

By the Committee on Judiciary and Senator Klein

308-1718-00

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A bill to be entitled
An act relating to durable powers of attorney;
amending s. 709.08, F.S.; providing for durable
powers of attorney contingent upon a specified
condition; providing guidelines for such
powers; providing statutory forms for
affidavits to attest to specified condition;
providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1), (4), and (5) of section
709.08, Florida Statutes, are amended to read:

709.08 Durable power of attorney.--

(1) CREATION OF DURABLE POWER OF ATTORNEY.--A durable
power of attorney is a written power of attorney by which a
principal designates another as the principal's attorney in
fact. The durable power of attorney must be in writing, must
be executed with the same formalities required for the
conveyance of real property by Florida law, and must contain
the words: "This durable power of attorney is not affected by
subsequent incapacity of the principal except as provided in
s. 709.08, Florida Statutes"; or similar words that show the
principal's intent that the authority conferred is exercisable
notwithstanding the principal's subsequent incapacity, except
as otherwise provided by this section. The durable power of
attorney is exercisable as of the date of execution; however,
if the durable power of attorney is conditioned upon the
principal's inability to manage property as defined in s.
744.102(10)(a), the durable power of attorney is exercisable

1 upon the delivery of affidavits in paragraphs (c) and (d) of
2 subsection (4) to the third party.

3 (4) PROTECTION WITHOUT NOTICE; GOOD FAITH ACTS;
4 AFFIDAVITS.--

5 (a) Any third party may rely upon the authority
6 granted in a durable power of attorney which is not
7 conditioned on the principal's inability to manage property
8 until the third party has received notice as provided in
9 subsection (5). A third party may, but need not, require the
10 attorney in fact to execute an affidavit pursuant to paragraph
11 (c).

12 (b) Any third party may rely upon the authority
13 granted in a durable power of attorney which is conditioned on
14 the principal's inability to manage property as defined in s.
15 744.102(10)(a) only after receiving the affidavits provided in
16 paragraphs (c) and (d), and such reliance shall end when the
17 third party has received notice as provided in subsection (5).
18 ~~Until a third party has received notice of revocation pursuant~~
19 ~~to subsection (5), partial or complete termination of the~~
20 ~~durable power of attorney by adjudication of incapacity,~~
21 ~~suspension by initiation of proceedings to determine~~
22 ~~incapacity, death of the principal, or the occurrence of an~~
23 ~~event referenced in the power of attorney, the third party may~~
24 ~~act in reliance upon the authority granted in the durable~~
25 ~~power of attorney.~~

26 (c) ~~A third party that has not received written notice~~
27 ~~under subsection (5) may, but need not, require that the~~
28 ~~attorney in fact execute~~ An affidavit executed by the attorney
29 in fact must state where the principal is domiciled, that the
30 principal is not deceased, and stating that there has been no
31 revocation, partial or complete termination by adjudication of

1 incapacity or by the occurrence of an event referenced in the
2 durable power of attorney, or suspension by initiation of
3 proceedings to determine incapacity or to appoint a guardian
4 of the durable power of attorney at the time the power of
5 attorney is exercised. A written affidavit executed by the
6 attorney in fact under this paragraph may, but need not, be in
7 the following form:

8
9 STATE OF
10 COUNTY OF

11
12 Before me, the undersigned authority, personally
13 appeared ...(attorney in fact)... ("Affiant"), who swore or
14 affirmed that:

15 1. Affiant is the attorney in fact named in the
16 Durable Power of Attorney executed by ...(principal)...
17 ("Principal") on ...(date)....

18 2. This Durable Power of Attorney is currently
19 exercisable by Affiant. The principal is domiciled in
20 ...insert name of state, territory or foreign county....

21 ~~3.2.~~ To the best of the Affiant's knowledge after
22 diligent search and inquiry:

23 a. The Principal is not deceased, ~~has not been~~
24 ~~adjudicated incapacitated, and has not revoked, partially or~~
25 ~~completely terminated, or suspended the Durable Power of~~
26 ~~Attorney;~~ and

27 b. There has been no revocation, partial or complete
28 termination by adjudication of incapacity or by the occurrence
29 of an event referenced in the durable power of attorney, or
30 suspension by initiation of proceedings to determine
31 incapacity or to appoint a guardian ~~A petition to determine~~

1 ~~the incapacity of or to appoint a guardian for the Principal~~
2 ~~is not pending.~~

3 4.3. Affiant agrees not to exercise any powers granted
4 by the Durable Power of Attorney if Affiant attains knowledge
5 that it has been revoked, partially or completely terminated,
6 suspended, or is no longer valid because of the death or
7 adjudication of incapacity of the Principal.

8
9
10 ...Affiant...
11

12 Sworn to (or affirmed) and subscribed before me
13 this.... day of , ...(month).....(year)..., by ...(name
14 of person making statement)...

15
16 ...(Signature of Notary Public-State of Florida)...
17 (Print, Type, or Stamp Commissioned Name of Notary Public)
18 Personally Known OR Produced Identification
19 ...(Type of Identification Produced)...

