

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 a specified condition;  
8           providing immunity from criminal and civil  
9           liability for physicians making a determination  
10          of incapacity to manage property under certain  
11          conditions; providing an effective date.

12  
13 Be It Enacted by the Legislature of the State of Florida:

14  
15           Section 1. Subsections (1), (4), and (5) of section  
16 709.08, Florida Statutes, are amended to read:

17           709.08 Durable power of attorney.--

18           (1) CREATION OF DURABLE POWER OF ATTORNEY.--A durable  
19 power of attorney is a written power of attorney by which a  
20 principal designates another as the principal's attorney in  
21 fact. The durable power of attorney must be in writing, must  
22 be executed with the same formalities required for the  
23 conveyance of real property by Florida law, and must contain  
24 the words: "This durable power of attorney is not affected by  
25 subsequent incapacity of the principal except as provided in  
26 s. 709.08, Florida Statutes"; or similar words that show the  
27 principal's intent that the authority conferred is exercisable  
28 notwithstanding the principal's subsequent incapacity, except  
29 as otherwise provided by this section. The durable power of  
30 attorney is exercisable as of the date of execution; however,  
31 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 affidavit of a physician  
25 licensed to practice medicine pursuant to chapters 458 and 459  
26 as of the date of the affidavit. A judicial determination that  
27 the principal lacks the capacity to manage property pursuant  
28 to chapter 744 is not required prior to the determination by  
29 the physician and the execution of the affidavit. For purposes  
30 of this section, the physician executing the affidavit must be  
31 the primary physician who has responsibility for the treatment

1 and care of the principal. The affidavit executed by a  
 2 physician must state where the physician is licensed to  
 3 practice medicine, that the physician is the primary physician  
 4 who has responsibility for the treatment and care of the  
 5 principal, and that the physician believes that the principal  
 6 lacks the capacity to manage property as defined in s.  
 7 744.102(10)(a). The affidavit may, but need not, be in the  
 8 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 the primary physician who has  
 20 responsibility for the treatment and care of ...(principal's  
 21 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, unless it is shown by a  
18 preponderance of the evidence that the physician making the  
19 determination did not comply in good faith with the provisions  
20 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.

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