

2016 GENERAL ASSEMBLY
ELDER LAW SUMMARY

April 2016¹

Long-Term Care

HB 343—Pogge—Nursing Homes; reimbursement of unexpended patient funds.

Amends § 32.1-127 to require the Board of Health to include in its regulations a provision requiring nursing homes to provide a full refund of any unexpended patient funds on deposit with the facility following the discharge or death of a patient, other than entrance-related fees paid to a continuing care provider, within 30 days of a written request for such funds by the discharged patient or, in the case of the death of a patient, the person administering the patient's estate in accordance with the Virginia Small Estates Act (§ 64.2-600 et seq. of the Code of Virginia).

Approved by the Governor.

HB 386—Minchew and SB 328--Favola—Nurse aide education programs; observational and reporting techniques to be included in curriculum.

Amends § 54.1-3028.1 to add training in observational and reporting techniques to the list of training and education requirements for nurse aide training programs.

Approved by the Governor.

HB 504—Garrett—Renewal of certification as nurse aide.

Amends § 54.1-3026 to change the frequency with which certification as a nurse aide must be renewed from biennially to annually.

Approved by the Governor

HB 420—Helsel—Auxiliary Grants; regulations.

Amends § 51.5- 160 to clarify that regulations adopted by the Commissioner of the Department for Aging and Rehabilitative Services shall establish auxiliary grant rates for adult foster care homes and licensed assisted living facilities, the process for reporting and certification, and services to be provided to auxiliary grant recipients and paid for using auxiliary grant funds. The bill eliminates specific requirements for regulations related to reporting certain allowable costs and resident charges, the time period for reporting such costs, forms to be used, financial reviews, and audits of reported costs, and clarifies processes for calculating auxiliary grant rates.

Approved by the Governor.

HB 435—Stolle—Adult day care centers; exempt from licensure, PACE.

Amends § 63.2-1701 to exempt adult day care centers that provide services only to individuals enrolled in a Programs of All-Inclusive Care for the Elderly (PACE) program from the requirement for obtaining a license issued by the Department of Social Services.

Approved by the Governor.

HB 536—Hope—Sponsored residential and shared living services; background checks.

¹ As of 4/12/16, these bills have cleared the House and Senate and have been approved by the Governor. Unless otherwise noted, new laws are effective July 1, 2016.

Amends §§ 19.2-389, 37.2-416, and 37.2-506 to establish a requirement for a national fingerprint-based background check for providers of sponsored residential and shared living services.

Approved by the Governor.

HB 304—Kilgore—Home service contract provider.

Amends §§ 38.2-2619 and 38.2-2622 to authorize the State Corporation Commission (SCC) to deny an initial license application for a home service contract provider based on its review of the financial statements and any reports, certificates, or other documents filed with the SCC. The measure also changes the license renewal cycle for home service contract providers from a biennial process to an annual process beginning July 1, 2017, and revises the application fee from \$1,000 biennially to \$500 annually. Other provisions (i) clarify that the Virginia reserve requirement for such companies is determined by taking the gross consideration received for all home service contracts, less the claims paid, and then multiplying the remainder by 40 percent; (ii) replace a reference to "premiums" with "provider fees" because home service contracts are not insurance; and (iii) amend the provision dealing with filing of audited financial statements to allow for statements prepared in accordance with generally accepted accounting principles. The bill has an emergency clause.

Approved by Governor.

HB 675—Peace—Auxiliary Grants; supportive housing.

Adds § 37.2-421.1 and amends § 51.5-160 to extend eligibility for auxiliary grants to include individuals residing in supportive housing, provided that the supportive housing provider has entered into an agreement for the provision of supportive housing with the Department of Behavioral Health and Developmental Services. The bill establishes requirements for providers of supportive housing that enter into agreements with the Department. Limited to 60 individuals.

Approved by the Governor.

HB 740—Yost—Federal Rehabilitation Act.

