

HOUSE BILL NO. 1242

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on _____)

(Patron Prior to Substitute--Delegate Willett)

A BILL to amend and reenact §§ 37.2-808 and 37.2-809 of the Code of Virginia, relating to emergency custody and temporary detention orders; evaluations; presence of others.

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-808 and 37.2-809 of the Code of Virginia are amended and reenacted as follows:

§ 37.2-808. Emergency custody; issuance and execution of order.

A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, or a court may issue pursuant to § 19.2-271.6, an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. Any emergency custody order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

When considering whether there is probable cause to issue an emergency custody order, the magistrate may, in addition to the petition, or the court may pursuant to § 19.2-271.6, consider (1) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (2) any past actions of the person, (3) any past mental health treatment of the person, (4) any relevant hearsay evidence, (5) any medical records available, (6) any affidavits submitted, if the witness is

27 unavailable and it so states in the affidavit, and (7) any other information available that the magistrate or
28 the court considers relevant to the determination of whether probable cause exists to issue an emergency
29 custody order.

30 B. Any person for whom an emergency custody order is issued shall be taken into custody and
31 transported to a convenient location to be evaluated to determine whether the person meets the criteria for
32 temporary detention pursuant to § 37.2-809 and to assess the need for hospitalization or treatment. The
33 evaluation shall be made by a person designated by the community services board who is skilled in the
34 diagnosis and treatment of mental illness and who has completed a certification program approved by the
35 Department.

36 C. The magistrate or court issuing an emergency custody order shall specify the primary law-
37 enforcement agency and jurisdiction to execute the emergency custody order and provide transportation.
38 However, the magistrate or court shall authorize transportation by an alternative transportation provider
39 in accordance with this section, whenever an alternative transportation provider is identified to the
40 magistrate or court, which may be a person, facility, or agency, including a family member or friend of
41 the person who is the subject of the order, a representative of the community services board, or other
42 transportation provider with personnel trained to provide transportation in a safe manner, upon
43 determining, following consideration of information provided by the petitioner; the community services
44 board or its designee; the local law-enforcement agency, if any; the person's treating physician, if any; or
45 other persons who are available and have knowledge of the person, and, when the magistrate or court
46 deems appropriate, the proposed alternative transportation provider, either in person or via two-way
47 electronic video and audio or telephone communication system, that the proposed alternative
48 transportation provider is available to provide transportation, willing to provide transportation, and able
49 to provide transportation in a safe manner.

50 When transportation is ordered to be provided by an alternative transportation provider, the
51 magistrate or court shall order the specified primary law-enforcement agency to execute the order, to take
52 the person into custody, and to transfer custody of the person to the alternative transportation provider
53 identified in the order. In such cases, a copy of the emergency custody order shall accompany the person

54 being transported pursuant to this section at all times and shall be delivered by the alternative
55 transportation provider to the community services board or its designee responsible for conducting the
56 evaluation. The community services board or its designee conducting the evaluation shall return a copy of
57 the emergency custody order to the court designated by the magistrate or the court that issued the
58 emergency custody order as soon as is practicable. Delivery of an order to a law-enforcement officer or
59 alternative transportation provider and return of an order to the court may be accomplished electronically
60 or by facsimile.

61 Transportation under this section shall include transportation to a medical facility as may be
62 necessary to obtain emergency medical evaluation or treatment that shall be conducted immediately in
63 accordance with state and federal law. Transportation under this section shall include transportation to a
64 medical facility for a medical evaluation if a physician at the hospital in which the person subject to the
65 emergency custody order may be detained requires a medical evaluation prior to admission.

66 D. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section,
67 the magistrate or court shall order the primary law-enforcement agency from the jurisdiction served by
68 the community services board that designated the person to perform the evaluation required in subsection
69 B to execute the order and, in cases in which transportation is ordered to be provided by the primary law-
70 enforcement agency, provide transportation. If the community services board serves more than one
71 jurisdiction, the magistrate or court shall designate the primary law-enforcement agency from the
72 particular jurisdiction within the community services board's service area where the person who is the
73 subject of the emergency custody order was taken into custody or, if the person has not yet been taken
74 into custody, the primary law-enforcement agency from the jurisdiction where the person is presently
75 located to execute the order and provide transportation.

