

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 23 Powers of Attorney
SPONSOR(S): Civil Justice Subcommittee; Raburn
TIED BILLS: None **IDEN./SIM. BILLS:** SB 362

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Robinson	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A power of attorney is a legal document in which a person (“the principal”) voluntarily authorizes another person or entity (“the agent”) to act on his or her behalf in medical, legal or financial matters. Powers of attorney are often used in the event of the future incapacity or unavailability of the principal as a low cost and less onerous alternative to a court-ordered guardianship or conservatorship.

The Florida Power of Attorney Act (“FPAA”) governs the creation and use of a power of attorney. The FPAA provides that only certain financial institutions with trust powers or a person 18 years of age or older may serve as an agent under a power of attorney.

The bill amends the FPAA to authorize certain not-for-profit corporations to serve as an agent under a power of attorney.

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

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Power of Attorney

A power of attorney is a legal document in which a person (“the principal”) voluntarily authorizes another person or entity (“the agent”) to act on his or her behalf in medical, legal or financial matters. The scope of the authority granted to an agent depends upon the specific language of the power of attorney. An agent may only exercise authority specifically granted in a power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority.¹ A power of attorney may include, without limitation, the authority to:²

- Convey or mortgage the principal’s real property, including homestead property.
- Make a gift of any of the principal’s property.
- Conduct banking transactions.
- Conduct investment transactions.
- Open the principal’s safe-deposit box.
- Create an inter vivos trust.
- Amend, modify, revoke, or terminate a trust created by or on behalf of the principal if allowed by the trust instrument.
- Create or change rights of survivorship.
- Create or change a beneficiary designation.
- Prepare, execute, and file federal, state, or local tax returns.
- Make health care decisions on behalf of the principal.

Court approval is not required for any action of the agent in furtherance of an express grant of specific authority.³ Such actions have the same effect and inure to the benefit of and bind the principal and the principal’s successor in interest as if the principal had performed the act.⁴ Accordingly, the agent has a fiduciary duty to the principal when exercising any authority under a power of attorney.⁵

A power of attorney terminates according to the terms therein, upon the death of the principal, upon the principal being adjudicated incapacitated,⁶ upon revocation by the principal, or upon the termination of the agent’s authority if the power of attorney does not provide for a successor agent.⁷

Powers of attorney are often used in the event of the future incapacity or unavailability of the principal as a low cost and less onerous alternative to a court-ordered guardianship or conservatorship.

Qualifications of Agents

Chapter 709, F.S., governs the creation and use of a power of attorney. Persons authorized to serve as an agent under the chapter has changed over time. Prior to 1995, ch.709, F.S. did not limit who may serve as an agent. After the chapter was amended in 1995,⁸ agents were expressly limited to natural persons who were 18 years of age or older and certain financial institutions with trust powers.⁹ In

¹ s. 709.2201(1), F.S.

² The exercise of certain powers requires the principal to sign or initial next to the specific enumeration thereof within the power of attorney. ss. 709.2201-709.2202, F.S.

³ s. 709.2201(1), F.S.

⁴ s. 709.2201(6), F.S.

⁵ s. 709.2114(1), F.S.

⁶ A durable power of attorney continues after the principal becomes incapacitated but will terminate upon the occurrence of any of the other listed events. s. 709.2104, F.S.

⁷ s. 709.2109, F.S.

⁸ ch. 95-401, L.O.F.

⁹ s. 709.08(2), F.S. (1995).

1997,¹⁰ the chapter was further amended to authorize not-for-profit corporations to also serve as an agent if:

- Organized for charitable or religious purposes in Florida.
- Qualified as a court-appointed guardian prior to January 1, 1996.
- A tax-exempt organization under 26 U.S.C. § 501(c)(3).¹¹

The Florida Power of Attorney Act (“FPAA”), enacted effective October 1, 2011, substantially re-wrote ch. 709, F.S., to conform to the Uniform Power of Attorney Act (UPOAA)¹² promulgated by the Uniform Law Commission. As adopted in Florida, the UPOAA did not carry forward the provision that authorized not-for-profit corporations to serve as an agent. Currently, an 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 this state, and is authorized to conduct trust business in this state.¹³ This limitation is a deviation from the UPOAA, which places no limits on who may serve as an agent, and previous state law.