Amends certain language in the Code of Virginia in §§ 51.5-41, 51.5-120, 51.5-164, 51.5-172 through -176 to conform to the federal Rehabilitation Act. The bill adds to the services to be provided through grants or contracts with centers for independent living to include services that (i) facilitate the transition of individuals with significant disabilities from nursing homes and other institutions to home and community-based residences, (ii) provide assistance to individuals with significant disabilities who are at risk of entering institutions so that the individuals may remain in the community, and (iii) facilitate the transition of youth with significant disabilities, who were eligible for individualized education programs under the Individuals with Disabilities Education Act or who have completed their secondary education, to post-secondary life. The bill also requires that individualized plans for employment for recipients of vocational rehabilitation services provided or funded by the Department for Aging and Rehabilitative Services (DARS) be developed as soon as possible, but not later than 90 days after the due date of the determination of eligibility. The bill also repeals a section of the Code of Virginia that lists certain services employers may provide through projects with DARS designed to provide vocational rehabilitation in realistic employment settings and to provide on-the-job training for persons with disabilities.

Approved by Governor.

SB 363—Reeves—Rights of persons with disabilities in public places and places of public accommodation; fraudulent representation of a service dog; penalty.

Adds § 51.5-44.1 to provide that any person who knowingly and willfully fits a dog with a harness, collar, vest, or sign, or uses an identification card commonly used by a person with a disability in order to represent that the dog is a service dog or hearing dog to fraudulently gain public access for such dog pursuant to 51.5-44 is guilty of a Class 4 misdemeanor.

Approved by the Governor.

SB 553—Cosgrove—Nursing facilities; audio visual monitoring.

A section 1 bill that directs the Board of Health to promulgate regulations governing audio-visual monitoring of patients in nursing homes by July 1, 2017, and requires the Board to convene a workgroup of stakeholders to make recommendations on such regulations. The regulations shall include provisions related to resident privacy, notice and disclosure, liability, ownership and maintenance of equipment, cost, recording and data security, and nursing facility options for facility-managed and resident-managed recording. The workgroup shall report its recommendations to the Board and the General Assembly by December 1, 2016.

Approved by the Governor.

HB 920—Mason—Barrier crimes; conviction or finding not guilty by reason of insanity.

Amends §§ 37.2-408.1, 63.2-1719, and 63.2-1726 to add conviction or a finding that a person is not guilty by reason of insanity of any offense that results in the offender's requirement to register with the Sex Offender and Crimes Against Minors Registry to the list of crimes that constitute a barrier to licensure as a child welfare agency or assisted living facility, approval as a foster or adoptive parent by a child-placing agency, approval as a family day home by a family day system, or employment or serving as a volunteer at a children's residential facility, assisted living facility, adult day care center, or child welfare agency.

Approved by the Governor.

SB 278—Wexton—Criminal history background checks; continued employment of individuals convicted of an offense.

Amends §§ 63.2-1720 and 63.2-1720.1 (eff. 7/1/17) to prohibit assisted living facilities, adult day care centers, licensed and registered child welfare agencies, and family day homes approved by family day systems from continuing to employ individuals who have been convicted of an offense as defined in § 63.2-1719.

Approved by the Governor.

SB 732—Hanger—Assisted living facilities; no facility shall be required to provide or allow hospice care.

Amends § 63.2-1806 to provide that, to the extent allowed by federal law, no assisted living facility shall be required to provide or allow hospice care if such hospice care restrictions are included in a disclosure statement that is signed by the resident prior to admission.

Approved by the Governor.

Guardianship, Powers of Attorney & Advance Directive Bills

HB 342—Pogge--and SB 466—Wagner—Guardianship; communication between incapacitated person and others.

Amends § 64.2-2019 to provide that 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.

Approved by the Governor.

HB 232—Leftwich—Medical bills; presumption; authenticity and reasonableness, who may identify and provide testimony.

Amends § 8.01-413.01 to allow a plaintiff's guardian, agent under an advance directive, or agent under a power of attorney to identify a medical bill and provide testimony on the bill to establish a rebuttable presumption of authenticity and reasonableness of the bill where the court finds the plaintiff is unable to provide testimony. Current law requires the plaintiff to identify and provide testimony on the bill.

Approved by the Governor.

HB 337—Pogge—Neurodegenerative diseases, informed consent to experimental treatment.

Amends § 32.1-162.18 to provide that in the case of persons suffering from neurodegenerative diseases causing progressive deterioration of cognition for which there is no known cure, the implementation of experimental courses of therapeutic treatment, including non-pharmacological treatment, to which a legally authorized representative has given informed consent shall not constitute the use of force. This provision replaces a current provision that informed consent to experimental courses of treatment, without reference to non-pharmacological treatment, given by a legally authorized representative shall not constitute the use of force in cases of organic brain diseases causing progressive deterioration in which there is no known cure or medically accepted treatment to the disorder.