76 E. The law-enforcement agency or alternative transportation provider providing transportation
77 pursuant to this section may transfer custody of the person to the facility or location to which the person
78 is transported for the evaluation required in subsection B, G, or H if the facility or location (i) is licensed
79 to provide the level of security necessary to protect both the person and others from harm, (ii) is actually
80 capable of providing the level of security necessary to protect the person and others from harm, and (iii)

81 in cases in which transportation is provided by a law-enforcement agency, has entered into an agreement
82 or memorandum of understanding with the law-enforcement agency setting forth the terms and conditions
83 under which it will accept a transfer of custody, provided, however, that the facility or location may not
84 require the law-enforcement agency to pay any fees or costs for the transfer of custody.

85 F. A law-enforcement officer may lawfully go or be sent beyond the territorial limits of the county,
86 city, or town in which he serves to any point in the Commonwealth for the purpose of executing an
87 emergency custody order pursuant to this section.

88 G. A law-enforcement officer who, based upon his observation or the reliable reports of others,
89 has probable cause to believe that a person meets the criteria for emergency custody as stated in this
90 section may take that person into custody and transport that person to an appropriate location to assess the
91 need for hospitalization or treatment without prior authorization. A law-enforcement officer who takes a
92 person into custody pursuant to this subsection or subsection H may lawfully go or be sent beyond the
93 territorial limits of the county, city, or town in which he serves to any point in the Commonwealth for the
94 purpose of obtaining the assessment. Such evaluation shall be conducted immediately. The period of
95 custody shall not exceed eight hours from the time the law-enforcement officer takes the person into
96 custody.

97 H. A law-enforcement officer who is transporting a person who has voluntarily consented to be
98 transported to a facility for the purpose of assessment or evaluation and who is beyond the territorial limits
99 of the county, city, or town in which he serves may take such person into custody and transport him to an
100 appropriate location to assess the need for hospitalization or treatment without prior authorization when
101 the law-enforcement officer determines (i) that the person has revoked consent to be transported to a
102 facility for the purpose of assessment or evaluation, and (ii) based upon his observations, that probable
103 cause exists to believe that the person meets the criteria for emergency custody as stated in this section.
104 The period of custody shall not exceed eight hours from the time the law-enforcement officer takes the
105 person into custody.

106 I. Nothing herein shall preclude a law-enforcement officer or alternative transportation provider
107 from obtaining emergency medical treatment or further medical evaluation at any time for a person in his
108 custody as provided in this section.

109 J. A representative of the primary law-enforcement agency specified to execute an emergency
110 custody order or a representative of the law-enforcement agency employing a law-enforcement officer
111 who takes a person into custody pursuant to subsection G or H shall notify the community services board
112 responsible for conducting the evaluation required in subsection B, G, or H as soon as practicable after
113 execution of the emergency custody order or after the person has been taken into custody pursuant to
114 subsection G or H.

115 K. The person shall remain in custody until (i) a temporary detention order is issued in accordance
116 with § 37.2-809, (ii) an order for temporary detention for observation, testing, or treatment is entered in
117 accordance with § 37.2-1104, ending law enforcement custody, (iii) the person is released, or (iv) the
118 emergency custody order expires. An emergency custody order shall be valid for a period not to exceed
119 eight hours from the time of execution.

120 L. Nothing in this section shall preclude the issuance of an order for temporary detention for
121 testing, observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an
122 emergency custody order issued pursuant to this section. In any case in which an order for temporary
123 detention for testing, observation, or treatment is issued for a person who is also the subject of an
124 emergency custody order, the person may be detained by a hospital emergency room or other appropriate
125 facility for testing, observation, and treatment for a period not to exceed 24 hours, unless extended by the
126 court as part of an order pursuant to § 37.2-1101, in accordance with subsection C of § 37.2-1104. Upon
127 completion of testing, observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or
128 other appropriate facility in which the person is detained shall notify the nearest community services
129 board, and the designee of the community services board shall, as soon as is practicable and prior to the
130 expiration of the order for temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of
131 the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809. The (i)
132 facility at which an individual is being evaluated pursuant to subsection B and § 37.2-809 or (ii) hospital

133 emergency department and treating physician or his designee shall allow a family member or legal
134 guardian of the individual subject to evaluation, who may provide support and shared decision-making,
135 to be present with the individual unless the individual objects or the presence of any such person would
136 create a medical or safety risk.

