SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 886

SPONSOR: Judiciary Committee and Senator Klein

SUBJECT: Durable Powers of Attorney

DATE: March 20, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill clarifies provisions relating to the durable power of attorney regarding how and when a third party may rely on the authority granted under any durable power of attorney. It also incorporates new procedures and requirements for the execution, exercise, and reliance on the authority granted in a durable power of attorney conditioned on a principal's incapacity to manage property. Criminal and civil immunity from liability is provided to physicians who, in good faith, execute affidavits of noncapacity to manage property. It includes suggested statutory forms for affidavits to attest to the principal's lack of capacity to manage property.

This bill substantially amends the following section of the Florida Statutes: 709.08

II. Present Situation:

A power of attorney is a document in which the client (the principal) authorizes someone or some entity (otherwise known as an agent or attorney-in-fact) to act on his or her behalf as pertains to matters of real estate, banking, insurance, health care or other transactions. There are typically three types of powers of attorney:

- The *general power of attorney* delegates to the attorney-in-fact the authority to act on behalf of the principal regarding specific acts on behalf of the principal. This power of attorney expires automatically upon the principal becoming mentally ill or otherwise incapacitated.

- The *durable power of attorney* delegates specific types of powers, and is immediately effective and exercisable upon the date of execution (even if the power of attorney is not actually exercised until later). It remains in effect even if the principal becomes

subsequently incapacitated. It expires immediately if the principal dies, is adjudicated legally incapacitated, or revokes the power of attorney.

- The *contingent or springing power of attorney* delegates specific types of powers but is not exercisable until the occurrence of a specified time or specified event (e.g., disability). Until that happens, the contingent power of attorney is dormant and ineffective, and the principal retains sole control over his or her property and is able to exercise other rights.

Florida recognizes fully the general power of attorney and the durable power of attorney. Florida does not recognize a general contingent or springing power of attorney based on the triggering of some event. However, in 1988, the Florida Legislature enacted a limited type of contingent or springing power of attorney conditioned on the military deployment of persons. *See* ch. 88-62, L.O.F., s. 709.11, F.S. No provisions, however, were provided for the verification of such deployment or for the duration and termination of the deployment contingent power of attorney.

In Florida, powers of attorney and similar instruments conferring legal authority are governed by chapter 709, F.S. The power of attorney must be in writing and executed in accordance with the statutory formality associated with the conveyance of real property. The powers delegable to a power of attorney can include, but are not limited to, unless otherwise provided in law: 1) every act authorized and specifically enumerated in the durable power of attorney, 2) authority to execute stock, security and other related powers, and 3) authority to convey or mortgage property. *See* s. 709.08(7)(a), F.S. Specifically, the durable power of attorney may include the power to make health care decisions, including those set forth in chapter 765, F.S., relating to health care advance directives. *See* s. 709.08(7)(c), F.S. However, a power of attorney may not include the power: 1) to exercise duties under a contract that require the personal services of the principal, 2) to execute an affidavit as to the personal knowledge of the principal, 3) to vote on behalf of the principal, 4) to execute or revoke a will or codicil, 5) to create, amend or revoke any document as to disposition of assets or to transfer assets in an existing trust, or 6) to exercise the power of the principal as a trustee or court-appointed fiduciary. *See* s. 709.08(7)(b), F.S.

A third party may rely on the authority granted in a durable power of attorney only until the third party receives written notice of revocation, partial or complete termination (which may be triggered by an adjudication of incapacity), or suspension (which may be triggered by pending proceedings to determine incapacity, death of the principal or other activity that signals the end of the exercise of a durable power of attorney). A third party may, but is not required to, request an affidavit from the attorney in fact attesting that the durable power of attorney is still valid and exercisable. There is a suggested statutory form for an affidavit by the attorney in fact.

