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**HOUSE BILL NO. 2864**

Offered January 10, 2007

Prefiled January 10, 2007

*A BILL to amend and reenact §§ 11-9.1, 11-9.6 and 37.2-1018 of the Code of Virginia, relating to duties and liabilities of holders of power of attorneys.*

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Patron—Moran

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Referred to Committee for Courts of Justice

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

**1. That § 11-9.1, 11-9.6 and 37.2-1018 of the Code of Virginia are amended and reenacted as follows:**

§ 11-9.1. When power of attorney, etc., not terminated by principal's disability; exception.

A. Whenever any power of attorney or other writing, in which any principal shall vest any power or authority in an attorney-in-fact or other agent, shall contain the words "This power of attorney (or his authority) shall not terminate on disability of the principal" or other words showing the intent of the principal that such power or authority shall not terminate upon his disability, then all power and authority vested in the attorney-in-fact or agent by the power of attorney or other writing shall continue and be exercisable by the attorney-in-fact or agent on behalf of the principal notwithstanding any subsequent disability, incompetence, or incapacity of the principal at law, except as provided in subsection B. All acts done by the attorney-in-fact or agent, pursuant to such power or authority, during the period of any such disability, incompetence or incapacity, shall have in all respects the same effect and shall inure to the benefit of, and bind the principal as fully as if the principal were not subject to such disability, incompetence or incapacity. If any conservator, guardian, or committee shall thereafter be appointed for the principal, the attorney-in-fact or agent shall, during the continuance of such appointment, account to such conservator, guardian, or committee as he would otherwise be obligated to account to the principal.

B. The appointment of a conservator, guardian, or committee pursuant to Title 37.2 shall not of itself revoke or limit the authority of the attorney-in-fact or other agent. However, in a proceeding in which the attorney-in-fact or other agent is made a party, the court which appointed the conservator, guardian, or committee may revoke, suspend, or otherwise limit the authority of the attorney-in-fact or other agent at the request of, and based upon information provided by, the conservator, guardian, committee, or other interested parties for an incapacitated individual. Furthermore, where no conservator, guardian, or committee has been appointed, the circuit court of the city or county where the principal resides or is located, in a proceeding brought by a person interested in the welfare of the principal as defined in § 37.2-1018, and in which the attorney-in-fact or other agent and the principal are made parties, may terminate, suspend, or otherwise limit the authority of the attorney-in-fact or other agent upon a finding that such termination, suspension or limitation is in the best interests of the principal or his estate.

C. *The holder of a power of attorney stands in a fiduciary relationship to the incapacitated person for whom he was appointed and may be held liable for a breach of any fiduciary duty to the incapacitated person.*

D. *In any proceeding where the holder of a power of attorney is seeking attorney fees associated with his service as a power of attorney, and the incapacitated person who is the subject to the power of attorney is determined to be indigent, any fees and costs of the proceeding as well as the attorney fees shall be borne by the Commonwealth. If the holder of a power of attorney is removed by the court because of abuse, neglect, or exploitation of the incapacitated person who is subject to the power of attorney, the costs of the proceedings shall be assessed against the holder of the power of attorney.*

§ 11-9.6. Certain duties of attorneys-in-fact and agents empowered to act under § 11-9.1.

An attorney-in-fact or other agent empowered to act under § 11-9.1 shall, on reasonable written request made by a person interested in the welfare of a principal who is unable to properly attend to his affairs, as set forth in § 37.2-1018, disclose to such person the extent to which he has chosen to act and the actions taken on behalf of the principal within the ~~two~~ five years prior to either (i) the date of the request or (ii) the date of the death of the principal, if the principal is deceased at the time such request is made, and shall permit reasonable inspection of records pertaining to such actions by such person unless such disclosure or inspection is specifically prohibited by the terms of the instrument under which he acts. In all cases where the principal is deceased at the time such request is made, such request shall be made within one year after the date of the death of the principal.

§ 37.2-1018. Discovery of information and records regarding actions of certain agents and

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59 attorneys-in-fact.

60 A. For purposes of this section:

61 "Member of the principal's family" means an adult who is a parent, brother or sister, niece or  
62 nephew, child or other descendent, spouse of a child of the principal, and spouse or surviving spouse of  
63 the principal.

64 "Person interested in the welfare of a principal" means any member of the principal's family; a  
65 person who is a co-agent or co-attorney-in-fact, an alternate agent or attorney-in-fact, or a successor  
66 agent or attorney-in-fact designated under the power of attorney or other writing described in § 11-9.1;  
67 and, if none of these persons is reasonably available and willing to act, the adult protective services unit  
68 of the local department of social services for the city or county where the principal resides or is located  
69 at the time of the request.

70 "Principal believed to be unable to properly attend to his affairs" means an individual believed in  
71 good faith by the petitioner to be a person who is impaired by reason of mental illness, mental  
72 retardation, physical illness or disability, substance abuse, or other causes to the extent of lacking  
73 sufficient understanding or capacity to make or communicate responsible decisions.

74 B. After having first made a request to an agent or attorney-in-fact for disclosure under § 11-9.6, any  
75 person interested in the welfare of a principal believed to be unable to properly attend to his affairs  
76 may, for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a  
77 proceeding under this chapter or (ii) terminating, suspending, or limiting the authority of an  
78 attorney-in-fact or other agent, petition a circuit court for discovery from the attorney-in-fact or other  
79 agent of information and records pertaining to actions taken within the past ~~two~~five years from the date  
80 the request under § 11-9.6 was made pursuant to powers or authority conferred by a power of attorney  
81 or other writing described in § 11-9.1.

82 C. The petition may be filed in the circuit court of the county or city in which the attorney-in-fact or  
83 agent resides or has his principal place of employment, or, if a nonresident, in any court in which a  
84 determination of incompetency or incapacity of the principal is proper under this title, or, if a  
85 conservator or guardian has been appointed for the principal, in the court that made the appointment.  
86 The court, after reasonable notice to the attorney-in-fact or agent and to the principal, if no guardian or  
87 conservator has been appointed, may conduct a hearing on the petition. The court, upon the hearing on  
88 the petition and upon consideration of the interest of the principal and his estate, may dismiss the  
89 petition or may enter such order or orders respecting discovery as it may deem appropriate, including an  
90 order that the attorney-in-fact or agent respond to all discovery methods that the petitioner might employ  
91 in a civil action or suit subject to the Rules of the Supreme Court of Virginia. Upon the failure of the  
92 agent or attorney-in-fact to make discovery, the court may make and enforce further orders respecting  
93 discovery that would be proper in a civil action subject to such Rules and may award expenses,  
94 including reasonable attorney's fees, as therein provided. Furthermore, upon completion of discovery, the  
95 court, if satisfied that prior to filing the petition the petitioner had requested the information or records  
96 that are the subject of ordered discovery pursuant to § 11-9.6, may, upon finding that the failure to  
97 comply with the request for information was unreasonable, order the attorney-in-fact or agent to pay the  
98 petitioner's expenses in obtaining discovery, including reasonable attorney's fees.

99 D. A determination to grant or deny in whole or in part discovery sought hereunder shall not be  
100 considered a finding regarding the competence, capacity, or impairment of the principal, nor shall the  
101 granting or denial of discovery hereunder preclude the availability of other remedies involving protection  
102 of the person or estate of the principal or the rights and duties of the attorney-in-fact or other agent.