

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 670

INTRODUCER: Senator Joyner

SUBJECT: Powers of Attorney

DATE: March 11, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	Pre-meeting
2.	_____	_____	BI	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill seeks to conform Florida’s power of attorney law under chapter 709, Florida Statutes, to the Uniform Power of Attorney Act,¹ with some modifications to achieve greater consistency among state laws.

The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled “Powers of Appointment.” The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled “Powers of Attorney.”

The revised power of attorney law applies only to powers of attorney created by an individual. Powers of attorney validly executed under Florida law before the effective date of the new Florida powers of attorney law will remain valid. If the power of attorney is a durable one (one which is not terminated by the principal’s incapacity) or a springing one (one which does not take effect until the principal loses capacity), it will remain durable or springing under the new law. To be effective in Florida, powers created on or after the effective date of the new power of attorney law must be exercisable as of the time they are executed. The meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if the power of attorney is used in Florida or states that it is to be governed by Florida law. A power of attorney executed in another state that does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.

¹ See National Conference of Commissioners on Uniform State Laws, “A Few Facts About the Uniform Power of Attorney Act,” available at <http://www.nccusl.org/Act.aspx?title=Power%20of%20Attorney> (last visited Mar. 9, 2011).

Powers of attorney that are executed after the effective date of part II of ch. 709, F.S., may not create springing powers, with an exception for military powers. Qualified agents as defined in the bill are entitled to reasonable compensation. The revised power of attorney provides requirements for written notice with special notice for financial institutions, and special rules for banking and investment transactions; provides default duties for the agent; creates co-agents and successor agents; prohibits blanket or default powers granted to an agent; prescribes requirements for the rejection by a third person of power of attorney; prescribes requirements for an agent's liability under power of attorney; and provides grounds for judicial relief and dealing with conflicts of interest.

This bill creates the following sections of the Florida Statutes: 709.2101, 709.2102, 709.2103, 709.2104, 709.2105, 709.2106, 709.2107, 709.2108, 709.2109, 709.2110, 709.2111, 709.2112, 709.2113, 709.2114, 709.2115, 709.2116, 709.2117, 709.2118, 709.2119, 709.2120, 709.2121, 709.2201, 709.2202, 709.2203, 709.2208, 709.2301, 709.2302, 709.2303, 709.2401, and 709.2402.

The bill amends section 736.0602, Florida Statutes. The bill repeals the following sections of the Florida Statutes: 709.01, 709.015, 709.08, and 709.11.

The bill provides an effective date of October 1, 2011.

II. Present Situation:

A power of attorney is a legal document that delegates authority from one person to another.² The person who creates a power of attorney is the principal, and the person to whom the authority to act is delegated is an agent of the principal. The power of attorney is an important document because it allows one person to legally act for another, and it benefits and binds the principal as if the principal had done the act himself or herself. A durable power of attorney is power of attorney that continues to be legally effective if the principal becomes incapacitated.³ Durable powers of attorney are often used in estate planning as an alternative to guardianship if a principal becomes incapacitated.⁴

In 2006, the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws completed a Uniform Power of Attorney Act.⁵ Since that time, nine states (Colorado, Idaho, Indiana, Maine, Maryland, Nevada, New Mexico, Virginia, and Wisconsin) and one United States territory (U.S. Virgin Islands) have adopted the Uniform Power of Attorney Act.⁶

A committee was formed in Florida to evaluate the Uniform Power of Attorney Act for possible enactment in Florida.⁷ The committee included attorneys with practices in various disciplines,

² Chapter 709, F.S.

³ Section 709.08, F.S.

⁴ Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Chapter 709, F.S. (2011) (on file with the Senate Committee on Judiciary).

⁵ See National Conference of Commissioners on Uniform State Laws, *supra* note 1.

⁶ *Id.*

⁷ Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

including estate planning, estate and trust litigation, elder law, and family law, and attorneys who work for financial institutions, who represent the Florida Bankers Association and attorneys whose practice is comprised of real estate title insurance.⁸ The committee recommended significant revisions to ch. 709, F.S., to propose the creation of a new part I to reinstate without substantive change those current provisions of ch. 709, F.S., relating to “powers of appointment” and a new part II of ch. 709, F.S., relating to “powers of attorney.”⁹

III. Effect of Proposed Changes:

The bill seeks to conform Florida’s power of attorney law under ch. 709, F.S., to the Uniform Power of Attorney Act, with some modifications to achieve greater consistency among state laws. The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled “Powers of Appointment.” The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled “Powers of Attorney.”