20
21 (d) A determination that a principal is unable to
22 manage property as defined in s. 744.102(10)(a) must be made
23 and evidenced by the affidavits of at least two physicians
24 licensed to practice medicine as of the date of the affidavit.
25 At least one of the physicians must be the attending
26 physician. For purposes of this section, the attending
27 physician is the primary physician who has responsibility for
28 the treatment and care of the principal. Affidavits executed
29 by each of the physicians must state where the physician is
30 licensed to practice medicine, whether the physician is an
31 attending physician, and that the physician believes that the

1 principal is unable to manage property as defined in s.
2 744.102(10)(a). The affidavit may, but need not, be in the
3 following form:

4
5 STATE OF
6 COUNTY OF

7
8 Before me, the undersigned authority, personally
9 appeared(name of physician)..., Affiant, who swore or
10 affirmed that:

11 1. Affiant is a physician licensed to practice
12 medicine in ...(name of state, territory, or foreign
13 country)....

14 2. Affiant is () is not () (check one) the
15 primary physician who has responsibility for the treatment and
16 care of ...(principal's name)...("Principal").

17 3. To the best of Affiant's knowledge after reasonable
18 inquiry, Affiant believes that the principal is unable to
19 manage property, including taking those actions necessary to
20 obtain, administer, and dispose of real and personal property,
21 intangible property, business property, benefits, and income.

22 _____
23 Affiant

24
25 Sworn to (or affirmed) and subscribed before me this
26 ...day of ...(month)..., ...(year)..., by (name of person
27 making statement).....

28
29 ...(Signature of Notary Public-State of Florida)....

30
31

1(Print, Type, or Stamp Commissioned Name of Notary
2 Public)....

3
4 Personally Known OR Produced Identification

5
6(Type of Identification Produced)....

7 (e) A third party may not rely on the authority
8 granted in a durable power of attorney when any affidavit
9 presented was executed more than 6 months prior to the first
10 presentation of the durable power of attorney to the third
11 party.

12 (f)(d) Third parties who act in reliance upon the
13 authority granted to the attorney in fact under the durable
14 power of attorney and in accordance with the instructions of
15 the attorney in fact must be held harmless by the principal
16 from any loss suffered or liability incurred as a result of
17 actions taken prior to receipt of written notice pursuant to
18 subsection (5)of revocation, suspension, notice of a petition
19 to determine incapacity, partial or complete termination, or
20 death of the principal. A person who acts in good faith upon
21 any representation, direction, decision, or act of the
22 attorney in fact is not liable to the principal or the
23 principal's estate, beneficiaries, or joint owners for those
24 acts.

25 (g)(e) A durable power of attorney may provide that
26 the attorney in fact is not liable for any acts or decisions
27 made by the attorney in fact in good faith and under the terms
28 of the durable power of attorney.

29 (5) NOTICE.--

30 (a) A notice, including, but not limited to, a notice
31 of revocation, notice of partial or complete termination by

1 adjudication of incapacity or by the occurrence of an event
2 referenced in the durable power of attorney, notice of death
3 of the principal, notice of suspension by initiation of
4 proceedings to determine incapacity or to appoint a guardian,
5 or other notice, ~~suspension, or otherwise,~~ is not effective
6 until written notice is served upon the attorney in fact or
7 any third persons relying upon a durable power of attorney.

8 (b) Notice must be in writing and served on the person
9 or entity to be bound by the ~~such~~ notice. Service may be by
10 any form of mail that requires a signed receipt or by personal
11 delivery as provided for service of process. Service is
12 complete when received by interested persons or entities
13 specified in this section and in chapter 48, where applicable.
14 In the case of a financial institution as defined in chapter
15 655, notice, when not mailed, must be served during regular
16 business hours upon an officer or manager of the financial
17 institution at the financial institution's principal place of
18 business in Florida and its office where the power of attorney
19 or account was presented, handled, or administered. Notice by
20 mail to a financial institution must be mailed to the
21 financial institution's principal place of business in this
22 state and its office where the power of attorney or account
23 was presented, handled, or administered. Except for service of
24 court orders, a third party served with notice must be given
25 14 calendar days after service to act upon that notice. In the
26 case of a financial institution, notice must be served before
27 the occurrence of any of the events described in s. 674.303.

28 Section 2. This act shall take effect January 1, 2001.
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STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
SB 1066

Deletes the provisions creating sections for a contingent power of attorney.

Provides requirements for the execution and the exercise of a durable power of attorney conditioned solely on the principal's inability to manage property and based on the execution of affidavits from the attorney in fact and two physicians.

Provides suggested statutory forms for such affidavits.

Clarifies and expands the provisions governing how and when a third party may rely on the authority granted under any durable power of attorney.

Clarifies notice provisions regarding when a third party may no longer rely on a durable power of attorney based on the receipt of a written notice of revocation, termination, or suspension of the durable power of attorney, or written notice of other activity signaling that the durable power of attorney is not valid or exercisable.