

1                   A bill to be entitled  
2           An act relating to durable powers of attorney;  
3           amending s. 709.08, F.S.; providing for durable  
4           powers of attorney contingent upon a specified  
5           condition; providing guidelines for such  
6           powers; providing statutory forms for  
7           affidavits to attest to specified condition;  
8           providing an effective date.

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10   Be It Enacted by the Legislature of the State of Florida:

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12           Section 1. Subsections (1), (4), and (5) of section  
13   709.08, Florida Statutes, are amended to read:

14           709.08 Durable power of attorney.--

15           (1) CREATION OF DURABLE POWER OF ATTORNEY.--A durable  
16   power of attorney is a written power of attorney by which a  
17   principal designates another as the principal's attorney in  
18   fact. The durable power of attorney must be in writing, must  
19   be executed with the same formalities required for the  
20   conveyance of real property by Florida law, and must contain  
21   the words: "This durable power of attorney is not affected by  
22   subsequent incapacity of the principal except as provided in  
23   s. 709.08, Florida Statutes"; or similar words that show the  
24   principal's intent that the authority conferred is exercisable  
25   notwithstanding the principal's subsequent incapacity, except  
26   as otherwise provided by this section. The durable power of  
27   attorney is exercisable as of the date of execution; however,  
28   if the durable power of attorney is conditioned upon the  
29   principal's lack of capacity to manage property as defined in  
30   s. 744.102(10)(a), the durable power of attorney is

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1 exercisable upon the delivery of affidavits in paragraphs  
2 (4)(c) and (d) to the third party.

3 (4) PROTECTION WITHOUT NOTICE; GOOD FAITH ACTS;  
4 AFFIDAVITS.--

5 (a) Any third party may rely upon the authority  
6 granted in a durable power of attorney which is not  
7 conditioned on the principal's lack of capacity to manage  
8 property until the third party has received notice as provided  
9 in subsection (5). A third party may, but need not, require  
10 the attorney in fact to execute an affidavit pursuant to  
11 paragraph (c).

12 (b) Any third party may rely upon the authority  
13 granted in a durable power of attorney which is conditioned on  
14 the principal's lack of capacity to manage property as defined  
15 in s. 744.102(10)(a) only after receiving the affidavits  
16 provided in paragraphs (c) and (d), and such reliance shall  
17 end when the third party has received notice as provided in  
18 subsection (5).~~Until a third party has received notice of~~  
19 ~~revocation pursuant to subsection (5), partial or complete~~  
20 ~~termination of the durable power of attorney by adjudication~~  
21 ~~of incapacity, suspension by initiation of proceedings to~~  
22 ~~determine incapacity, death of the principal, or the~~  
23 ~~occurrence of an event referenced in the power of attorney,~~  
24 ~~the third party may act in reliance upon the authority granted~~  
25 ~~in the durable power of attorney.~~

26 (c) ~~A third party that has not received written notice~~  
27 ~~under subsection (5) may, but need not, require that the~~  
28 ~~attorney in fact execute~~ An affidavit executed by the attorney  
29 in fact must state where the principal is domiciled, that the  
30 principal is not deceased, and stating that there has been no  
31 revocation, partial or complete termination by adjudication of

1 incapacity or by the occurrence of an event referenced in the  
 2 durable power of attorney, or suspension by initiation of  
 3 proceedings to determine incapacity or to appoint a guardian  
 4 of the durable power of attorney at the time the power of  
 5 attorney is exercised. A written affidavit executed by the  
 6 attorney in fact under this paragraph may, but need not, be in  
 7 the following form:

8  
 9 STATE OF  
 10 COUNTY OF

11  
 12 Before me, the undersigned authority, personally  
 13 appeared ...(attorney in fact)... ("Affiant"), who swore or  
 14 affirmed that:

15 1. Affiant is the attorney in fact named in the  
 16 Durable Power of Attorney executed by ...(principal)...  
 17 ("Principal") on ...(date)....

18 2. This Durable Power of Attorney is currently  
 19 exercisable by Affiant. The principal is domiciled in  
 20 ...insert name of state, territory or foreign county....

21 3.2. To the best of the Affiant's knowledge after  
 22 diligent search and inquiry:

23 a. The Principal is not deceased, ~~has not been~~  
 24 ~~adjudicated incapacitated, and has not revoked, partially or~~  
 25 ~~completely terminated, or suspended the Durable Power of~~  
 26 ~~Attorney;~~ and

27 b. There has been no revocation, partial or complete  
 28 termination by adjudication of incapacity or by the occurrence  
 29 of an event referenced in the durable power of attorney, or  
 30 suspension by initiation of proceedings to determine  
 31 incapacity or to appoint a guardian ~~A petition to determine~~

1 ~~the incapacity of or to appoint a guardian for the Principal~~  
2 ~~is not pending.~~

3 ~~4.3.~~ Affiant agrees not to exercise any powers granted  
4 by the Durable Power of Attorney if Affiant attains knowledge  
5 that it has been revoked, partially or completely terminated,  
6 suspended, or is no longer valid because of the death or  
7 adjudication of incapacity of the Principal.

8  
9 .....  
10 ...Affiant...  
11

12 Sworn to (or affirmed) and subscribed before me  
13 this.... day of ,...(month).....(year)..., by ...(name  
14 of person making statement)...