The revised power of attorney law applies only to powers of attorney created by an individual.¹⁰ Powers of attorney validly executed under Florida law before the effective date of the new Florida powers of attorney law will remain valid. If the power of attorney is a durable one (one which is not terminated by the principal’s incapacity) or a springing one (one which does not take effect until the principal loses capacity), it will remain durable or springing under the new law. To be effective in Florida, powers created on or after the effective date of the new power of attorney law must be exercisable as of the time they are executed.¹¹ The meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if the power of attorney is used in Florida or states that it is to be governed by Florida law.¹² A power of attorney executed in another state that does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.¹³ The revised power of attorney law provides: requirements for written notice with special notice for financial institutions;¹⁴ special rules for banking and investment transactions;¹⁵ and default duties for the agent.¹⁶ The revised power of attorney law: creates co-agents and successor agents;¹⁷ prohibits blanket or default powers granted to an agent;¹⁸ outlines requirements for the rejection by a third person of power of attorney;¹⁹ specifies requirements for an agent’s liability under power of attorney;²⁰ and provides grounds for judicial relief and dealing with conflicts of interest.²¹

⁸ *Id.*

⁹ *Id.*

¹⁰ Section 709.2103, F.S.

¹¹ Section 709.2108(1), F.S.

¹² Section 709.2107, F.S.

¹³ This concept of portability makes powers of attorneys portable between states. See Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

¹⁴ Section 709.2121, F.S.

¹⁵ Section 709.2208(1) and (2), F.S.

¹⁶ Section 709.2114, F.S.

¹⁷ Section 709.2111, F.S.

¹⁸ Section 709.2201, F.S.

¹⁹ Section 709.2120, F.S.

²⁰ Section 709.2117, F.S.

²¹ Section 709.2116, F.S.

Powers of attorney that are executed after the effective date of part II of ch. 709, F.S., may not create springing powers, with an exception for military powers.²²

Section-by-Section Analysis

Section 1. The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled “Powers of Appointment.”

Section 2. The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled “Powers of Attorney.”

Section 3. Section 709.2101, F.S., provides for the “Florida Power of Attorney Act.”

Section 4. Section 709.2102, F.S., provides definitions.

“Agent” means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise, and the term includes an original agent, co-agent, and successor agent.

“Durable” means, with respect to a power of attorney, not terminated by the principal’s incapacity.

“Electronic” means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

“Financial institution has the same meaning as in s. 655.005, F.S., relating financial institutions.

“Incapacity” means the inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.²³

“Knowledge” means a person has actual knowledge of the fact, has received a notice or notification of the fact, or has reason to know the fact from all other facts and circumstances known to the person at the time in question. With respect to an organization operating through employees, the organization has notice of or knowledge of a fact involving the power of attorney only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the power of attorney or the time the information would have been brought to the employee’s attention if the organization had exercised reasonable diligence. The term is substantively identical to the definition of the term in the Florida Probate Code.²⁴

²² See s. 709.2108(1) and s. 709.2106(4), F.S. as discussed in Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

²³ See s. 744.102(12)(a), F.S., which provides a comparable definition for an “incapacitated person” as it relates to the management of property.

²⁴ See s. 736.0104, F.S.

“Power of Attorney” means a writing that grants authority to an agent to act in the place of the principal, whether or not that the term is used in that writing. An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit and binds the principal and the principal’s successors in interest as if the principal had performed the act.

“Principal” means an individual who grants authority to an agent in a power of attorney.

“Sign” means having present intent to authenticate or adopt a record to: execute or adopt a tangible symbol; or attach to, or logically associate with the record an electronic sound, symbol, or process.

“Third person” means any person other than the principal or the agent in the agent’s capacity as agent.

