 pursuant to subsection B.

154 D. If the court finds that a restriction is reasonable to prevent harm to or financial exploitation of  
155 such incapacitated person, the court may continue or modify such restriction in its discretion.

156 E. If the court does not find that a restriction is reasonable to prevent harm to or financial  
157 exploitation of such incapacitated person, the court may issue an order terminating, continuing, or  
158 modifying any restriction the guardian imposed on the person challenging such restriction.

159 F. If the court finds that a guardian imposed a restriction in bad faith, primarily for the purposes  
160 of harassment, or that was clearly frivolous or vexatious, the court may require the guardian to pay or

161 reimburse, from the guardian's personal funds, all or some of the costs and fees, including attorney fees,  
162 incurred by the restricted person in connection with such motion.

163 G. If the court finds that the claim of a restricted person who filed a motion pursuant to this section  
164 was made in bad faith, was brought primarily for the purposes of harassment, or was clearly frivolous or  
165 vexatious, the court may require such restricted person to pay or reimburse the guardian all or some of the  
166 costs and fees, including attorney fees, incurred by the guardian in connection with such claim.

167 H. Any court order issued pursuant to the provisions of this section shall be provided to the local  
168 department of social services of the jurisdiction where the incapacitated person resides.

169 #