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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
HEALTH REGULATION
ANALYSIS

BILL #: HB 1031

RELATING TO: Durable Powers of Attorney

SPONSOR(S): Representative Carassas

TIED BILL(S): None.

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
(2) HEALTH REGULATION YEAS 11 NAYS 0
(3) SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

A durable power of attorney is a power of attorney that is not affected by subsequent incapacity of the principal, but remains in effect until death of the principal, revocation by a competent principal, or a judicial finding of incapacity. Florida law currently requires that a durable power of attorney be exercisable immediately. HB 1031 creates new provisions under the durable power of attorney law that provides for the creation of a durable power of attorney based on a principal's lack of capacity to manage property.

This bill authorizes individuals to create a springing durable power of attorney, which is a durable power of attorney that is not exercisable immediately, but that takes effect when the individual who created the power of attorney is unable to manage his or her property.

A springing durable power of attorney will become effective upon presentation to a third party of an affidavit of the attorney in fact that the springing durable power of attorney is in effect because of the incapacity of the principal, together with an affidavit from the treating physician confirming that the principal is unable to manage his or her property. A physician executing such an affidavit in good faith is immune from civil liability, disciplinary action, or criminal prosecution.

This bill does not appear to have a fiscal impact on the state or on local governments.

See amendment section of bill analysis for changes made by amendments that are traveling with the bill.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes [x]	No []	N/A []
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes [x]	No []	N/A []

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

A power of attorney is defined[1] as:

> An instrument in writing whereby one person, as principal, appoints another as his [or her] agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. An instrument authorizing another to act as one's agent or attorney. The agent is attorney in fact and his [or her] power revoked on the death of the principal by operation of law. Such power may be either general (full) or special (limited).

The general legal concepts relating to powers of attorney are in the common law; ch. 709, F.S., provides exceptions from the common law regarding powers of attorney. A common law power of attorney delegates to the attorney in fact[2] the authority to act on behalf of the principal regarding specific acts on behalf of the principal. A general power of attorney may be revoked at any time by a competent principal, and is revoked automatically upon the death or incapacity of the principal. The theory behind revocation upon incapacity is the assumption that, because there is no way to determine at what point an incapacitated principal may have wanted to revoke the power of attorney, it should be revoked at the happening of the incapacity. A general power of attorney is quite useful in many business contexts, but is of little practical use in family and estate planning where the primary purpose of a power of attorney is to tend to the affairs of the family member should the family member become incapacitated.

Section 709.08, F.S., provides for creation of a durable power of attorney. Unlike an ordinary power of attorney, a durable power of attorney is not affected by subsequent incapacity of the principal, but remains in effect until death of the principal, revocation by a competent principal, or a judicial finding of incapacity (in which case the guardianship assumes the role of principal).

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[1] From Black's Law Dictionary, 6th Edition, at 1171.

[2] An "attorney in fact" is not the same as an "attorney at law"; any competent adult may be an attorney in fact.

Section 709.08(1), F.S., provides that a durable power of attorney must be exercisable as of the date of execution. This requirement is the drawback of a durable power of attorney under current law, because it has the potential of allowing mischief.[3]

A springing power of attorney is a power of attorney that is not exercisable until the occurrence of a specified time or specified event (e.g. disability), at which time the power of attorney "springs" into effect. Until the occurrence, the springing power of attorney is dormant and ineffective. Under current law, a springing power of attorney is only recognized in Florida as to certain military personnel. *See* s. 709.11, F.S.

Chapter 744, F.S., is the guardianship law. Section 744.102(10)(a), F.S., defines "manage property" to mean "to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income."

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 709.08, F.S., to provide for the creation of a springing durable power of attorney, that is, a power of attorney that is conditioned upon the principal's lack of capacity to manage property, as defined by s. 744.102(10)(a), F.S. In general, current law applicable to durable powers of attorney is applicable to springing durable powers of attorney.

Affidavit Requirement
A third party may rely on a durable power of attorney without requiring an affidavit that the durable power of attorney is valid; although a third party may require such an affidavit. However, this bill provides that a third party may only rely on a springing power of attorney should the third party be presented with an affidavit from the attorney in fact and an affidavit from the treating physician.