Section 5. Section 709.2103, F.S., provides that this part (part II of ch. 709, F.S.) applies to all powers of attorney except:

- A proxy or other delegation to exercise voting rights or management rights with respect to an entity;
- A power created on a form prescribed by a government or its subdivision for a governmental purpose;
- A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction; and
- A power created by a person other than an individual.

Section 6. Section 709.2104, F.S., provides that except as otherwise provided under this part (part II of ch. 709, F.S.), a power of attorney is durable if it contains the words: “This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes,” or similar words that show the principal’s intent that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity.

Section 7. Section 709.2105, F.S., specifies qualifications of the agent and requirements for the execution of a power of attorney. The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in Florida, and is authorized to conduct trust business in Florida.

A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or otherwise provided for the conveyance of real estate.²⁵

Section 8. Section 709.2106, F.S., specifies that a power of attorney executed on or after October 1, 2011, is valid if its execution complies with s. 709.2103, F.S. A power of attorney executed before October 1, 2011 is valid if its execution complied with Florida law at the time of

²⁵ See s. 695.03, F.S.

execution. Additionally if the power of attorney is a durable power of attorney or a springing power of attorney it will remain durable or springing under this act (part II of ch. 709, F.S.).

A power of attorney executed in another state which does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.²⁶ A third person who is requested to accept a power of attorney that is valid in Florida solely because of the requirement of s. 709.2106(3), F.S., (that the execution of the power of attorney complied with the law of the state of execution) may in good faith request, and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under s. 709.2106(3), F.S., must be provided at the principal's expense. A third person may accept a power of attorney that is valid in Florida solely because of s. 709.2106(3), F.S., if the agent does not provide the requested opinion of counsel, and in such case, a third person has no liability for refusing to accept the power of attorney. Subsection 709.2106(3), F.S., does not affect any other right of a third person who is requested to accept the power of attorney under this part (part II of ch. 709, F.S.), or any other provisions of applicable law.

Section 709.2106(4), F.S., provides that a military power of attorney is valid if it is executed in accordance with federal law, as amended. A deployment-contingent power of attorney may be signed in advance, and is effective upon deployment of the principal, and shall be afforded full force and effect by Florida courts.

Section 9. Section 709.2107, F.S., provides that the meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if it is used in Florida or the power of attorney states that it is to be governed by the laws of Florida.

Section 10. Section 709.2108, F.S., specifies that except as provided in s. 709.2108(2), F.S., a power of attorney is exercisable when executed. Section 709.2108(2), F.S., provides that if a power of attorney executed before October 1, 2011, is conditioned on the principal's lack of capacity to manage property and the power of attorney has not become exercisable before that date, the power of attorney is exercisable upon delivery of the affidavit of a Florida-licensed medical or osteopathic physician. The affidavit must state that the physician believes that the principal lacks the capacity to manage property.

Except as provided in s. 709.2108(2), F.S., or s. 709.2106(4) F.S., a power of attorney is ineffective if the power of attorney provides that it is to become effective at a future date or upon the occurrence of a future event or contingency.

Section 11. Section 709.2109, F.S., provides requirements for the termination or suspension of a power of attorney or an agent's authority. A power of attorney terminates when:

- The principal dies;
- The principal becomes incapacitated, if the power is not durable;

²⁶ This concept of portability makes powers of attorneys portable between states. See Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Chapter 709, F.S. (2011) (on file with the Senate Committee on Judiciary).

- The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;
- The purpose of the power of attorney is accomplished; or
- The agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority is exercisable until the authority terminates. An agent's authority terminates when:

- The agent dies, becomes incapacitated, resigns, or is removed by a court;
- An action is filed for the dissolution or annulment of the agent's marriage to the principal or for their legal separation, unless the power of attorney otherwise provides; or
- The power of attorney terminates.

The authority granted under a power of attorney is suspended until the petition to initiate judicial proceedings to determine the principal's incapacity, or for the appointment of a guardian advocate, is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney. The agent may petition the court in which a proceeding is pending, in the event of an emergency, for authorization to exercise a power granted under the power of attorney. The petition must set forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent.