Approved by the Governor.

HB 616—Bell—Discharge from involuntary admission; advance directive.

Amends §§ 37.2-817, 37.2-837, and 37.2-838 to require that, prior to the release from involuntary admission or discharge from involuntary admission to mandatory outpatient treatment of an individual who has not executed an advance directive, the individual be given a written explanation of the procedures for executing an advance directive and an advance directive form.

Approved by the Governor.

HB 816—Peace—Public Guardian and Conservator Advisory Board.

Amends § 51.5-150, adds §§ 51.5-149.1 and -149.2, and repeals §§ 2.2-2411 and 2.2-2412 to remove from the membership of the Public Guardian and Conservator Advisory Board (the Advisory Board) one representative of the Virginia Guardianship Association. The bill also moves existing provisions relating to the Advisory Board from Title 2.2 (Administration of Government) to Title 51.5 (Persons with Disabilities) for administrative purposes.

Approved by Governor.

HJ 87—Hodges—and SJ 35—Miller—Advance Care Planning month.

Designates April, in 2016 and in each succeeding year, as Advance Care Planning Month in Virginia.

Passed House and Senate.

HB 1266—Habeeb—Guardianship appointments, modifications, and terminations; notice to DMAS.

Amends §§ 64.2-2011 and 64.2-2014 to require that notices of guardianship appointments, modifications, and terminations be sent to the Department of Medical Assistance Services. Current law requires that such notices be sent only to the local department of social services.

Approved by Governor.

HB 1267—Habeeb—Petitions for guardianship or conservatorship; orders prior to the respondent's 18th birthday.

Amends §§ 64.2-2001 and 64.2-2009 to clarify that a court may enter an order of appointment for a respondent's parent or guardian, or other person if there is no living parent or guardian, prior to the respondent's eighteenth birthday. The bill requires that any such order state whether the order takes effect immediately upon entry or on the child's eighteenth birthday.

Approved by Governor.

Financial Exploitation, Abuse and Neglect of Elderly & Vulnerable Adults

HB 248—Minchew—and SB 249--Black—Financial exploitation of adults; documentation referred to law enforcement.

Amends § 63.2-1605 to provide that upon receipt of a report or during an adult protective services investigation of suspected financial exploitation of an adult who is 60 years old or older or incapacitated in which financial losses to such adult resulting from the exploitation are suspected to be greater than \$50,000, the local department of social services or adult protective services hotline shall immediately refer the matter to the local law-enforcement agency for investigation

Approved by the Governor.

HB 676—Peace—DARS; work group to study financial exploitation of adults in the Commonwealth.

Section 1 bill that directs the Commissioner of the Department for Aging and Rehabilitative Services (DARS), together with the Director of the Department for Planning and Budget or his designee, representatives of DARS' Adult Protective Services Unit and local department of social services' adult protective services units, law-enforcement agencies, financial institutions in the Commonwealth, and organizations representing elderly individuals and adults with disabilities, to determine the cost of financial exploitation of adults in the Commonwealth and develop recommendations for improving the ability of financial institutions to identify financial exploitation of adults, the process by which financial institutions report suspected financial exploitation of adults, and interactions between financial institutions and local adult protective services units investigating reports of suspected financial exploitation of adults and to report on his activities and recommendations to the Governor and the General Assembly by January 1, 2017.

Approved by the Governor.

APA

SB 206—Edwards--Administrative Process Act; ex parte communication.

Adds § 2.2-4024.2 to provide that, during the period that a hearing is pending, a hearing officer is prohibited from communicating with any person concerning the hearing without notice and opportunity for all parties to participate in the communication. The bill also provides that a hearing officer may communicate about a pending hearing in instances where the communication is authorized by law, involves a ministerial matter, or does not augment, diminish, or modify the evidence in the record. In addition, the bill establishes the procedures to be followed if a hearing officer makes or receives a prohibited communication and the relief that a hearing officer may provide in such instances. As introduced, the bill is the recommendation of the Administrative Law Advisory Committee and approved by the Virginia Code Commission.