Non-Profit Corporations as Agents, Guardians and Conservators

A not-for-profit corporation may continue to serve as an agent under a power of attorney executed prior to October 1, 2011.¹⁴ In almost all other circumstances, a not-for-profit corporation must be appointed by a court as a guardian¹⁵ or conservator¹⁶ in order to exercise similar authority over the person or property of another.¹⁷

Unlike an agent, the actions of a guardian or conservator are subject to the control, review and supervision of the court.¹⁸ Such additional oversight results in greater protection for a ward or absentee against abuse, but also results in greater costs for the ward or absentee than under a power of attorney. The costs, which are assessed against the property of the ward or absentee, result from attorney fees for court filings and fees to prepare annual accountings and annual plans.¹⁹

Figure 1 highlights the major similarities and differences between the powers, duties, and oversight of not-for-profit corporations when serving as agents, guardians, or conservators over the person or property of another.

Figure 1

Agent	Guardian/Conservator
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¹⁰ ch. 97-240, L.O.F.

¹¹ s. 709.08(2), F.S. (1997).

¹² The National Conference of Commissioners on Uniform State Laws, *Uniform Power of Attorney Act (2006)*, http://www.uniformlaws.org/shared/docs/power%20of%20attorney/UPOAA_2011_Final%20Act_2014sep9.pdf, (last visited October 12, 2015).

¹³ s. 709.2105(1), F.S.

¹⁴ s. 709.2106(2), F.S.

¹⁵ A person who is incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity may voluntarily petition for the establishment of a guardianship. s. 744.341, F.S. A guardianship may also be involuntarily established for a person who has been adjudicated incapacitated. s. 744.331, F.S.

¹⁶ A conservatorship may be established to manage the estate and property of an “absentee”, a person who is missing as a result of some mental cause or circumstances that indicate he or she has died. s. 747.01, F.S. A conservator has all the rights, powers, and duties of a guardian of property and an absentee, and an absentee’s dependents, are entitled to all benefits accruing to a ward or a ward’s dependents. s. 747.035(1), F.S.

¹⁷ Not-for-profit corporations may apply to serve as a representative payee under the Social Security Administration’s Representative Payment Program. A representative payee receives Social Security or SSI benefits on behalf of a person who cannot manage or direct the management of his or her benefits. A representative payee must use the benefits to pay for current and future needs of the beneficiary and may collect a fee if approved by the Social Security Administration. See SOCIAL SECURITY ADMINISTRATION, *When People Need Help Managing Their Money*, <http://www.socialsecurity.gov/payee/> (last visited October 14, 2015).

¹⁸ s. 747.035(2), F.S.

¹⁹ s. 744.108, F.S.

Selection	Selected by principal. ²⁰	Appointed by court, but court must consider known wishes of ward/absentee and give priority to family members. ²¹
Background Check	Not required.	Must pass a credit and criminal background check. ²² Persons with certain criminal convictions, physical infirmities, or conflicts of interest are disqualified. ²³
Training	Not required.	Several hours of training required. ²⁴
Fiduciary	Yes. ²⁵	Yes. ²⁶
Fees	Unless otherwise provided in the power of attorney, an agent is entitled to reimbursement for reasonable expenses. A “qualified agent” may also be entitled to a fee for his/her services. ²⁷ Fees not subject to court approval.	A guardian/conservator, or an attorney who has rendered services thereto, is entitled to a reasonable fee for services and reimbursement for expenses. Fees must be approved by a court. ²⁸
Required Recordkeeping	<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.²⁹ 	<ul style="list-style-type: none"> An inventory of a ward's/absentee's property,³⁰ Annual guardianship plans;³¹ and Annual accountings of a ward's/absentee's property.³²
Court Approval of Actions	Not required. ³³	Required for many actions, including the sale of homestead property. ³⁴
Court Oversight	Actions are not reviewed by a court unless a person petitions a court for review of the agent's actions. ³⁵	Actions are reviewed by a court or clerk of court on an annual basis. ³⁶ Any interested person may petition the court for an earlier review. ³⁷
Liability	Liable for the misuse of a principal's property, ³⁸ but not required to maintain a bond or insurance policy. Subject to criminal penalties for exploitation of an elderly person or disabled adult. ³⁹	Must maintain a bond or insurance policy to ensure the faithful performance of his or her duties. ⁴⁰ Subject to criminal penalties for exploitation, abuse, or neglect. ⁴¹

Effect of Bill

The bill essentially reinstates the authority that not-for-profit corporations had to serve as an agent under a power of attorney before the enactment of the FPAA in 2011, but adds protections which are currently applicable to court-appointed and court-supervised guardians and conservators.