Notwithstanding s. 709.2109, F.S., unless otherwise ordered by the court, a proceeding to determine incapacity does not affect the authority of the agent to make health care decisions for the principal, including those provided in ch. 765, F.S., which deal with health care advance directives. If a health care advance directive has been executed by the principal, the terms of the directive control if the directive and the power of attorney are in conflict unless the power of attorney is later executed and expressly states otherwise.

Termination or suspension of an agent's authority or of a power of attorney is ineffective as to the agent who, without knowledge of the termination or suspension, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

Section 12. Section 709.2110, F.S., specifies requirements for the revocation of a power of attorney. A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may give notice of the revocation to an agent who has accepted authority under the revoked power of attorney. The execution of a power of attorney does not revoke a power of attorney previously executed by the principal except as provided in this section

Section 13. Section 709.2111, F.S., specifies requirements for co-agents and successor agents under a power of attorney. Unless the power of attorney states otherwise, each co-agent may

exercise its authority independently. A principal may designate one of more successor agents to act if an agent dies, becomes incapacitated, is not qualified to serve, or declines to serve.

Except as otherwise provided in the power of attorney or s. 709.2111(4), F.S., an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions or omissions of the other agent.

Under s. 709.2111(4), F.S., an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent must take reasonable actions appropriate in the circumstances to safeguard the principal's best interests. If the principal is not incapacitated, giving notice to the principal is sufficient. An agent who fails to take action is liable to the principal for reasonably foreseeable damages that the principal could have avoided if the agent had taken such action. A successor agent does not have a duty to review the conduct or decisions of a predecessor agent. Except as provided in s. 709.2111(4), F.S., a successor agent does not have a duty to institute any proceeding against a predecessor agent or file a claim against a predecessor agent's estate, for acts or omissions of the predecessor agent as an agent of the principal. If a power of attorney requires two or more persons as co-agents to act together, one or more of the agents may delegate to a co-agent the authority to conduct banking transactions as provided in s. 709.2208(1), F.S., whether the authority to conduct banking transactions is specifically enumerated or incorporated by reference to that section in the power of attorney.

Section 14. Section 709.2112, F.S., specifies requirements for the reimbursement and compensation of agents. Unless otherwise stated in the power of attorney, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal. Unless otherwise stated in the power of attorney, a qualified agent is entitled to compensation that is reasonable under the circumstances. Notwithstanding any provision in the power of attorney, an agent may not be paid compensation unless the agent is a qualified agent. A "qualified agent" is an agent who is the spouse of the principal, an heir of the principal, a financial institution that has trust powers and a place of business in Florida, an attorney or certified public accountant licensed in Florida, or a natural person who has never been an agent for more than three principals at the same time.

Section 15. Section 709.2113, F.S., provides that, except as provided in the power of attorney, a person accepts appointment as an agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. The scope of an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

Section 16. Section 709.2114, F.S., specifies the duties of an agent. An agent is a fiduciary, must act only within the scope of authority granted in the power of attorney and may not act contrary to the principal's reasonable expectations actually known by the agent. The agent must act in good faith and not in a manner contrary to the principal's best interests with specified exceptions. The agent must attempt to preserve the principal's estate plan, to the extent actually known to the agent, if preserving the plan is consistent with the principal's best interests based on specified factors. The agent is prohibited from delegating authority except as provided in law for the delegation of investment functions. The agent must keep records on behalf of the principal, as

well as create and maintain an accurate inventory of the principal's safe-deposit box, if applicable.

Except as otherwise provided in the power of attorney, the agent who has accepted appointment must act loyally for the sole benefit of the principal; act so as to not create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interests; and cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations and otherwise act in the principal's best interests. An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan. If an agent has special skills or expertise or was selected based on the agent's representation that the agent has such skills or expertise, then those special skills must be considered in determining whether the agent acted with care, competence, and diligence under the circumstances. Absent a breach of duty to the principal, an agent is not liable for a decline in the value of the principal's property. An agent must disclose specified information and documents within 60 days of the request or ask for additional time to comply with the request.