137 M. Any person taken into emergency custody pursuant to this section shall be given a written
138 summary of the emergency custody procedures and the statutory protections associated with those
139 procedures.

140 N. If an emergency custody order is not executed within eight hours of its issuance, the order shall
141 be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if such office is
142 not open, to any magistrate serving the jurisdiction of the issuing court.

143 O. In addition to the eight-hour period of emergency custody set forth in subsection G, H, or K, if
144 the individual is detained in a state facility pursuant to subsection E of § 37.2-809, the state facility and
145 an employee or designee of the community services board as defined in § 37.2-809 may, for an additional
146 four hours, continue to attempt to identify an alternative facility that is able and willing to provide
147 temporary detention and appropriate care to the individual.

148 P. Payments shall be made pursuant to § 37.2-804 to licensed health care providers for medical
149 screening and assessment services provided to persons with mental illnesses while in emergency custody.

150 Q. An employee or contractor of an entity providing alternative transportation services pursuant
151 to a contract with the Department who has completed training approved by the Department in the proper
152 and safe use of restraint may use restraint (i) if restraint is necessary to ensure the safety of the person or
153 others or prevent escape and (ii) if less restrictive techniques have been determined to be ineffective to
154 protect the person or others from harm or to prevent escape.

155 R. No person who provides alternative transportation pursuant to this section shall be liable to the
156 person being transported for any civil damages for ordinary negligence in acts or omissions that result
157 from providing such alternative transportation.

158 S. For purposes of this section:

159 "Law-enforcement agency" includes an auxiliary police force established pursuant to § 15.2-1731.

160 "Law-enforcement officer" includes an auxiliary police officer appointed or provided for pursuant
161 to §§ 15.2-1731 and 15.2-1733, except for the purposes of subsection G.

162 **§ 37.2-809. Involuntary temporary detention; issuance and execution of order.**

163 A. For the purposes of this section:

164 "Designee of the local community services board" means an examiner designated by the local
165 community services board who (i) is skilled in the assessment and treatment of mental illness, (ii) has
166 completed a certification program approved by the Department, (iii) is able to provide an independent
167 examination of the person, (iv) is not related by blood or marriage to the person being evaluated, (v) has
168 no financial interest in the admission or treatment of the person being evaluated, (vi) has no investment
169 interest in the facility detaining or admitting the person under this article, and (vii) except for employees
170 of state hospitals and of the U.S. Department of Veterans Affairs, is not employed by the facility.

171 "Employee" means an employee of the local community services board who is skilled in the
172 assessment and treatment of mental illness and has completed a certification program approved by the
173 Department.

174 "Investment interest" means the ownership or holding of an equity or debt security, including
175 shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity
176 or debt instruments.

177 B. A magistrate shall issue, upon the sworn petition of any responsible person, treating physician,
178 or upon his own motion and only after an evaluation conducted in-person or by means of a two-way
179 electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or a
180 designee of the local community services board to determine whether the person meets the criteria for
181 temporary detention, a temporary detention order if it appears from all evidence readily available,
182 including any recommendation from a physician, clinical psychologist, clinical social worker, or licensed
183 professional counselor treating the person, that the person (i) has a mental illness and that there exists a
184 substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious
185 physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening
186 harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect

187 himself from harm or to provide for his basic human needs; (ii) is in need of hospitalization or treatment;
188 and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. The
189 magistrate shall also consider, if available, (a) information provided by the person who initiated
190 emergency custody and (b) the recommendations of any treating or examining physician licensed in
191 Virginia either verbally or in writing prior to rendering a decision. Any temporary detention order entered
192 pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This
193 subsection shall not preclude any other disclosures as required or permitted by law.

194 C. When considering whether there is probable cause to issue a temporary detention order, the
195 magistrate may, in addition to the petition, consider (i) the recommendations of any treating or examining
196 physician, psychologist, clinical social worker, or licensed professional counselor licensed in Virginia, if
197 available, (ii) any past actions of the person, (iii) any past mental health treatment of the person, (iv) any
198 relevant hearsay evidence, (v) any medical records available, (vi) any affidavits submitted, if the witness
199 is unavailable and it so states in the affidavit, and (vii) any other information available that the magistrate
200 considers relevant to the determination of whether probable cause exists to issue a temporary detention
201 order.

