

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 Judiciary

BILL: CS/SB 362

INTRODUCER: Judiciary Committee and Senator Lee

SUBJECT: Powers of Attorney

DATE: February 18, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	Fav/CS
2.			CF	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 362 authorizes certain not-for-profit corporations to serve as an agent for a principal under a power of attorney. A not-for-profit corporation may serve as an agent if, among other things, the corporation was qualified as a court appointed guardian before 1996 and if the corporation:

- Maintains a fiduciary bond in the amount of \$250,000 which covers the acts or omissions of each agent or employee of the corporation who has direct contact with the principal or access to the principal's assets;
- Maintains a liability insurance policy in the amount of \$250,000 which covers any losses sustained by the principal caused by errors, omissions, or intentional misconduct committed by the corporation's officers or directors; or
- Discloses that the principal will have limited recourse against the corporation for losses caused by errors, omissions, or intentional misconduct of an employee or agent of the corporation.

II. Present Situation:

Powers of Attorney

A power of attorney is a writing in which a person, called a principal, authorizes an agent (formerly known as an attorney in fact) to act on the person's behalf.¹ A power of attorney that continues after the principal's incapacity is a durable power of attorney.² Powers of attorney are

¹ Section 709.2102(9), F.S.

² Section 709.2014, F.S.

often used by elderly persons to designate someone to handle their financial matters in anticipation of becoming incapacitated.³ A power of attorney is a low cost alternative to guardianship.

Qualifications of Agents

Chapter 709, F.S., governs the creation and use of powers of attorney. Who the chapter has authorized to serve as an agent has changed over time. Before 1995, chapter 709, F.S., did not expressly limit who could serve as an agent. After the chapter was amended in 1990, agents were limited to natural persons who were at least 18 years of age and certain financial institutions having trust powers.⁴ In 1997, the chapter was amended to authorize a narrow category of not-for-profit corporations to serve as agents. The specific 1997 authorization stated:

A not-for-profit corporation, organized for charitable or religious purposes in this state, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt organization under 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact. Notwithstanding any contrary clause in the written power of attorney, no assets of the principal may be used for the benefit of the corporate attorney in fact,⁵ or its officers or directors.⁶

In 2011, Florida's power of attorney law was rewritten and largely conformed to the Uniform Power of Attorney Act by the National Conference of Commissioners on Uniform State Laws.⁷ As adopted in Florida, the new power of attorney law did not carry forward the provision that authorized not-for-profit corporations to serve as agents. The 2011 law, which to date remains substantially unchanged, limited those who may serve as an agent to natural persons and financial institutions. This limitation was a deviation from the uniform act, which places no limits on who may serve as an agent. However, the 2011 law allowed preexisting powers of attorney to continue in effect.⁸ As such, not-for-profit corporations may continue to serve as agents under powers of attorney executed before the October 1, 2011, effective date of the 2011 law.

Power of Attorney v. Guardianship

Under current law, not-for-profit corporations that wish to manage a person's finances must be appointed as a guardian to handle a person's financial matters. A guardianship provides for supervision of the actions of a guardian by a court. But the additional oversight comes with additional costs. The additional costs may result from attorney fees for making court filings and fees to prepare annual accountings and annual guardianship plans.⁹

³ Donna Fuscaldo, *Why You Need a Financial Power of Attorney*, Fox Bus. News, (Jul. 16, 2013)

<http://www.foxbusiness.com/personal-finance/2013/07/16/why-need-financial-power-attorney/>.

⁴ Section 708.08(2), F.S. (1995).

⁵ Under current law, attorneys in fact are known as agents.

⁶ Chapter 97-240, s. 2, Laws of Fla.

⁷ Comm. on Judiciary, The Florida Senate, *Bill Analysis and Fiscal Impact Statement for CS/SB 670* (Mar. 6, 2011), available at <http://www.flsenate.gov/Session/Bill/2011/0670/Analyses/2011s0670.ju.PDF>.

⁸ Section 709.2106(2), F.S.

⁹ See s. 744.108, F.S.

The major similarities and differences between a power of attorney and a guardianship are shown in the table below.