Section 17. Section 709.2115, F.S., provides requirements for the exoneration of an agent. A power of attorney may provide for exoneration of the agent for acts or decisions made in good faith and under the power of attorney except to the extent the provision:

- Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the principal's best interest; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Section 18. Section 709.2116, F.S., provides that a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief. The following may petition the court: the principal or agent; a guardian, conservator, trustee, or other fiduciary acting for the principal or principal's estate; a person authorized to make health care decisions for the principal if the principal's health care is affected by the agent's actions; any other interested person; a governmental agency that has regulatory authority to protect the welfare of the principal; or a person asked to honor the power of attorney.

The court may award reasonable attorney's fees and costs in any proceeding commenced by the filing of a petition under this section. If an agent's exercise of power is challenged on the grounds that the exercise of power was affected by a conflict of interest and evidence is presented that the agent (or affiliate) had a personal interest in exercise of the power, then the agent or affiliate has the burden of proving, by clear and convincing evidence, that the agent acted solely in the interest of the principal or in good faith in the principal's best interest, and the conflict of interest was expressly authorized in the power of attorney. A provision authorizing an agent to engage in a transaction affected by a conflict of interest which is inserted into a power of attorney as the result of the abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate is invalid.

The section recognizes and defines affiliates of the agent who may be involved in potential conflicts of interest in the exercise of the agent's powers. Affiliates of an agent include: the

agent's spouse; the agent's descendant, siblings, parents, or their spouses; a corporation or entity that owns a significant interest in the agent; or the agent acting in a fiduciary capacity for someone other than the principal.

Section 19. Section 709.2117, F.S., outlines an agent's liability for violations of applicable law to the principal or the principal's successors in interest. The agent may be required to restore the value of the principal's property to what it would be if the violation had not occurred and to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid from the principal's funds on the agent's behalf in defense of the agent's actions.

Section 20. Section 709.2118, F.S., provides requirements for and methods for an agent's resignation.

Section 21. Section 709.2119, F.S., provides that a third person who in good faith accepts a power of attorney that appears to be executed in accordance with Florida law may rely upon the power of attorney and enforce an authorized transaction against the principal's property as if the power of attorney, the agent's authority, and authority of the officer executing for or behalf of a financial institution that has trust powers and acting as an agent were genuine, valid, and still in effect. A third person does not accept a power of attorney in good faith if the person has notice that the power of attorney or the purported agent's authority is void, invalid, or terminated.

A third person may require an agent to execute an affidavit stating where the principal is domiciled; that the principal is not deceased; that there has been no revocation, or partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney; that the power of attorney has not been suspended by the initiation of proceedings to determine incapacity or the appointment of a guardian for the principal; and the reasons for the unavailability of the predecessor agents if the affiant is a successor agent. A third person may require an officer of a financial institution acting as agent to provide an affidavit that meets the requirements of the section. The form of affidavit executed by an agent is provided.

Section 22. Section 709.2120, F.S., requires a third person to accept or reject a power of attorney within a reasonable time and to state in writing the reason for the rejection. Four days, excluding Saturdays, Sundays, and legal holidays, are presumed to be a reasonable time for a financial institution to accept or reject a power of attorney for banking or security transactions. A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented. A third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;
- A timely request by the third person for an affidavit, English transaction, or opinion of counsel is refused by the agent;
- The third person believes in good faith that the power is not valid or that the agent lacks authority to perform the act requested with exceptions; or

- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office alleging that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or others acting for or with the agent;

A third person who refuses to accept a power of attorney, in violation of s. 709.2120, F.S., is subject to:

- A court order mandating acceptance of the power of attorney; and
- Liability for damages, including reasonable attorney's fees and costs incurred in an action that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Section 23. Section 709.2121, F.S., provides requirements for notice. A notice, including a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until written notice is provided to the agent or any third persons relying upon a power of attorney. Notice is legally effective only if it is in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document on the agent or affected third person. Notice to a financial institution has additional requirements and must contain the name, address, and the last four digits of the principal's taxpayer identification number and be directed to an officer or manager of the financial institution in Florida. Notice is effective when given, except notice to a financial institution, brokerage company, or title company is not effective until 5 days, excluding Saturdays, Sundays, and legal holidays, after it is received.