202 D. A magistrate may issue a temporary detention order without an emergency custody order
203 proceeding. A magistrate may issue a temporary detention order without a prior evaluation pursuant to
204 subsection B if (i) the person has been personally examined within the previous 72 hours by an employee
205 or a designee of the local community services board or (ii) there is a significant physical, psychological,
206 or medical risk to the person or to others associated with conducting such evaluation.

207 E. An employee or a designee of the local community services board shall determine the facility
208 of temporary detention in accordance with the provisions of § 37.2-809.1 for all persons detained pursuant
209 to this section. An employee or designee of the local community services board may change the facility
210 of temporary detention and may designate an alternative facility for temporary detention at any point
211 during the period of temporary detention if it is determined that the alternative facility is a more
212 appropriate facility for temporary detention of the person given the specific security, medical, or
213 behavioral health needs of the person. In cases in which the facility of temporary detention is changed

214 following transfer of custody to an initial facility of temporary custody, transportation of the person to the
215 alternative facility of temporary detention shall be provided in accordance with the provisions of § 37.2-
216 810. The initial facility of temporary detention shall be identified on the preadmission screening report
217 and indicated on the temporary detention order; however, if an employee or designee of the local
218 community services board designates an alternative facility, that employee or designee shall provide
219 written notice forthwith, on a form developed by the Executive Secretary of the Supreme Court of
220 Virginia, to the clerk of the issuing court of the name and address of the alternative facility. Subject to the
221 provisions of § 37.2-809.1, if a facility of temporary detention cannot be identified by the time of the
222 expiration of the period of emergency custody pursuant to § 37.2-808, the person shall be detained in a
223 state facility for the treatment of persons with mental illness and such facility shall be indicated on the
224 temporary detention order. Except as provided in § 37.2-811 for inmates requiring hospitalization in
225 accordance with subdivision A 2 of § 19.2-169.6, the person shall not be detained in a jail or other place
226 of confinement for persons charged with criminal offenses. Except as provided in § 37.2-811 for inmates
227 requiring hospitalization in accordance with subdivision A 2 of § 19.2-169.6 or in subsection C of § 37.2-
228 813 for persons prior to transfer to the facility of temporary detention, the person shall remain in the
229 custody of law enforcement until either (i) the person is detained within a secure facility or (ii) custody
230 has been accepted by the appropriate personnel designated by either the initial facility of temporary
231 detention identified in the temporary detention order or by the alternative facility of temporary detention
232 designated by the employee or designee of the local community services board pursuant to this subsection.
233 The person detained or in custody pursuant to this section shall be given a written summary of the
234 temporary detention procedures and the statutory protections associated with those procedures.

235 F. Any facility caring for a person placed with it pursuant to a temporary detention order is
236 authorized to provide emergency medical and psychiatric services within its capabilities when the facility
237 determines that the services are in the best interests of the person within its care. The costs incurred as a
238 result of the hearings and by the facility in providing services during the period of temporary detention
239 shall be paid and recovered pursuant to § 37.2-804. The maximum costs reimbursable by the
240 Commonwealth pursuant to this section shall be established by the State Board of Medical Assistance

241 Services based on reasonable criteria. The State Board of Medical Assistance Services shall, by regulation,
242 establish a reasonable rate per day of inpatient care for temporary detention.

243 G. The employee or the designee of the local community services board who is conducting the
244 evaluation pursuant to this section shall determine, prior to the issuance of the temporary detention order,
245 the insurance status of the person. Where coverage by a third party payor exists, the facility seeking
246 reimbursement under this section shall first seek reimbursement from the third party payor. The
247 Commonwealth shall reimburse the facility only for the balance of costs remaining after the allowances
248 covered by the third party payor have been received.

