

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 841 Powers of Attorney  
**SPONSOR(S):** Judiciary Committee; Powell and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 832

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Ward	Bond
2) Judiciary Committee	18 Y, 0 N, As CS	Ward	Havlicak

### SUMMARY ANALYSIS

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) to act on his or her behalf. What authority is granted depends on the specific language of the power of attorney. A person giving a power of attorney may provide very broad authority or may limit the authority to certain specific acts.

The Florida Power of Attorney Act (the "Act"), was enacted effective October 1, 2011, to conform to the Uniform Power of Attorney Act. This bill addresses some additional changes to facilitate the proper functioning of the Act. The bill:

- Adds definitions for terms used in the Act;
- Identifies additional exceptions to the application of the Act;
- Authorizes a notary to sign a power of attorney on behalf of a disabled principal;
- Specifies when a third party may reject an out-of-state power of attorney;
- Provides an exception for title agents because they require an original powers of attorney for recording;
- Broadens the agent's ability to delegate certain ministerial tasks;
- Provides a standard for a court to award fees and costs in a judicial proceeding;
- Specifies the content and form of the affidavit to be provided by an agent;
- Provides that an English translation must be certified rather than verified;
- Provides when written notice of a third party's rejection of a power of attorney is required; and
- Specifies the application of numerous sections to financial institutions and broker-dealers.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill is effective upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **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 amount and nature of 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 being adjudicated 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 completed a 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. This bill addresses some additional changes to facilitate the functioning of the Act.

##### **Section by Section Analysis**

#### **1. Definitions – Section 709.2102, F.S.**

The bill adds a definition for "broker-dealer." The purpose of the addition is to clarify that broker-dealers should be treated similar to financial institutions in the application of the Act. The bill also makes conforming amendments to ss. 709.2120, 709.2121, 709.2207 and 709.2208, F.S., to clarify that the Act applies to both broker-dealers and financial institutions in almost all instances.

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

A definition of "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>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> "Insular is defined as "of islands." <http://www.merriam-webster.com/dictionary/insular>. (Last visited March 9, 2013).

Currently, the insular possessions of the United States are the U.S. Virgin Islands, American Samoa, and Guam.

## **2. Powers to which the Act does not apply – Section 709.2103, F.S.**

Section 709.2103, F.S., provides that the Act does not apply to specialized powers of attorney encountered in common agency relationships and commercial contexts. The Act currently excludes:

- A power created by an entity, such as a corporation;
- A proxy or other delegation to exercise voting or management rights;
- A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; or
- Powers coupled with an interest (such as powers given to a creditor to perfect or protect title in or to sell, pledged collateral).

The bill adds the following exceptions to transactions covered by the Act:

- Financial interest transfer powers.<sup>7</sup>
- Agent for trades and transfers.<sup>8</sup>
- Agent for a trustee to whom authority is delegated under s. 736.0807, F.S.<sup>9</sup>

## **3. Execution requirements – Sections 709.2105 and 709.2202, F.S.**

A power of attorney must be signed by the principal. A reasonable accommodation is needed to facilitate the “signing” of a power of attorney by a principal who is physically unable to sign his or her name but otherwise has the capacity to enter into a power of attorney.

The bill adopts the procedure in ch. 117, F.S., to authorize a notary to sign the name of the disabled principal. The notary is authorized to execute the power of attorney at the direction of the principal by the amendment of s. 709.2105, F.S. In addition, the principal may also direct the notary to provide the required separate powers that require additional signatures or initials under s. 709.2202, F.S. The separate powers in this provision relate to special authority to effect the disposition of the principal’s assets by trust, gift or beneficiary designation. Due to the nature of this authority, the Act requires a separate acknowledgment by the principal that such authority has been granted to the agent. The amendment of s. 709.2202, F.S., specifies the requirements for the notary to provide the acknowledgment on behalf of the principal. These include:

- The principal must direct the notary to sign or initial the specifically enumerated authority;
- The notary must do so in the presence of the principal and two disinterested witnesses, and
- The notary must include a reference to s. 709.2202(2), F.S., in each instance where the acknowledgment is made by the notary.

## **4. Validity of Power of Attorney – Section 709.2106, F.S.**

One of the key provisions of the existing Act is to provide a mechanism for a power of attorney executed pursuant to the laws of another state to be recognized in Florida, even if its execution did not comply with the requirements of the Act. The current language is unclear regarding the third person’s right to refuse to accept the power of attorney.

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<sup>7</sup> The Depository Trust Company and other transfer agents rely on these stock powers to facilitate transfers of certificates. They frequently are provided on pre-printed forms and do not meet the execution requirements of the Act. The provisions of the Act are not applicable to this type of agency appointment.

<sup>8</sup> Most investment management agreements authorize the broker-dealer or financial institution to execute trades and transfers on a client’s behalf by appointing the broker-dealer or financial institution (or an employee) as an agent of the client. This appointment is necessary to facilitate the sale and purchase of investments and transfers in a timely manner in response to market changes. The provisions of the Act are not applicable to this type of agency appointment.

