

**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 Committee on Governmental Oversight and Accountability

BILL: SB 832

INTRODUCER: Senator Joyner

SUBJECT: Powers of Attorney

DATE: March 20, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Shankle	Cibula	JU	<b>Favorable</b>
2.	McKay	McVaney	GO	<b>Pre-meeting</b>
3.			RC	
4.				
5.				
6.				

**I. Summary:**

SB 832 makes a number of changes to chapter 709, F.S., concerning powers of attorney, which were recommended by the Real Property, Probate, and Trust Law Section of The Florida Bar. These changes:

- Make provisions of chapter 709, F.S., which apply to financial institutions expressly applicable to broker-dealers.
- Specify three powers given by a principal to an agent in which the laws governing powers of attorney do not apply.
- Allow a notary public to sign the principal’s name on a power of attorney document if the principal is physically unable to sign.
- Allow a third party to require an original power of attorney be provided for recording in official records if the power of attorney is relied on to transfer real property.
- Allow an agent with a power of attorney to delegate authority to a third person using a prescribed government form if the delegation is for a governmental purpose.
- Provide a standard for a court to award attorney fees in litigation involving a power of attorney.
- Allow a third party to require that an agent provide an affidavit stating whether the agent’s authority has been terminated by the filing of an action for dissolution of marriage of the agent and principal.
- Clarify when a rejection of a power of attorney by a third party must be in writing.
- Clarify that the default cap in existing law on the amount of gifts that an agent may give under a power of attorney applies to gifts given in a single a calendar year.

This bill substantially amends the following sections of the Florida Statutes: 709.2102, 709.2103, 709.2105, 709.2106, 709.2114, 709.2116, 709.2119, 709.2120, 709.2121, 709.2202, and 709.2208.

## II. Present Situation:

### Powers of Attorney Generally

A power of attorney is a legal document in which the client (the principal) authorizes a person or entity (the agent or attorney-in-fact)<sup>1</sup> to act on his or her behalf. The authority granted depends on the specific language of the power of attorney. A person giving a power of attorney may provide very broad authority (a general power of attorney) or may limit the authority to certain specific acts (a limited power of attorney).

A power of attorney expires automatically upon the principal becoming mentally ill or otherwise incapacitated.<sup>2</sup> However, a durable power of attorney remains in effect if the principal subsequently becomes incapacitated, but expires immediately if the principal is adjudicated legally incapacitated.<sup>3</sup> Any power of attorney expires upon death of the principal or revocation by the principal.<sup>4</sup>

### Uniform Power of Attorney Act

In 2006, the Uniform Law Commission of the National Conference of Commissioners on Uniform Laws promulgated the Uniform Power of Attorney Act (UPOAA). The catalyst for UPOAA was a national study which revealed a growing divergence in state power of attorney legislation. Since its completion thirteen states and one territory have adopted the UPOAA.<sup>5</sup> The goal of the UPOAA is to promote uniformity and portability of powers of attorney across state lines.

The Florida Power of Attorney Act (the "Act"), was enacted effective October 1, 2011, and substantially re-wrote ch. 709, F.S., to conform to the Uniform Power of Attorney Act, with modifications.<sup>6</sup>

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<sup>1</sup> Chapter 709, F.S., uses the term "attorney-in-fact" to describe a person granted authority pursuant to a power of attorney. This bill uses the term "agent" to describe a person granted authority pursuant to a power of attorney.

<sup>2</sup> A general power of attorney is the default power of attorney in this state.

<sup>3</sup> See s. 709.2121, F.S.

<sup>4</sup> *Id.*

<sup>5</sup> See [http://www.uniformlaws.org/Act.aspx?title=Power of Attorney](http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney) for information regarding the UPOAA. Thirteen states are recognized as having adopted the Act and one state has proposed legislation to adopt the act this year. (Last visited March 9, 2013).

<sup>6</sup> Chapter 2011-210, L.O.F.