Power of Attorney	Guardianship
The principal selects an agent. ¹⁰	A court appoints a guardian. ¹¹
No similar requirement.	A guardian must pass a background check. ¹²
No similar requirement.	A guardian must have several hours of training. ¹³
An agent has fiduciary obligations to the principal. ¹⁴	A guardian has fiduciary responsibilities to a ward. ¹⁵
Unless otherwise provided in a power of attorney, an agent who is a “qualified agent” is entitled to reasonable compensation and reimbursement for reasonable expenses. ¹⁶	Fees for a guardian or attorney must be approved by a court. ¹⁷
An agent must: <ul style="list-style-type: none"> • Keep a record of all receipts, disbursements, and transactions; and • Maintain an inventory of the principal’s safe-deposit box.¹⁸ 	A guardian must prepare: <ul style="list-style-type: none"> • An inventory of a ward’s property;¹⁹ • Annual guardianship plans;²⁰ and • Annual accountings of a ward’s property.²¹
The actions of an agent will not be reviewed by a court unless a person petitions a court for review of the agent’s actions. ²²	The actions of a guardian will be reviewed by a court or clerk at least on an annual basis. ²³
An agent is liable for the misuse of a principal’s property, ²⁴ but agents are not required to maintain a bond.	A guardian generally must maintain a bond to ensure the faithful performance of his or her duties. ²⁵

¹⁰ Section 709.2102(11), F.S.

¹¹ Sections 744.3031 and 744.334, F.S.

¹² Section 744.3135, F.S.

¹³ Sections 744.1085 and 744.3145, F.S.

¹⁴ Section 709.2114(1), F.S.

¹⁵ Section 744.446, F.S.

¹⁶ Section 709.2112, F.S. A qualified agent is an agent who is the principal’s spouse, or heir, a financial institution, a certified public accountant, or a natural person who has never served as an agent for more than three principals at the same time.

¹⁷ Section 744.108, F.S.

¹⁸ Section 709.2114(1)(c) and (d), F.S.

¹⁹ Section 744.362(1), F.S.

²⁰ Section 744.367, F.S.

²¹ Section 744.367, F.S.

²² Section 709.2116, F.S.

²³ Sections 744.3125(1), 744.367, and 744.3678, F.S.

²⁴ Section 709.2117, F.S.

²⁵ Sections 744.1085 and 744.351, F.S.

III. Effect of Proposed Changes:

The bill essentially reinstates the authority that certain not-for-profit corporations had to serve as agents under a power of attorney before the power of attorney laws were rewritten in 2011.

Under the bill, certain not-for-profit corporations may serve as an agent for a principal under a power of attorney. A not-for-profit corporation may serve as an agent if, most significantly, the corporation was qualified as a court appointed guardian before 1996 and if the corporation:

- Maintains a fiduciary bond in the amount of \$250,000 which covers the acts or omissions of each agent or employee of the corporation who has direct contact with the principal or access to the principal's assets;
- Maintains a liability insurance policy in the amount of \$250,000 which covers any losses sustained by the principal caused by errors, omissions, or intentional misconduct committed by the corporation's officers or directors; or
- Discloses that the principal will have limited recourse against the corporation for losses caused by errors, omissions, or intentional misconduct of an employee or agent of the corporation.

The disclosure of the limited recourse available is accomplished by the principal signing a statement mandated by the bill which must be written in 14-point uppercase type. In detail, the disclosure statement advises that:

- The officers of the not-for-profit corporation are not liable for the acts of the corporation.
- The corporation does not maintain insurance or a bond to cover any losses incurred by the principle.
- The assets of the corporation may not be sufficient to cover any of the principal's losses resulting from an error, omission, or intentional misconduct by an employee or agent of the corporation.

The bill further provides that if a not-for-profit corporation acting as an agent fails to maintain insurance or a bond or fails to make the required disclosure, the officers of the corporation are jointly and severally liable with the corporation for acts and omissions under a power of attorney. However, the bill does not provide liability protection to an individual who is directly responsible for an error, omission, or intentional misconduct.

By operation of existing s. 709.2112, F.S., a not-for-profit corporation that qualifies as an agent under this bill is not entitled to compensation for serving as an agent.²⁶

The bill takes effect July 1, 2015.

²⁶ See note 16.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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:

This bill makes powers of attorney, a low cost alternative to guardianship, available to more people.

C. Government Sector Impact:

The Office of the State Courts Administrator anticipates that this bill will have little or no impact on the courts.²⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 709.2105 and 709.2202.

²⁷ Office of the State Courts Administrator, *2015 Judicial Impact Statement* (Feb. 16, 2015) (on file with the Senate Committee on Judiciary).

IX. Additional Information:

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

CS by Judiciary on February 17, 2015:

The committee substitute corrects a technical drafting error in the bill by moving a concept in subsection (2) of s. 709.2105, F.S., into sub-subparagraph d. of s. 709.2105(1)(c)3., F.S. Because the correction eliminates the need to conform a cross-reference to s. 709.2105, F.S., in section 2 of the original bill, the committee substitute no longer includes section 2 of the original bill.

- B. **Amendments:**

None.