Approved by the Governor.

SB 207—Edwards--Administrative Process Act; reconsideration of formal hearings.

Amends § 2.2-4020 and adds § 2.2-4023.1 to provide a procedure for a party to file a petition for reconsideration of an agency's decision from a formal hearing under the Administrative Process Act (APA). The bill requires the agency to render a written decision on a party's timely petition for reconsideration within 30 days; the agency may deny the petition, modify the decision, or vacate the decision and set a new hearing for further proceedings. The agency shall state the reasons for its action. The bill also provides for the reconsideration of other decisions of a policy-making board of a state agency. If reconsideration is sought for the decision of a board, the board may (i) consider the petition for reconsideration at its next regularly scheduled meeting, (ii) schedule a special meeting to consider and decide upon the petition within 30 days of receipt, or (iii) delegate authority to consider the petition to either the board chairman, a subcommittee of the board, or the director of the state agency that provides administrative support to the board. A timely filed petition for reconsideration does not suspend execution of the agency decision or toll the time for filing a notice of appeal under Rule 2A:2 unless the agency provides for suspension of its decision when it grants a petition for reconsideration. The bill provides that any agency that intends to promulgate regulations that specify the scope of evidence that may be considered by such agency in support of any petition for reconsideration may promulgate emergency regulations. The bill also requires the Department of Human Resource Management to submit an annual report to the Senate Committee on General Laws and Technology and the House Committee on General Laws detailing (a) the number of employee grievance hearings held pursuant to the APA and (b) the number of decisions from such hearings that were rendered in favor of employees. As introduced, the bill is the recommendation of the Administrative Law Advisory Committee and approved by the Virginia Code Commission.

Approved by the Governor.

HB 462—Head—Administrative Process Act; contents of notice for case proceedings.

Amends §§ 2.2-4019 and 2.2-4020 to require the notice for either an informal conference or a formal proceeding to include contact information consisting of the name, telephone number, and government email address of the person designated by the agency to answer questions or otherwise assist a named party.

Approved by the Governor.

HB 644—Leftwich—Administrative Process Act; judicial review of certain regulations.

Amends § 2.2-4026 to provide that in any court action brought by a person affected by and claiming the unlawfulness of any regulation on the basis that an agency failed to follow any procedure for the promulgation or adoption of a regulation specified in the Administrative Process Act or in such agency's basic law, the burden shall be upon the party complaining of the agency action to designate and demonstrate the unlawfulness of the regulation by a preponderance of the evidence. The bill provides that if the court finds in favor of the party complaining of the agency action, the court shall declare the regulation null and void and remand the case to the agency for further proceedings.

Approved by Governor.

Mental Health

HB 1110—Bell—Temporary detention; notice of recommendation; communication with magistrate.

Amends §§ 16.1-337, 37.2-804.2, and 37.2-809 to provide that the magistrate conducting a temporary detention hearing shall consider, if available, information provided by the person who initiated emergency custody. The bill also requires the community services board evaluating a person for temporary detention, if the evaluator recommends that the person not be subject to temporary detention, (i) to notify, if present, the person who initiated emergency custody of such recommendation in addition to the current obligation to notify the petitioner and an onsite treating physician; (ii) to promptly inform the person who initiated emergency custody that the community services board will facilitate communication between such person and the magistrate if such person disagrees with the recommendation of the community services board; and (iii) to arrange for the person who initiated emergency custody to communicate, upon request, with the magistrate as soon as practicable prior to the expiration of the period of emergency custody. Finally, the bill imposes a duty on health care providers providing services to a person subject to emergency custody, temporary detention, or involuntary admission proceedings to make a reasonable attempt to notify the person's family member or personal representative and clarifies that such representative includes an agent named in an advance directive; currently, such health care provider has discretion as to whether to make such notification.

Approved by the Governor.

SB 567—Barker—Temporary detention; notice of recommendation; communication with magistrate.