## Broker-dealers

Certain provisions of chapter 709, F.S., apply specifically to financial institutions:

- A written notice relating to the validity of a power of attorney to a financial institution must include the name, address, and last four digits of the principal's taxpayer identification number and be delivered to an officer or director of the financial institution.<sup>7</sup>
- A power of attorney that includes the statement that the agent has "authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes" grants general authority for a financial institution to handle, buy, and sell investment instruments.<sup>8</sup>
- A financial institution has 4-day limit on what is considered a reasonable time for it to reject or accept a power of attorney provided by an agent.<sup>9</sup>

A broker-dealer is an entity that is registered with the United States Securities and Exchange Commission or the Commodity Futures Trading Commission.<sup>10</sup> These entities act similarly to financial institutions in the handling, buying, and selling of investment instruments, but chapter 709, F.S., does not specifically address whether the same provisions that apply to financial institutions also apply to broker-dealers.

## Exceptions to when Powers of Attorney Apply

Section 709.2103, F.S., provides for four exceptions where chapter 709, F.S., does not apply to certain powers given by a principal to an agent that are encountered in common commercial contexts:

- A power created by an entity.
- 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 governmental subdivision, agency, or instrumentality 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.<sup>11</sup>

## Execution Requirements

Under s. 709.2105, F.S., a power of attorney must be signed by the principal. The statutes do not accommodate a person who is unable to sign his or her name due to a physical disability, but who otherwise has the capacity to execute a power of attorney.<sup>12</sup>

<sup>7</sup> Section 709.2121(3), F.S.

<sup>8</sup> Section 709.2208(2), F.S.

<sup>9</sup> Section 709.2120(1)(b), F.S.

<sup>10</sup> U.S. Securities and Exchange Commission, *Guide to Broker-Dealer Registration*, <http://www.sec.gov/divisions/marketreg/bdguide.htm> (last visited Mar. 1, 2013).

<sup>11</sup> Section 709.2103, F.S.

<sup>12</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper Chapter 709 "Glitch" Bill* (2013) (on file with the Senate Committee on Judiciary).

### **Validity of Power of Attorney**

Section 709.2106(5), F.S., allows a copy of a power of attorney to have the same effect as the original.<sup>13</sup> However, title insurance agents are concerned that an original copy of the power of attorney must be recorded in the public records when real estate transfers are completed via a power of attorney.<sup>14</sup> Section 709.2106, F.S., prevents title agents from requiring an original.

### **Delegation of Agent's Duties**

A principal delegates authority to an agent to act for the principal by execution of the power of attorney. There are limited circumstances in which the agent is allowed to further delegate his or her authority to another person. Currently, an agent with a power of attorney is only allowed to delegate authority to act under the power of attorney to a third person for purposes of managing financial investments.<sup>15</sup>

### **Awarding Attorney Fees**

Section 709.2116(3), F.S., allows a court to award attorney fees in proceedings involving disputes over a power of attorney. However, it does not provide guidance for a court to apply if making such an award.

### **Reliance on a Power of Attorney**

Currently, before relying on a power of attorney, a third party may request that an agent provide an affidavit as to the validity of the power of attorney. The third party may require that the affidavit state, among other things, where the principal is domiciled, that the principal is not deceased, and that there has been no suspension of powers of attorney by the initiation of proceedings to determine incapacity.<sup>16</sup> However, whether the agent's authority has been terminated by the filing of an action for dissolution of marriage between the agent and principal is not among the items a third party may require in an affidavit from an agent.

### **Refusal to Accept a Power of Attorney**

Section 709.2120, F.S., identifies certain situations in which a third party may reject a power of a power of attorney. It also requires that any such rejection must be in writing and state the reason for rejection of the power of attorney.<sup>17</sup> Based on the wording of s. 709.2120, F.S., the statute does not clearly indicate whether the requirement that the rejection be in writing apply to any of those situations.<sup>18</sup> This leads to a possible interpretation that a written rejection is not required if a valid reason for rejection exists.

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<sup>13</sup> Section 709.2106(5), F.S.

<sup>14</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 6.

<sup>15</sup> Sections 709.2114 F.S., and 518.112, F.S.

<sup>16</sup> Section 709.2119, F.S.

<sup>17</sup> *Id.*

<sup>18</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 6.

### **Authority to Make Gifts**

A power of attorney may grant an agent the authority to make a gift of the principal's property to another individual. Unless the power of attorney otherwise provides, the agent's ability to make a gift of the principal's property is limited by a default amount equal to the annual exclusion amount for federal gift tax purposes.<sup>19</sup>

## **III. Effect of Proposed Changes:**

### **Definitions**

**Section 1** amends s. 709.2102, F.S., to define the term "broker-dealer." The bill also amends ss. 709.2120 (**Section 8**), 709.2121 (**Section 9**), and 709.2208 (**Section 11**), F.S., to clarify that those sections apply to both financial institutions and broker-dealers.

