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SENATE BILL NO. 1235

Offered January 10, 2007

Prefiled January 10, 2007

A *BILL to amend and reenact §§ 11-9.6 and 37.2-1018 of the Code of Virginia, relating to challenges to attorneys-in-fact made after the death of the principal.*

Patron—Obenshain

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That §§ 11-9.6 and 37.2-1018 of the Code of Virginia are amended and reenacted as follows:**

§ 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 *believed to be* unable to properly attend to his affairs *or by a person who was interested in the welfare of a deceased principal who, prior to his death, was believed to be 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 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. *Any request properly made under this section may be enforced in the manner provided in § 37.2-1018 by petition to the appropriate court having jurisdiction over the principal or the estate of a deceased principal if the request is not complied with by the attorney-in-fact or other agent within 60 days of the date such request is made.*

§ 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 *who is or was* 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 agent or attorney-in-fact designated under the power of attorney or other writing described in § 11-9.1; *in the case of a deceased principal, a personal representative of the estate of a deceased principal*; and, if none of these persons is reasonably available and willing to act, the adult protective services unit of the local department of social services for the city or county where the principal resides or is located at the time of the request *or where a deceased principal resided at the time of his death*.

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

B. After having first made a request to an agent or attorney-in-fact for disclosure under § 11-9.6, any person interested in the welfare of a principal believed to be unable to properly attend to his affairs may, for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a proceeding under this chapter ~~or~~; (ii) terminating, suspending, or limiting the authority of an attorney-in-fact or other agent; *or (iii) bringing a proceeding to hold the attorney-in-fact or other agent, or a transferee from such attorney-in-fact or other agent, liable for breach of duty or to recover particular assets or the value of such assets of a principal or deceased principal*, petition a circuit court for discovery from the attorney-in-fact or other agent of information and records pertaining to actions taken *pursuant to powers or authority conferred by a power of attorney or other writing described in § 11-9.1* within the ~~past two years from the date the request time periods set forth under § 11-9.6 was made pursuant to powers or authority conferred by a power of attorney or other writing described in § 11-9.1.~~

C. The petition may be filed in the circuit court of the county or city in which the attorney-in-fact or agent resides or has his principal place of employment, or, if a nonresident, in any court in which a determination of incompetency or incapacity of the principal is proper under this title, or, if a

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59 conservator or guardian has been appointed for the principal, in the court that made the appointment.
60 The court, after reasonable notice to the attorney-in-fact or agent and to the principal, if no guardian or
61 conservator has been appointed, may conduct a hearing on the petition. The court, upon the hearing on
62 the petition and upon consideration of the interest of the principal and his estate, may dismiss the
63 petition or may enter such order or orders respecting discovery as it may deem appropriate, including an
64 order that the attorney-in-fact or agent respond to all discovery methods that the petitioner might employ
65 in a civil action or suit subject to the Rules of the Supreme Court of Virginia. Upon the failure of the
66 agent or attorney-in-fact to make discovery, the court may make and enforce further orders respecting
67 discovery that would be proper in a civil action subject to such Rules and may award expenses,
68 including reasonable attorney's fees, as therein provided. Furthermore, upon completion of discovery, the
69 court, if satisfied that prior to filing the petition the petitioner had requested the information or records
70 that are the subject of ordered discovery pursuant to § 11-9.6, may, upon finding that the failure to
71 comply with the request for information was unreasonable, order the attorney-in-fact or agent to pay the
72 petitioner's expenses in obtaining discovery, including reasonable attorney's fees.

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