Amends §§ 16.1-337, 37.2-804.2, and 37.2-809 to provide that the magistrate conducting a temporary detention hearing shall consider, if available, information provided by the person who initiated emergency custody. The bill also requires the community services board evaluating a person for temporary detention, if the evaluator recommends that the person not be subject to temporary detention, (i) to notify, if present, the person who initiated emergency custody of such recommendation in addition to the current obligation to notify the petitioner and an onsite treating physician; (ii) to promptly inform the person who initiated emergency custody that the community services board will facilitate communication between such person and the magistrate if such person disagrees with the recommendation of the community services board; and (iii) to arrange for the

person who initiated emergency custody to communicate, upon request, with the magistrate as soon as practicable prior to the expiration of the period of emergency custody. Finally, the bill imposes a duty on health care providers providing services to a person subject to emergency custody, temporary detention, or involuntary admission proceedings to make a reasonable attempt to notify the person's family member or personal representative and clarifies that such representative includes an agent named in an advance directive; currently, such health care provider has discretion as to whether to make such notification.

Approved by the Governor.

Wills and Estates

HB 231—Leftwich—and SB 181—Chafin—Augmented Estate; elective share of surviving spouse.

Revises numerous provisions of the Code related to the elective share of the surviving spouse of a decedent dying on or after January 1, 2017, to track revisions made to the Uniform Probate Code by the Uniform Law Commission. The bill calculates the elective share of the surviving spouse as a graduated percentage, taking into account both spouses' assets and the length of marriage. Under current law, the surviving spouse is awarded 50% of the estate if there were no children and 33.3% if there were children. The bill also clarifies the process by which the elective share is to be claimed and provides instructions for the valuation of assets to encourage uniformity in the method of calculation of the elective share.

Approved by the Governor.

SB 127—Edwards—Uniform Powers of Appointment Act; codification of Act.

Amends various section of Title 64.2 to codify the Uniform Powers of Appointment Act (the Act), which governs the use of an estate planning tool that permits the owner of property to name a third party and give that person the power to direct the distribution of that property among some class of eligible recipients. The Act is based on the Restatement (Third) of Property: Wills and Other Donative Transfers and was adopted by the Uniform Law Commission in 2013.

Approved by the Governor.

HB 230—Minchew—Judicial creation of trusts.

Amends § 64.2-719 to clarify that a circuit court may create and establish a trust upon petition of an interested party. The bill states that its provisions are declarative of existing law.

Approved by the Governor.

HB 789—Adams—Exhumations; notice to next of kin.

Amends § 32.1-286 to establish procedures for notification of the next of kin of a dead person upon receipt by the circuit court of a report regarding an investigation that requires an exhumation or filing of a petition for exhumation. The bill provides that in cases in which the exhumation is requested as part of an investigation by the Chief Medical Examiner or other medical examiner, upon request of the attorney for the Commonwealth and a finding that good cause exists, a judge may order for a period not to exceed 90 days that notification of the next of kin of the dead person be withheld, the report and order for exhumation be sealed, and any parties involved in the investigation or exhumation not disclose to the next of kin of the dead person or any other person

that the court may deem appropriate that the investigation or exhumation has occurred. Such order may be extended for additional periods of up to 90 days upon petition of the attorney for the Commonwealth and a finding that good cause for such extension exists.

Approved by Governor.

Miscellaneous

HB 1128—Habeeb—Spouse’s liability for medical care; exemption for principal residence.

Amends § 8.01-220.2 to provide that a lien arising out of a judgment for a spouse's emergency medical care shall not be enforced against the judgment debtor's principal residence held as tenants by the entireties unless the residence is refinanced or transferred to new owners.

Approved by the Governor.

HB 1103—Filler-Corn—ABLE savings trust accounts; exclusion from determination of state means-tested assistance and benefits.

Amends § 23-38.81 to provide that notwithstanding any other provision of state law that requires consideration of one or more financial circumstances of an individual for the purpose of determining (i) the individual's eligibility to receive any assistance or benefit pursuant to such provision of state law or (ii) the amount of any such assistance or benefit that such individual is eligible to receive pursuant to such provision of state law, any (a) moneys in an ABLE savings trust account for which such individual is the beneficiary, including any interest on such moneys, (b) contributions to an ABLE savings trust account for which such individual is the beneficiary, and (c) distribution for qualified disability expenses for such individual from an ABLE savings trust account for which such individual is the beneficiary shall be disregarded for such purpose with respect to any period during which such individual remains the beneficiary of, makes contributions to, or receives distributions for qualified disability expenses from such ABLE savings trust account.

Approved by the Governor.