

H. B. 3123

(By Delegate L. Phillips)

[Introduced March 25, 2013; referred to the
Committee on the Judiciary then Finance.]

**FISCAL
NOTE**

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new section, designated §16-30-4b; and to
12 amend and reenact §39B-1-105 and §39B-1-114 of said code, all
13 relating to enhancing protections of the principal under a
14 medical power of attorney and power of attorney; requiring
15 that named agent under a medical power of attorney and a power
16 of attorney provide thirty day notice to the children and
17 spouse of the principal during which time the medical power of
18 attorney and power of attorney is temporary and agency limited
19 to necessary acts; requiring that medical power of attorney
20 and power of attorney be filed in the county clerk's office of
21 the principal's residence; requiring that copy of medical
22 power of attorney and power of attorney be provided to the
23 principal's children and spouse; requiring that financial
24 statements be provided to children and spouse of principal

1 every six months; requiring that accounts of the principal be
2 maintained separate from accounts of agent and those with whom
3 the agent is familiar; and creating crime and penalty.

4 *Be it enacted by the Legislature of West Virginia:*

5 That the Code of West Virginia, 1931, as amended, be amended
6 by adding thereto a new section, designated §16-30-4b; and that
7 §39B-1-105 and §39B-1-114 of said code be amended and reenacted,
8 all to read as follows:

9 **CHAPTER 16. PUBLIC HEALTH.**

10 **ARTICLE 30. WEST VIRGINIA HEALTH CARE DECISIONS ACT.**

11 **§16-30-4b. Notice of execution of medical power of attorney;**
12 **temporary medical power of attorney; filing.**

13 (a) The named agent in a medical power of attorney shall
14 provide notice of the medical power of attorney by certified mail,
15 return receipt requested, to the principal's spouse and principal's
16 children at their last known addresses thirty days prior to its
17 effective date. At the end of thirty days, plus delivery time of
18 three days, the medical power of attorney has full force and
19 effect.

20 (b) During the thirty day notice period under subsection (a)
21 of this section, a medical power of attorney is a temporary agency
22 and limited to decisions of a necessary or emergency nature.

23 (c) When the medical power of attorney has full force and

1 effect pursuant to subsection (a) of this section, the agent shall
2 file a copy of the document in the county clerk's office of the
3 principal's residence and, if the principal has resided in the
4 county for one year or less, in both the county of the principal's
5 residence and the county of residence immediately preceding the
6 current one.

7 (d) When the medical power of attorney has full force and
8 effect pursuant to subsection (a) of this section, the agent shall
9 mail copies by certified mail, return receipt requested, to the
10 principal's children and spouse at their last known addresses.

11 **CHAPTER 39B. UNIFORM POWER OF ATTORNEY ACT.**

12 **ARTICLE 1. GENERAL PROVISIONS.**

13 **§39B-1-105. Execution of power of attorney; temporary power of**
14 **attorney.**

15 (a) A power of attorney must be signed by the principal or in
16 the principal's conscious presence by another individual directed
17 by the principal to sign the principal's name on the power of
18 attorney and must be acknowledged by the principal before a notary
19 public or other individual authorized by law to take
20 acknowledgments. A power of attorney is initially a limited and
21 temporary power of attorney and does not take full effect until
22 after the notice period provided in subsection (b) of this section.

23 (b) Prior to the power of attorney having full force and

1 effect, the named agent shall provide thirty day notice of the
2 power of attorney by certified mail, return receipt requested, to
3 the principal's spouse and principal's children at their last known
4 addresses. At the end of thirty days, plus delivery time of three
5 days, the power of attorney has full force and effect.

6 (c) During the thirty day notice period, plus delivery time of
7 three days, under subsection (b) of this section, a power of
8 attorney is a temporary agency limited to the payment of bills and
9 expenses of the principal.

10 **§39B-1-114. Agent's duties.**

11 (a) Notwithstanding provisions in the power of attorney, an
12 agent who has accepted appointment shall:

13 (1) Act in accordance with the principal's reasonable
14 expectations to the extent actually known by the agent and,
15 otherwise, in the principal's best interest;

16 (2) Act in good faith; and

17 (3) Act only within the scope of authority granted in the
18 power of attorney.

19 (b) Except as otherwise provided in the power of attorney, an
20 agent who has accepted appointment shall:

21 (1) Act loyally for the principal's benefit;

22 (2) Act so as not to create a conflict of interest that
23 impairs the agent's ability to act impartially in the principal's
24 best interest;

1 (3) Act with the care, competence and diligence ordinarily
2 exercised by agents in similar circumstances;

3 (4) Upon the effective date of the power of attorney following
4 the thirty day notice period under section one hundred five of this
5 article, file a copy of the power of attorney in the county clerk's
6 office of the principal's residence and, if the principal has
7 resided in a county for one year or less, in both the county of the
8 principal's residence and the county of residence immediately
9 preceding the current one.

