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HOUSE BILL NO. 2601

Offered January 20, 1997

A *BILL to amend and reenact §§ 11-9.1 and 55-107 of the Code of Virginia, relating to power of attorney.*

Patron—Howell (By Request)

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-9.1 and 55-107 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; recordation; statement of responsibilities.

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. *Such a power of attorney shall be known as a "durable" power of attorney.* 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 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 guardian or committee as he would otherwise be obligated to account to the principal.

The appointment of a guardian or committee pursuant to Title 37.1 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 guardian or committee may revoke, suspend, or otherwise limit such authority. Furthermore, where no 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 § 37.1-132.1, 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.

B. *No action taken under any durable power of attorney executed after January 1, 1998, whether executed within or without this Commonwealth, shall be effective unless the power is recorded in the clerk's office (i) designated in the power; or (ii) for the principal's residence as stated in the power, if no place of recordation is designated; or (iii) for any jurisdiction wherein the principal has real or personal property, if no place of residence is stated or the principal does not reside in this Commonwealth. However, a power recorded in the wrong clerk's office shall nevertheless be as effective as if correctly recorded. The recordation required by this subsection may occur after the principal becomes incapacitated. Any action taken by an agent that is ineffective solely because of a failure to comply with the recordation requirement of this subsection may be ratified by the agent after such recordation, if the ratification does not adversely affect the intervening rights of third parties. This subsection shall not apply to a power of attorney limited to one or more specific purposes or to any power of attorney, or portion thereof, authorized by § 54.1-2983.*

C. *The clerk of any court in which a person records a power of attorney after January 1, 1998, shall deliver to such person, at the time of recordation, a statement regarding the duties and responsibilities of an agent under Virginia law, on a form to be prepared by the Office of the Executive Secretary of the Supreme Court, which shall include, at least, language substantially similar to the following: "An agent who acts under a durable power of attorney (1) must use due care to act in the best interests of the principal in accordance with the terms of the power of attorney, (2) is liable for any breach of legal duty owed to the principal as a fiduciary under Virginia law, (3) shall not allow any of the principal's property to become commingled with the agent's property, (4) shall keep a record of all receipts, disbursements, and significant actions taken as agent under the power of attorney, and (5) upon proper demand, shall make an accounting of all receipts, disbursements, and significant actions under the power of attorney (i) to the principal, (ii) to a person interested in the welfare of a principal who is*

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HB2601

60 *unable to properly attend to his affairs (unless specifically prohibited by the terms of the power of*
61 *attorney), (iii) to the guardian or committee of an incapacitated or incompetent principal, and (iv) upon*
62 *the principal's death, to the principal's executor or administrator. An agent is entitled to obtain the*
63 *advice of a lawyer concerning these and any other of the agent's duties and responsibilities under a*
64 *durable power of attorney and to be reimbursed for such expense from the principal's assets."*

65 *D. The clerk of court shall have no responsibility to ensure that a power of attorney is recorded in*
66 *the correct jurisdiction for the purpose of subsection B, and shall not be subject to personal liability for*
67 *any failure to deliver the statement described by subsection C.*

68 *§ 55-107. Power of attorney, where recorded.*

69 *A power of attorney, a certified copy of a power of attorney, or a writing purporting to revoke a*
70 *power of attorney may be admitted to record in any county or corporation if it is properly acknowledged*
71 *or proved as provided by law; however, a power not containing the principal's signature acknowledged*
72 *or proved as provided by law may nevertheless be recorded if an affidavit executed by two persons*
73 *attesting to the authenticity of the principal's signature is attached thereto. The clerk shall record and*
74 *index a power of attorney, a certified copy of a power of attorney, or a writing purporting to revoke a*
75 *power of attorney in the same manner as provided for a deed to real estate. The recordation of a*
76 *writing purporting to revoke a power of attorney shall not operate to give notice of revocation to any*
77 *person unless it is so provided in the power to be revoked.*