

By Senator Klein

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A bill to be entitled
An act relating to durable powers of attorney;
amending s. 709.08, F.S.; providing for durable
powers of attorney contingent upon a specified
condition; providing guidelines for such
powers; providing statutory forms for
affidavits to attest to a specified condition;
providing immunity from criminal and civil
liability for physicians making a determination
of incapacity to manage property under certain
conditions; providing an effective date.

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

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

709.08 Durable power of attorney.--

(1) CREATION OF DURABLE POWER OF ATTORNEY.--A durable
power of attorney is a written power of attorney by which a
principal designates another as the principal's attorney in
fact. The durable power of attorney must be in writing, must
be executed with the same formalities required for the
conveyance of real property by Florida law, and must contain
the words: "This durable power of attorney is not affected by
subsequent incapacity of the principal except as provided in
s. 709.08, Florida Statutes"; or similar words that show the
principal's intent that the authority conferred is exercisable
notwithstanding the principal's subsequent incapacity, except
as otherwise provided by this section. The durable power of
attorney is exercisable as of the date of execution; however,
if the durable power of attorney is conditioned upon the

1 principal's lack of capacity to manage property as defined in
2 s. 744.102(10)(a), the durable power of attorney is
3 exercisable upon the delivery of affidavits in paragraphs
4 (4)(c) and (d) to the third party.

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

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

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

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

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

9
10 STATE OF
11 COUNTY OF

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

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

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

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

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

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

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

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

9
10
11 ...Affiant...
12

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

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

21
22 (d) A determination that a principal lacks the
23 capacity to manage property as defined in s. 744.102(10)(a)
24 must be made and evidenced by the affidavits of at least two
25 physicians licensed to practice medicine pursuant to chapter
26 458 or chapter 459 as of the date of the affidavit. A judicial
27 determination that the principal lacks the capacity to manage
28 property pursuant to chapter 744 is not required prior to the
29 determination by the physicians and the execution of the
30 affidavits. At least one of the physicians must be the
31 attending physician. For purposes of this section, the

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

9
10 STATE OF _____
11 COUNTY OF _____
12

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

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

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

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

28 _____
29 Affiant
30
31

1 Sworn to (or affirmed) and subscribed before me this
2 ...day of... ...(month)..., ...(year)..., by (name of
3 person making statement)....

4
5(Signature of Notary Public-State of Florida)....

6
7(Print, Type, or Stamp Commissioned Name of Notary
8 Public)....

9
10 Personally Known OR Produced Identification

11
12(Type of Identification Produced)....

13 (e) A physician who makes a determination of
14 incapacity to manage property under paragraph (d) is not
15 subject to criminal prosecution or civil liability and is not
16 considered to have engaged in unprofessional conduct as a
17 result of making such determination. The provisions of this
18 paragraph do not apply if there is shown by a preponderance of
19 the evidence that the physician making the determination did
20 not comply in good faith with the provisions of this section.

21 (f) A third party may not rely on the authority
22 granted in a durable power of attorney conditioned on the
23 principal's lack of capacity to manage property as defined in
24 s. 744.102(10)(a) when any affidavit presented has been
25 executed more than 6 months prior to the first presentation of
26 the durable power of attorney to the third party.

27 (g)~~(d)~~ Third parties who act in reliance upon the
28 authority granted to the attorney in fact under the durable
29 power of attorney and in accordance with the instructions of
30 the attorney in fact must be held harmless by the principal
31 from any loss suffered or liability incurred as a result of

1 actions taken prior to receipt of written notice pursuant to
2 subsection (5) of revocation, suspension, notice of a petition
3 to determine incapacity, partial or complete termination, or
4 death of the principal. A person who acts in good faith upon
5 any representation, direction, decision, or act of the
6 attorney in fact is not liable to the principal or the
7 principal's estate, beneficiaries, or joint owners for those
8 acts.

9 (h)(e) A durable power of attorney may provide that
10 the attorney in fact is not liable for any acts or decisions
11 made by the attorney in fact in good faith and under the terms
12 of the durable power of attorney.

13 (5) NOTICE.--

14 (a) A notice, including, but not limited to, a notice
15 of revocation, notice of partial or complete termination by
16 adjudication of incapacity or by the occurrence of an event
17 referenced in the durable power of attorney, notice of death
18 of the principal, notice of suspension by initiation of
19 proceedings to determine incapacity or to appoint a guardian,
20 or other notice, suspension, or otherwise, is not effective
21 until written notice is served upon the attorney in fact or
22 any third persons relying upon a durable power of attorney.

23 (b) Notice must be in writing and served on the person
24 or entity to be bound by the ~~such~~ notice. Service may be by
25 any form of mail that requires a signed receipt or by personal
26 delivery as provided for service of process. Service is
27 complete when received by interested persons or entities
28 specified in this section and in chapter 48, where applicable.
29 In the case of a financial institution as defined in chapter
30 655, notice, when not mailed, must be served during regular
31 business hours upon an officer or manager of the financial

1 institution at the financial institution's principal place of
2 business in Florida and its office where the power of attorney
3 or account was presented, handled, or administered. Notice by
4 mail to a financial institution must be mailed to the
5 financial institution's principal place of business in this
6 state and its office where the power of attorney or account
7 was presented, handled, or administered. Except for service of
8 court orders, a third party served with notice must be given
9 14 calendar days after service to act upon that notice. In the
10 case of a financial institution, notice must be served before
11 the occurrence of any of the events described in s. 674.303.

12 Section 2. This act shall take effect January 1, 2002.

13
14 *****

15 SENATE SUMMARY

16 Provides for the creation of a durable power of attorney
17 that will take effect at a specified future time or upon
18 the occurrence of a specified event. Prescribes
19 requirements for such powers of attorney and provides a
20 statutory form. Provides immunity from criminal and civil
21 liability for physicians who make a determination of
22 incapacity to manage property under certain conditions.
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