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HOUSE BILL NO. 2864

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 15, 2007)

(Patron Prior to Substitute—Delegate Moran)

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.

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 agent stands in a fiduciary relationship to the principal by whom he was appointed and may be held liable for a breach of any fiduciary duty to the principal.

D. If an agent is removed by the court because of abuse, neglect or exploitation of the principal, all fees and costs associated with the removal proceeding, including the attorney's fees of the prevailing party, shall be borne by the agent.

§ 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 attorneys-in-fact.

A. For purposes of this section:

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

"Person interested in the welfare of a principal" means any member of the principal's family; a person who is a co-agent or co-attorney-in-fact, an alternate agent or attorney-in-fact, or a successor

60 agent or attorney-in-fact designated under the power of attorney or other writing described in § 11-9.1;
61 and, if none of these persons is reasonably available and willing to act, the adult protective services unit
62 of the local department of social services for the city or county where the principal resides or is located
63 at the time of the request.

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

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

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

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