Section 24. Section 709.2201, F.S., outlines an agent's authority to exercise only authority specifically granted to the agent in the power of attorney except as provided in other applicable law. General provisions in a power of attorney which do not identify the specific authority granted are not an express grant of specific authority and do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of a specific authority. Authorization to an agent in a power of attorney may include authority to:

- Execute stock powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities into or out of the principal's or nominee's name.
- Convey or mortgage homestead property with some requirements for joinder of the principal's spouse or the spouse's guardian if the principal is married.

If such authority is specifically granted in a durable power of attorney, the agent may make all health care decisions on behalf of the principal, including health care advance directives specified in ch. 765, F.S. An agent may not: perform duties under a contract that requires the exercise of personal services of the principal; make any affidavit as to the personal knowledge of the principal; vote in any public election on behalf of the principal; execute or revoke any will or

codicil for the principal; or exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

If the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls. Authority granted in a power of attorney is exercisable with respect to property the principal has when the power of attorney is executed and to property the principal later acquires, whether or not the property is located in Florida and whether or not the authority is exercised or the power of attorney is executed in Florida. Acts by the agent under the power of attorney have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal had performed the act.

Section 25. Under s. 709.2202, F.S., notwithstanding s. 709.2201, F.S., an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties under s. 709.2114, F.S., and the exercise is not otherwise prohibited by another agreement or instrument:

- Create an inter vivos trust;
- Amend, modify, revoke, or terminate a trust created by or on behalf of the principal and only if the trust instrument explicitly authorizes such acts by the settlor's agent;
- Make a gift with specified limitations;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including survivor benefits under a retirement plan; or
- Disclaim property and powers of appointment.

Notwithstanding a grant of authority to do an act authorized under this section, unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise

Unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gift authorizes the agent to only:

- Make outright to, or for the benefit of, a person a gift of any of the principal's property in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and
- Consent to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

Section 709.2202(4), F.S., specifies additional acts that do not require specific authority (making a deposit to or withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account, or any other account held jointly or otherwise held in

survivorship or payable on death) if the agent is authorized to conduct banking transactions. A bank or other financial institution does not have a duty to inquire as to the appropriateness of the agent's exercise of that authority and is not liable to the principal or any other person for actions taken in good faith reliance on the appropriateness of the agent's actions. The agent's fiduciary duties to the principal with respect to the exercise of the power of attorney under the acts specified in s. 709.2202(4), F.S., are not eliminated.

Section 709.2202, F.S., does not apply to a power of attorney executed before October 1, 2011.

Section 26. Section 709.2208(1), F.S., provides that a power of attorney that includes a statement that the agent has "authority to conduct banking transactions as provided in s. 709.2208(1), F.S.," grants general authority to the agent to engage in specified transactions with financial institutions without additional specific enumeration in the power of attorney which include but are not limited to authority to:

- Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution;
- Contract for services available from a financial institution;
- Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;
- Receive statements of accounts, vouchers, notices, and similar documents from a financial institution and act with respect to them;
- Purchase cashier's checks, official checks, counter checks, bank drafts, money orders, and similar instruments;
- Endorse and negotiate checks, cashier's checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal's order, transfer money, and accept a draft drawn by a person upon the principal and pay it when due;
- Apply for, receive, and uses debit cards, electronic transaction authorizations, and traveler's checks from a financial institution;
- Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution; and
- Consent to an extension of time of payment with respect to commercial paper or a financial transaction with a financial institution.

Section 709.2208(2), F.S., provides that a power of attorney that includes a statement that the agent has "authority to conduct investment transactions as provided in s. 709.2208(2), F.S.," grants general authority to the agent with respect to securities held by financial institutions to take specified actions without additional specific enumeration in the power of attorney which include but are not limited to authority to:

- Buy, sell, and exchange investment instruments;
- Establish, continue, modify, or terminate an account with respect to investment instruments;
- Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

- Receive certificates and other evidences of ownership with respect to investment instruments;
- Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote; and
- Sell commodity futures contracts and call and put options on stocks and stock indexes.

“Investment instruments” is defined for purposes of s. 709.2208(2), F.S., and expressly excludes commodity futures contracts and call and put options on stocks and stock indexes.

Section 27. Section 709.2301, F.S., provides that the common law of agency and principles of equity supplement this part (part II of ch. 709, F.S.), except as modified by this part (part II of ch. 709, F.S.) or other state law.