²⁰ s. 709.2102(11), F.S.

²¹ ss. 744.312 and 747.032, F.S.

²² s. 744.3135, F.S.

²³ s. 744.309(3), F.S.

²⁴ ss. 744.1085 and 744.3145, F.S.

²⁵ s. 709.2114(1), F.S.

²⁶ ss. 744.361 and 744.446, F.S.

²⁷ s. 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.

²⁸ s. 744.108, F.S.

²⁹ s. 709.2114(1)(c) and (d), F.S.

³⁰ s. 744.362(1), F.S.

³¹ s. 744.367, F.S.

³² s. 744.367, F.S.

³³ s. 709.2201(1), F.S.

³⁴ s. 744.441, F.S.

³⁵ s. 709.2116, F.S.

³⁶ ss. 744.368, 744.369, 744.372, and 744.3735, F.S.

³⁷ s. 744.3715(1), F.S.

³⁸ s. 709.2117, F.S.

³⁹ s. 825.103, F.S.

⁴⁰ ss. 744.1085, 744.309(7), 744.351, and 747.034, F.S.

⁴¹ ss. 744.359 and 825.103, F.S.

Eligible Non-Profit Corporations

The bill amends the FPAA to provide that a not-for-profit corporation may serve as an agent under a power of attorney if the corporation:

- Was organized for charitable or religious purposes in this state on or after January 1, 1980;
- Is qualified to do business in this state;
- Has been in continuous existence in this state for at least 30 years;
- Has never been administratively dissolved; and
- Is tax exempt under s. 501(c)(3) of the Internal Revenue Code and designated as a public charity for deductibility purposes.

The corporation must comply with governance requirements which mirror similar requirements for guardians and conservators under ch. 744, F.S., specifically:

- Conducting, at their own expense, criminal history and, every two years, credit history background checks of each director, officer, and employee of the corporation, and any person who acts on behalf of the corporation in its role as an agent. The corporation must maintain a file on each person which includes a record of the background checks.
- Prohibiting any person from acting on behalf of the corporation as an agent who is disqualified from serving as a guardian or conservator, who has been adjudicated bankrupt in the last 10 years, or who has committed any offense involving dishonesty.
- Allowing the clerk of the circuit court to audit the books and records of the corporation, including records of criminal history and credit history background checks. A principal may also review records of criminal history background checks.

The bill also reaffirms current law that a person acting as an agent must comply with all obligations of an agent under ch. 709, F.S. including fiduciary obligations. The agent is subject to criminal penalties for the exploitation of an elderly person or disabled adult.⁴²

Eligible Principals

The bill limits eligible not-for-profit-corporations to serving as an agent for principals who are residents or former residents of communities that provide housing for older persons.⁴³ The majority of such residents, but not all, are persons age 55 or older. The corporation:

- May not charge a fee or cost to the principal for services, but may require reimbursement for actual expenses.
- Must provide a written disclosure form to each principal who signs a power of attorney on or after July 1, 2016. The disclosure must advise that the corporation's agents may be unlicensed or uncertified and of limited recourse against the corporation for losses caused by such agents.
- Must keep on file in such communities a list of persons authorized to act on behalf of the corporation as an agent along with a copy of any background check. A principal may request a copy of the list of authorized persons.

B. SECTION DIRECTORY:

Section 1 amends s. 709.2105, F.S., relating to qualifications of agent; execution of power of attorney.

Section 2 provides an effective date of July 1, 2016.

⁴² s. 825.103, F.S.

⁴³Consists of housing provided under any government program that is specifically designed and operated to assist "elderly persons", as defined in the government program; housing intended for, and solely occupied by, persons 62 or older; or housing intended and operated for occupancy by persons 55 or older if at least 80% of the occupied units are occupied by at least one person 55 or older, the facility or community establishes policies and procedures that demonstrate the intent to restrict occupancy to such persons, and the facility or community complies with certain federal rules. s. 760.29(4), F.S.

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.

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:

The Florida Department of Law Enforcement recommends that the bill specify Level 1 (state level) criminal background checks and that the term "criminal history background check" be replaced with "criminal history record check."⁴⁴

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 20, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed

⁴⁴ *Analysis of HB 23* (October 15, 2015), Florida Department of Law Enforcement (on file with the Civil Justice Subcommittee, Florida House of Representatives).

by revising the criteria for eligible non-profits that may serve as an agent and requiring that persons associated with the non-profit undergo criminal background checks.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.