10 ~~(4)~~ (5) Keep a record of all receipts, disbursements and
11 transactions made on behalf of the principal until death of the
12 principal.

13 (6) Keep separate records of all financial accounts of the
14 principal in which the agent has acted on behalf of the principal
15 and keep all financial accounts of the principal separate from
16 accounts of the agent or accounts of individuals with whom the
17 agent is familiar.

18 (7) Mail financial statements of the principal's accounts by
19 certified mail, return receipt requested, to all children and
20 spouse of the principal every six months.

21 (A) The first financial statement, which must include an
22 identification and description of all assets, shall be mailed upon
23 the effective date of the power of attorney under section one
24 hundred five of this article and every six months thereafter.

1 (B) For a power of attorney that exists at the effective date
2 of this subdivision, the initial mailing of financial statements,
3 which must include financial statements from the beginning of the
4 power of attorney up to and including the present month, shall be
5 mailed within thirty days of the effective date of this subdivision
6 and every six months thereafter.

7 ~~(5)~~ (8) Cooperate with a person that has authority to make
8 health-care decisions for the principal to carry out the
9 principal's reasonable expectations to the extent actually known by
10 the agent and, otherwise, act in the principal's best interest; ~~and~~

11 ~~(6)~~ (9) Attempt to preserve the principal's estate plan, to
12 the extent actually known by the agent, if preserving the plan is
13 consistent with the principal's best interest based on all relevant
14 factors, including:

15 (A) The value and nature of the principal's property;

16 (B) The principal's foreseeable obligations and need for
17 maintenance;

18 (C) Minimization of taxes, including income, estate,
19 inheritance, generation-skipping transfer and gift taxes; and

20 (D) Eligibility for a benefit, a program or assistance under
21 a statute or regulation; and

22 (c) An agent that acts in good faith is not liable to any
23 beneficiary of the principal's estate plan for failure to preserve
24 the plan.

1 (d) An agent that acts with care, competence and diligence for
2 the best interest of the principal is not liable solely because the
3 agent also benefits from the act or has an individual or
4 conflicting interest in relation to the property or affairs of the
5 principal.

6 (e) If an agent is selected by the principal because of
7 special skills or expertise possessed by the agent or in reliance
8 on the agent's representation that the agent has special skills or
9 expertise, the special skills or expertise must be considered in
10 determining whether the agent has acted with care, competence and
11 diligence under the circumstances.

12 (f) Absent a breach of duty to the principal, an agent is not
13 liable if the value of the principal's property declines.

14 (g) An agent who exercises authority to delegate to another
15 person the authority granted by the principal or who engages
16 another person on behalf of the principal is not liable for an act,
17 error of judgment or default of that person if the agent exercises
18 care, competence and diligence in selecting and monitoring the
19 person.

20 (h) Except as otherwise provided in the power of attorney and
21 this section, an agent is not required to disclose receipts,
22 disbursements or transactions conducted on behalf of the principal
23 or provide an accounting unless: ordered by a court or requested by
24 the principal, a guardian, a conservator, another fiduciary acting

1 for the principal, a governmental agency having authority to
2 protect the welfare of the principal or, upon the death of the
3 principal, by the personal representative or successor in interest
4 of the principal's estate. If so requested, within thirty days the
5 agent shall comply with the request or provide a writing or other
6 record substantiating why additional time is needed and shall
7 comply with the request within an additional thirty days. If an
8 agent fails or refuses to comply with the provisions of this
9 section, the court may award the principal or other authorized
10 party requesting the disclosure reimbursement of reasonable
11 attorneys fees and costs incurred.

12 (i) An agent who violates a duty under this section or as
13 provided in the power of attorney, in addition to any civil
14 liability, is guilty of a misdemeanor and, upon conviction thereof,
15 shall be fined not less than \$100 nor more than \$2,500 or confined
16 in jail not more than one year, or both fined and confined.

NOTE: The purpose of this bill to enhance protections of the principal under a medical power of attorney and power of attorney by requiring the named agent under a medical power of attorney and a power of attorney to provide thirty day notice to the children and spouse of the principal during which time the medical power of attorney and power of attorney is temporary and agency limited to necessary acts; by requiring that the medical power of attorney and power of attorney be filed in the county clerk's office of the principal's residence; by requiring that copy of the medical power of attorney and power of attorney be provided to the principal's children and spouse; by requiring that financial statements be

provided to children and spouse of principal every six months and that all accounts of the principal be kept separate from the accounts of the agent and those with whom the agent is familiar; and, by creating criminal and penalty provisions for violation of agent's duties.

§16-30-4b is new; therefore, it has been completely underscored.

Strike throughs indicate language that would be stricken from the present law and underscoring indicates new language that would be added.