15  
16 ...(Signature of Notary Public-State of Florida)...  
17 (Print, Type, or Stamp Commissioned Name of Notary Public)  
18 Personally Known OR Produced Identification  
19 ...(Type of Identification Produced)...  
20

21 (d) A determination that a principal lacks the  
22 capacity to manage property as defined in s. 744.102(10)(a)  
23 must be made and evidenced by the affidavits of at least two  
24 physicians licensed to practice medicine as of the date of the  
25 affidavit. A judicial determination that the principal lacks  
26 the capacity to manage property pursuant to chapter 744 is not  
27 required prior to the determination by the physicians and  
28 execution of the affidavits. At least one of the physicians  
29 must be the attending physician. For purposes of this section,  
30 the attending physician is the primary physician who has  
31 responsibility for the treatment and care of the principal.

1 Affidavits executed by each of the physicians must state where  
 2 the physician is licensed to practice medicine, whether the  
 3 physician is an attending physician, and that the physician  
 4 believes that the principal lacks the capacity to manage  
 5 property as defined in s. 744.102(10)(a). The affidavit may,  
 6 but need not, be in the following form:

7  
 8 STATE OF  
 9 COUNTY OF

10  
 11 Before me, the undersigned authority, personally  
 12 appeared .....(name of physician)..., Affiant, who swore or  
 13 affirmed that:

14 1. Affiant is a physician licensed to practice  
 15 medicine in ...(name of state, territory, or foreign  
 16 country)....

17 2. Affiant is ( ) is not ( ) (check one) the  
 18 primary physician who has responsibility for the treatment and  
 19 care of ...(principal's name)....

20 3. To the best of Affiant's knowledge after reasonable  
 21 inquiry, Affiant believes that the principal lacks the  
 22 capacity to manage property, including taking those actions  
 23 necessary to obtain, administer, and dispose of real and  
 24 personal property, intangible property, business property,  
 25 benefits, and income.

26 \_\_\_\_\_  
 27 Affiant

28  
 29 Sworn to (or affirmed) and subscribed before me this  
 30 ...day of ...(month)..., ...(year)..., by .... (name of person  
 31 making statement).....

1  
2 ....(Signature of Notary Public-State of Florida)....

3  
4 ....(Print, Type, or Stamp Commissioned Name of Notary  
5 Public)....

6  
7 Personally Known OR Produced Identification

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9 ....(Type of Identification Produced)....

10 (e) A third party may not rely on the authority  
11 granted in a durable power of attorney conditioned on the  
12 principal's lack of capacity to manage property as defined in  
13 s. 744.102(10)(a) when any affidavit presented was executed  
14 more than 6 months prior to the first presentation of the  
15 durable power of attorney to the third party.

16 (f)~~(d)~~ Third parties who act in reliance upon the  
17 authority granted to the attorney in fact under the durable  
18 power of attorney and in accordance with the instructions of  
19 the attorney in fact must be held harmless by the principal  
20 from any loss suffered or liability incurred as a result of  
21 actions taken prior to receipt of written notice pursuant to  
22 subsection (5) of revocation, suspension, notice of a petition  
23 to determine incapacity, partial or complete termination, or  
24 death of the principal. A person who acts in good faith upon  
25 any representation, direction, decision, or act of the  
26 attorney in fact is not liable to the principal or the  
27 principal's estate, beneficiaries, or joint owners for those  
28 acts.

29 (g)~~(e)~~ A durable power of attorney may provide that  
30 the attorney in fact is not liable for any acts or decisions

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1 made by the attorney in fact in good faith and under the terms  
2 of the durable power of attorney.

3 (5) NOTICE.--

4 (a) A notice, including, but not limited to, a notice  
5 of revocation, notice of partial or complete termination by  
6 adjudication of incapacity or by the occurrence of an event  
7 referenced in the durable power of attorney, notice of death  
8 of the principal, notice of suspension by initiation of  
9 proceedings to determine incapacity or to appoint a guardian,  
10 or other notice, ~~suspension, or otherwise,~~ is not effective  
11 until written notice is served upon the attorney in fact or  
12 any third persons relying upon a durable power of attorney.

13 (b) Notice must be in writing and served on the person  
14 or entity to be bound by the ~~such~~ notice. Service may be by  
15 any form of mail that requires a signed receipt or by personal  
16 delivery as provided for service of process. Service is  
17 complete when received by interested persons or entities  
18 specified in this section and in chapter 48, where applicable.  
19 In the case of a financial institution as defined in chapter  
20 655, notice, when not mailed, must be served during regular  
21 business hours upon an officer or manager of the financial  
22 institution at the financial institution's principal place of  
23 business in Florida and its office where the power of attorney  
24 or account was presented, handled, or administered. Notice by  
25 mail to a financial institution must be mailed to the  
26 financial institution's principal place of business in this  
27 state and its office where the power of attorney or account  
28 was presented, handled, or administered. Except for service of  
29 court orders, a third party served with notice must be given  
30 14 calendar days after service to act upon that notice. In the  
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1 case of a financial institution, notice must be served before  
2 the occurrence of any of the events described in s. 674.303.  
3 Section 2. This act shall take effect January 1, 2001.  
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