249 H. The duration of temporary detention shall be sufficient to allow for completion of the
250 examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-
251 816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid
252 involuntary commitment where possible, but shall not exceed 72 hours prior to a hearing. If the 72-hour
253 period herein specified terminates on a Saturday, Sunday, legal holiday, or, if the individual has been
254 admitted to a facility of temporary detention, day or part of a day on which the clerk's office is lawfully
255 closed, the person may be detained, as herein provided, until the close of business on the next day that is
256 not a Saturday, Sunday, legal holiday, or, if the individual has been admitted to a facility of temporary
257 detention, day or part of a day on which the clerk's office is lawfully closed. The person may be released,
258 pursuant to § 37.2-813, before the 72-hour period herein specified has run.

259 I. If a temporary detention order is not executed within 24 hours of its issuance, or within a shorter
260 period as is specified in the order, the order shall be void and shall be returned unexecuted to the office of
261 the clerk of the issuing court or, if the office is not open, to any magistrate serving the jurisdiction of the
262 issuing court. Subsequent orders may be issued upon the original petition within 96 hours after the petition
263 is filed. However, a magistrate must again obtain the advice of an employee or a designee of the local
264 community services board prior to issuing a subsequent order upon the original petition. Any petition for
265 which no temporary detention order or other process in connection therewith is served on the subject of
266 the petition within 96 hours after the petition is filed shall be void and shall be returned to the office of
267 the clerk of the issuing court.

268 J. The Executive Secretary of the Supreme Court of Virginia shall establish and require that a
269 magistrate, as provided by this section, be available seven days a week, 24 hours a day, for the purpose of
270 performing the duties established by this section. Each community services board shall provide to each
271 general district court and magistrate's office within its service area a list of its employees and designees
272 who are available to perform the evaluations required herein.

273 K. For purposes of this section, a health care provider or designee of a local community services
274 board or behavioral health authority shall not be required to encrypt any email containing information or
275 medical records provided to a magistrate unless there is reason to believe that a third party will attempt to
276 intercept the email.

277 L. If the employee or designee of the community services board who is conducting the evaluation
278 pursuant to this section recommends that the person should not be subject to a temporary detention order,
279 such employee or designee shall (i) inform the petitioner, the person who initiated emergency custody if
280 such person is present, and an onsite treating physician of his recommendation; (ii) promptly inform such
281 person who initiated emergency custody that the community services board will facilitate communication
282 between the person and the magistrate if the person disagrees with recommendations of the employee or
283 designee of the community services board who conducted the evaluation and the person who initiated
284 emergency custody so requests; and (iii) upon prompt request made by the person who initiated emergency
285 custody, arrange for such person who initiated emergency custody to communicate with the magistrate as
286 soon as is practicable and prior to the expiration of the period of emergency custody. The magistrate shall
287 consider any information provided by the person who initiated emergency custody and any
288 recommendations of the treating or examining physician and the employee or designee of the community
289 services board who conducted the evaluation and consider such information and recommendations in
290 accordance with subsection B in making his determination to issue a temporary detention order. The
291 person who is the subject of emergency custody shall remain in the custody of law enforcement or a
292 designee of law enforcement and shall not be released from emergency custody until communication with
293 the magistrate pursuant to this subsection has concluded and the magistrate has made a determination
294 regarding issuance of a temporary detention order.

295 M. For purposes of this section, "person who initiated emergency custody" means any person who
296 initiated the issuance of an emergency custody order pursuant to § 37.2-808 or a law-enforcement officer
297 who takes a person into custody pursuant to subsection G of § 37.2-808.

298 N. In any case in which a person subject to an evaluation pursuant to this section is receiving
299 services in a hospital emergency department, the treating physician or his designee and the employee or
300 designee of the local community services board shall disclose to each other relevant information pertaining
301 to the individual's treatment in the emergency department. The (i) evaluator conducting the evaluation
302 pursuant to subsection B of § 37.2-808 and the provisions of this section or (ii) hospital emergency
303 department and treating physician or other health care provider designated by the physician shall allow a
304 family member or legal guardian of the individual subject to evaluation who is present, and who may
305 provide support and supportive decision-making, to be present with the individual unless the individual
306 objects or the evaluator or treating physician determines that the presence of any such person would create
307 a medical, clinical, or safety risk to the patient or health care provider or interferes with patient care. No
308 provision of this section shall delay the process of the patient receiving treatment.

309 #