The definition of "sign" is modified to clarify that the principal may use either a signature or a mark as evidence of execution.

A definition of "another state" has also been included as it relates to acceptance of powers of attorney executed in compliance with the laws of another state, territory, or insular possession of the United States.<sup>20</sup>

### **Exceptions to when Powers of Attorney Apply**

**Section 2** amends s. 709.2103, F.S., creating three additional powers of attorney that chapter 709, F.S., does not apply to:

- A power given to a transfer agent to facilitate a specific transfer of stocks, bonds, or other financial instrument.
- A power authorizing a financial institution or broker-dealer to act as agent for the account owner in executing transfers of cash, securities, commodities, or other financial assets.
- A delegation of powers by a trustee as regulated by chapter 736, F.S., the Florida Trust Code.

### **Execution Requirements**

**Sections 3 and 10** amends ss. 703.2105 and 709.2202, F.S., respectively, to allow a notary public to sign a principal's name on a power of attorney document if the principal is physically unable to sign as long as the requirements for a notary providing services under s. 117.05(14), F.S., are met. These requirements include:

- The person with a disability directs the notary to sign in his or her presence.
- The document signing is witnessed by two disinterested persons.

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<sup>19</sup> Section 709.2202(3), F.S.

<sup>20</sup> "Insular" is defined as "of islands." <http://www.merriam-webster.com/dictionary/insular> (Last visited March 18, 2013). Currently, the insular possessions of the United States are the U.S. Virgin Islands, American Samoa, and Guam.

- The notary writes below the signature the following statement: “Signature affixed by notary, pursuant to s. 117.05(14), Florida Statutes,” and states the circumstances of the signing in the notarial certificate.<sup>21</sup>

### **Validity of Power of Attorney**

**Section 4** amends s. 709.2106, F.S., to allow a third party to require that an original power of attorney be provided for recording in official records if the power of attorney is relied on to transfer real property. The bill specifies the process by which a power of attorney can be recorded by the clerk of courts.

### **Delegation of Agent’s Duties**

**Section 5** amends s. 709.2114, F.S., to allow an agent with power of attorney to delegate authority to a third person using a prescribed government form if the delegation is for a governmental purpose. An example is the appointment of an agent for communication with the Internal Revenue Service using IRS Form 2848.<sup>22</sup>

### **Awarding Attorney Fees**

**Section 6** amends s. 709.2116(3), F.S., to provide a standard for awarding attorney fees as in a chancery action. This standard provides that “a court of equity may, as justice requires, order that costs follow the result of the suit, apportion the costs between the parties, or require all costs be paid by the prevailing party.”<sup>23</sup> This standard gives a court full discretion in determining whether to make an award.

### **Reliance on a Power of Attorney**

**Section 7** amends s. 709.2119, F.S., to allow a third party, relying on a power of attorney, to require an affidavit from an agent stating whether the agent’s authority has been terminated by the filing of an action for dissolution or annulment of marriage of the agent and principal.

The bill also corrects a cross-reference.

### **Refusal to Accept a Power of Attorney**

**Section 8** amends s. 709.2120, F.S., to clarify that written notice of rejection is not required when the third person would not otherwise be required to engage in a transaction with the principal in the same circumstances and that written notice is required in all other circumstances.

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<sup>21</sup> Section 117.05(14), F.S.

<sup>22</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 6.

<sup>23</sup> *Dayton v. Conger*, 448 So. 2d 609, 612 (Fla. 3d DCA 1984).

**Authority to Make Gifts**

**Section 10** amends s. 709.2202, F.S., to clarify that the default cap amount of gifts is measured on a calendar year basis, the same as it is measured for federal gift tax purposes, which is \$14,000 per donee in 2013.<sup>24</sup>

**Effective Date**

The bill takes effect upon becoming law.

**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:**

None.

**VII. Related Issues:**

None.

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<sup>24</sup> American Taxpayer Relief Act of 2012, Pub. Law No. 112-240, H.R. 8, 112th Cong. (Jan. 2, 2013).

**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.

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

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