Section 28. Section 709.2302, F.S., provides that this part (part II of ch. 709, F.S.) does not supersede any other law applicable to financial institutions or other entities, and that law controls if inconsistent with this part (part II of ch. 709, F.S.).

Section 29. Section 709.2303, F.S., provides that the remedies under this part (part II of ch. 709, F.S.) are not exclusive and do not abrogate any right or remedy under any other law than part II (part II of ch. 709, F.S.).

Section 30. Section 709.2401, F.S., provides that this part (part II of ch. 709, F.S.) modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede s. 101 (c) of that federal act or authorize electronic delivery of any of the notices described in s. 103(b) of that federal act.

Section 31. Section 709.2402 provides that, except as otherwise provided in part II (part II of ch. 709, F.S.), part II:

- Applies to a power of attorney created before, on, or after October 1, 2011, and to acts of the agent occurring on or after that date.
- An act of the agent occurring before October 1, 2011, is not affected by (part II, of ch. 709, F.S.).

Section 32. Section 736.0602, F.S., is amended to correct a statutory cross-reference to s. 709.2202, F.S.

Section 33. The bill repeals s. 709.01, F.S., relating to the authority of a power of attorney when the principal is dead; s. 709.015, F.S., relating to the authority of an agent under a power of attorney when the principal is listed as missing; s. 709.08, F.S., relating to a durable power of attorney; and s. 709.11, F.S., relating to a deployment-contingent power of attorney.

Section 34. The bill provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Line 214 of the bill contains a statutory cross-reference to “s. 709.2103” but should refer to “s. 709.2105,” which relates to the execution of a power of attorney.

Lines 258-270 of the bill require a Florida-licensed medical physician or osteopathic physician to provide an affidavit attesting to a principal’s incapacity for a springing power of attorney to take effect at the time of the principal’s incapacity to become exercisable. It is unclear whether the physician who provides an affidavit of the principal’s incapacity for a springing power of attorney that was executed before October 1, 2011, to become exercisable (take effect) must be a Florida-licensed medical or osteopathic physician, because the affidavit must state “where” the physician is licensed to practice medicine or osteopathic medicine. If the physicians must be Florida licensed, the following language is suggested: delete lines 264-267 and insert: “care of the principal and who is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459 as of the date of the affidavit. The affidavit executed by the physician must state that the physician is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or 459, that the physician is the primary”.

The suggested written affidavit in the bill on lines 613-658 contains scrivener’s errors which should be corrected as conforming changes to the bill.

Section 709.2121, F.S. (lines 752-775 of SB 670) is created in the bill to provide requirements for notice. A notice, including a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until *written notice* is provided to the agent or any third persons relying upon a power of attorney. Notice is legally *effective only if it is in writing*. References to notice do not need to be modified to require that they be written. To be consistent, the reference to a “written notice” on line 681 should be modified to remove “written.”

On lines 783- 787, a scrivener’s error needs correction.

It is unclear whether the statutory cross-reference to “s. 709.2206, F.S.,” on line 1014 of the bill should be corrected to “s. 709.2202, F.S.” which, in part, refers to an agent’s authority to amend, modify, revoke, or terminate a trust.

VII. Related Issues:

On lines 428-440 of the bill, the mandatory duty “to preserve the principal’s estate plan” is new to Florida law.²⁷ Under the Uniform Powers of Attorney Act, it was a default duty rather than a mandatory one.²⁸ The duty applies only to the extent the principal’s estate plan is actually known by the agent and only when the preservation of the principal’s estate plan is in the principal’s best interest based on all relevant factors. The agent may not actually know the principal’s estate plan but has a fiduciary duty to apply the relevant factors listed in the bill as to whether preservation of the estate is consistent with the principal’s best interest. Members of the committee that drafted the proposed powers of attorney legislation suggest that lines 428-431 of the bill should be revised to clarify that the agent must attempt to preserve the principal’s estate plan, as the plan is known to the agent, and as the agent applies the factors to determine whether the preservation is consistent with the principal’s best interest.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

²⁷ See discussion of the duty to preserve the principal’s estate plan in White Paper, Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

²⁸ *Id.*