The affidavit executed by the attorney in fact must state where the principal is domiciled, that the principal is not deceased, and that there has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian of the durable power of attorney at the time the power of attorney is exercised. A written affidavit executed by the attorney in fact under this paragraph may, but need not, be in the following form:

STATE OF
COUNTY OF

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

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

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

3. To the best of the Affiant's knowledge after diligent search and inquiry:

[3] The durable power of attorney is effective at signing, and remains effective until revoked. A typical scenario is that a husband and wife will each execute a durable power of attorney naming the other. Years later, when the marriage turns bad, one can use the durable power of attorney to clean out the bank account, sell the boats and cars, and leave the other spouse broke.

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

b. There has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian A petition to determine the incapacity of or to appoint a guardian for the Principal is not pending.

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

.....
...Affiant...

Sworn to (or affirmed) and subscribed before me this.... day of
,...(month).....(year)..., by ...(name of person making statement)...
...(Signature of Notary Public-State of Florida)...
(Print, Type, or Stamp Commissioned Name of Notary Public)
Personally Known OR Produced Identification
...(Type of Identification Produced)...

A determination that the principal lacks the capacity to manage property must be made and evidenced by the affidavit of a physician licensed to practice medicine as of the date of the affidavit. A judicial determination that the principal lacks the capacity to manage property pursuant to chapter 744 is not required prior to the determination by the physician and the execution of the affidavit. The physician executing the affidavit must be the primary physician who has responsibility for the treatment and care of the principal. The affidavit executed by the physician must state where the physician is licensed to practice medicine, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the physician believes that the principal lacks the capacity to manage property as defined in s. 744.102(10)(a). The affidavit may, but need not, be in the following form:

STATE OF_____
COUNTY OF_____

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

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

2. Affiant is the primary physician who has responsibility for the treatment and care of ...(principal's name)....

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

_____
Affiant

Sworn to (or affirmed) and subscribed before me this ...day of... ...(month)...,
...(year)..., by .... (name of person making statement)....
....(Signature of Notary Public-State of Florida)....
....(Print, Type, or Stamp Commissioned Name of Notary Public)....
Personally Known OR Produced Identification
....(Type of Identification Produced)....

A third party may not rely on the authority granted in a durable power of attorney conditioned on the principal's lack of capacity to manage property as defined in s. 744.102(10)(a) when any affidavit presented has been executed more than six months prior to the first presentation of the durable power of attorney to the third party.

Physician Immunity
A physician who makes a determination of incapacity to manage property is not subject to criminal prosecution or civil liability and is not considered to have engaged in unprofessional conduct as a result of making such determination. The provisions of this paragraph do not apply if there is shown by a preponderance of the evidence that the physician making the determination did not comply in good faith with the provisions of this section.

Notice Requirements
This bill amends the requirements of notice to third parties. This bill adds that the holder of a durable power of attorney must notify third parties of an adjudication of incapacity, occurrence of an event referenced in the durable power of attorney that would affect the validity of the powers conferred upon the attorney in fact, death of the principal, suspension by initiation of proceedings to determine incapacity or to appoint a guardian, all as additional cause for an attorney in fact to provide notice to third parties that a durable power of attorney may no longer be effective.

This bill further provides that if notice is given by mail to a financial institution, such notice must be mailed to the financial institution's principal place of business in this state and its office where the power of attorney or account was presented, handled, or administered.

D. SECTION-BY-SECTION ANALYSIS:

See “Present Situation” and Effect of Proposed Changes.”.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 29, 2001, the Committee on Health Regulation adopted two amendments as follows:

Amendment 1. A technical amendment conforming the House bill to the Senate version.

Amendment 2. Defines “primary physician” as a licensed physician pursuant to Chapters 458 and 459, Florida Statutes.

Both amendments passed and are traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
Nathan L. Bond, J.D.	Lynne Overton, J.D.

AS REVISED BY THE COMMITTEE ON HEALTH REGULATION:

Prepared by:	Staff Director:
Lisa Rawlins Maurer, Legislative Analyst	Lucretia Shaw Collins