<sup>9</sup> A trustee is authorized in ch. 736, F.S., to appoint agents to assist the trustee in fulfilling its responsibilities. The provisions of the Act are not applicable to this type of agency appointment as the fulfillment of a trustee’s responsibilities and those of his agent are adequately governed by ch. 736, F.S.

The current provision allows third parties to request an opinion of counsel that the power of attorney was properly executed under the laws of the other state. The bill modifies the Act to specify that if a third person requests such an opinion of counsel and it is not provided, that is sufficient grounds for the third person to refuse to accept the power of attorney.

Another key provision of the current Act allows third parties to accept a copy of a power of attorney rather than requiring the agent to produce an original each time it is used. Title insurance agents have expressed concern that an original document must be recorded in the public records for purposes of real estate title transfers using a power of attorney. The bill amends the Act to provide that a third party such as a title agent may require an original power of attorney if the original must be recorded in the public records as part of the transaction. Additionally, a new provision is included to authorize the recording of an original power of attorney in the public records upon payment of the prescribed fee.<sup>10</sup>

#### **5. Agent's duties – Section 709.2114, F.S.**

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. The Act currently limits this to delegation of investment authority pursuant to s. 518.112, F.S., to enable an agent to obtain qualified investment management on the principal's behalf.

The bill allows the agent to also delegate his or her authority in situations using a prescribed governmental form, such as a power of attorney to a car dealer to facilitate the transfer of title for the sale of a vehicle, or the appointment of an agent for communication with the Internal Revenue Service using IRS Form 2848.

#### **6. Judicial relief; conflicts of interest – Section 709.2116, F.S.**

The Act allows a court to award attorney's fees and costs in any proceeding involving a power of attorney but it does not provide a standard for the court to apply in making the award. The bill includes the standard "as in chancery actions" to allow the court full discretion in whether or not to make an award and against whom.

#### **7. Acceptance of and reliance upon power of attorney – Section 709.2119, F.S.**

A component of the Act is the ability of a third party to request that the agent provide an affidavit as to the validity of the power of attorney. The bill specifies the contents of the affidavit and provides a suggested form, including statements regarding the marital status of the principal and agent, if appropriate.

The bill also changes the requirement that an English translation be "verified," to simply "certified." Verification of a translation requires the certification by the translator that it is an accurate translation as well as a certification by a court that the translator has been approved to provide translation services.

#### **8. Liability for refusal to accept power of attorney - Section 709.2120, F.S.**

Section 709.2120, F.S., currently identifies situations where it is appropriate for a third party to reject a power of attorney. It also includes a requirement that the third party notify the agent in writing of the reason for the rejection. The bill adds that the written notice of rejection is not required when the third person is not otherwise required to engage in the same transaction with the principal. Conversely, notice is required in all other situations.

References to financial institutions in this section are amended to include broker- dealers, and "security transactions" is changed to "investment transactions" to conform to the terminology in s. 709.2208, F.S.

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<sup>10</sup> See also, s. 28.222, F.S.  
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**9. Notice – Section 709.2121, F.S.**

References to financial institutions in subsections (3) and (4) are changed to specifically include broker-dealers.

**10. Authority to make gifts – Section 709.2202, F.S.**

The agent's ability to make a gift of the principal's property is limited by a default "cap" equal to the annual exclusion amount for federal gift tax purposes. This amount is \$14,000 per donee in 2013.<sup>11</sup> The bill provides that this cap is measured on a calendar year basis, the same as it is measured for federal gift tax purposes.

**11. Banks and other financial institutions – Section 709.2208, F.S.**

A reference to banks and other financial institutions is changed by the bill to specifically include broker-dealers.

**12. Effective Date.**

The bill is effective upon becoming law.

**B. SECTION DIRECTORY:**

Section 1 amends s. 709.2102, F.S., regarding definitions.

Section 2 amends s. 709.2103, F.S., regarding applicability.

Section 3 amends s. 709.2105, F.S., regarding qualifications of agents.

Section 4 amends s. 709.2106, F.S., regarding validity of powers of attorney.

Section 5 amends s. 709.2114, F.S., regarding agent's duties.

Section 6 amends s. 709.2116, F.S., regarding judicial relief.

Section 7 amends s. 709.2119, F.S., regarding acceptance of and reliance upon power of attorney.

Section 8 amends s. 709.2120, F.S., regarding refusal to accept power of attorney.

Section 9 amends s. 709.2121, F.S., regarding notice.

Section 10 amends s. 709.2202, F.S., regarding authority that requires separate signed enumeration.

Section 11 amends s. 709.2208, F.S., regarding banks and other financial institutions.

Section 12 provides that the bill is effective upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill does not appear to have any impact on state revenues.

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<sup>11</sup> See 26 U.S.C. s. 1; 26 U.S.C. s. 2503.  
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2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 20, 2013, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment changes the bill to conform more closely with the Senate version. Such changes are technical in nature without changing the effect or substantive provisions of the original bill. This analysis is drafted to the committee substitute as passed by the Judiciary Committee.