Other states have enacted statutory forms for Aspringing@ or Acontingent@ powers of attorney. In 1997, New York state enacted statutory short forms for Anondurable,@ Adurable,@ and Aspringing@ powers of attorney. *See* N.Y. General Obligations Law '5-1501, Cons. 1997.

III. Effect of Proposed Changes:

Section 1 amends s. 709.08, F.S., relating to durable power of attorney. The section is amended to provide the requirements and the procedure for the execution, exercise, and reliance on the authority granted in a durable power of attorney conditioned on a principal=s incapacity to manage property as defined in s. 744.102(10)(a), F.S. The lack of capacity to manage property is defined as including inability to take those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits, and income.

An attorney in fact may not exercise authority granted under a durable power of attorney conditioned on the principal=s incapacity to manage property until he or she has executed an affidavit and secured the affidavits of a physician attesting to the principal=s condition. Existing requirements for the content and execution of an affidavit of the attorney in fact in any durable power of attorney are revised to require a statement indicating where the principal is domiciled and that the principal is not deceased. The suggested statutory form for the affidavit is similarly revised to conform with these new requirements.

Requirements are created for the content and execution of an affidavit by a physician for purposes of a durable power of attorney conditioned on the principal's incapacity to manage property.[1] The physician executing the affidavit must be the principal=s primary physician. The physician must be licensed to practice medicine as of the date of the affidavit. The physician's affidavit must indicate the physician is licensed to practice medicine, that he or she is the principal's primary physician, and that the physician believes the principal lacks the capacity to manage property. A suggested statutory form for the affidavit incorporating the requirements is provided.

Physicians who execute such affidavits are presumed to have engaged in professional conduct. Physicians are also given civil and criminal immunity from liability for making a determination of a person’s incapacity to manage property for purposes of specified durable power of attorney. The immunity is not available if it is shown by a preponderance of the evidence that the physician did not act in good faith. This immunity provision is almost identical to the civil and criminal immunity provision for physicians provided in s. 765.109, F.S. relating to medical professionals acting on health care decisions.

A third party may rely on a durable power of attorney conditioned on the principal=s incapacity to manage property upon the delivery of the affidavit by the attorney in fact and the physician’s affidavit but only until the third party receives notice in accordance with subsection (5). Subsection (5) is revised to conform and clarify the written notice provisions to state that a third

[1] Under s. 765.204, F.S., a determination of whether a principal has the capacity to make health care decisions is based solely on the evaluation of one attending physician which then triggers notice to a health care surrogate or an attorney in fact under a durable power of attorney to exercise specified authority on behalf of the principal (the additional reference to the surrogate and attorney in fact was enacted last year – See ch. 2000-295, L.O.F.) . If the attending physician still has a question about the principal’s capacity, another physician must evaluate the principal’s capacity to make health care decisions before the evaluation is entered in the medical records (presuming the physicians are in agreement) and then the notice requirements to the surrogate or attorney in fact are triggered. A determination that a principal lacks capacity to make health care decisions is not to be construed as a finding that a principal lacks capacity for any other purpose.

party may no longer rely on *any* durable power of attorney once the third party has received written notice of any of the following:

- Revocation,
- Partial or complete termination of the durable power of attorney by adjudication of, incapacity or by the occurrence of an event referenced in the durable power of attorney,
- Suspension by initiation of proceedings to determine incapacity or to appoint a guardian,
- The principal=s death, or
- Other (i.e., unspecified activity that indicates that the durable power of attorney is no longer valid and exercisable).

New provisions also include a requirement that notice by mail or otherwise of these actions be made to the financial institution=s principal place of business in Florida and its office where the power of attorney or account was presented, handled, or administered.

A new provision precludes a third party from relying on the authority granted under a durable power of attorney if any affidavit presented was executed more than 6 months prior to the first presentation of any durable power of attorney to that third party.

Section 2 provides that the act shall take effect on January 1, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may provide an additional estate planning tool to manage one's property or affairs, through a power of attorney in the event of mental incapacity.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.