

**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: SB 832

INTRODUCER: Senator Joyner

SUBJECT: Power of Attorney

DATE: March 5, 2013

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Shankle	Cibula	JU	<b>Pre-meeting</b>
2.			GO	
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.
- Specifies three powers given by a principal to an agent in which the laws governing powers of attorney, chapter 709, F.S., 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:

### 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>1</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>2</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>3</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>4</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>5</sup>

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<sup>1</sup> Section 709.2121(3), F.S.

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

<sup>3</sup> Section 709.2120(1)(b), F.S.

<sup>4</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>5</sup> Section 709.2103, F.S.

### **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>6</sup>

### **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>7</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>8</sup> Section 709.2106, F.S., prevents title agents from requiring an original.

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

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>9</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>10</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.<sup>11</sup> It also requires that any such rejection must be in writing and state the reason for rejection of the power of attorney.<sup>12</sup> However, s. 709.2120(2), F.S., enumerates the situations in which a third party may reject a power of an attorney. Based on the wording of

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<sup>6</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).

<sup>7</sup> Section 709.2106(5), F.S.

<sup>8</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 6.

<sup>9</sup> Sections 709.2114 F.S., and 518.112, F.S.

<sup>10</sup> Section 709.2119, F.S.

<sup>11</sup> Section 709.2120, F.S.

<sup>12</sup> *Id.*

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>13</sup> This leads to a possible interpretation that a written rejection is not required if a valid reason for rejection exists.

### **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>14</sup>

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

### **Broker-dealers**

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

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

The bill amends s. 709.2103, F.S., creating three additional powers 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**

The bill amends ss. 703.2105 and 709.2202, F.S., 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.
- 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>15</sup>

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<sup>13</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 6.

<sup>14</sup> Section 709.2202(3), F.S.

<sup>15</sup> Section 117.05(14), F.S.

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

The bill amends s. 709.2106, F.S., to 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. The bill specifies the process by which a power of attorney can be recorded by the clerk of courts.

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

The bill 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>16</sup>

### **Awarding Attorney Fees**

The bill 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>17</sup> This standard gives a court full discretion in determining whether to make an award.

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

The bill 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.

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

The bill amends s. 709.2120, F.S., clarifying 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.

### **Authority to Make Gifts**

The bill 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.<sup>18</sup>

### **Effective Date**

The bill takes effect upon becoming law.

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<sup>16</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 6.

<sup>17</sup> *Dayton v. Conger*, 448 So. 2d 609, 612 (Fla. 3d DCA 1984).

<sup>18</sup> American Taxpayer Relief Act of 2012, Pub. Law No. 112-240, H.R. 8, 112th Cong. (Jan. 2, 2013).

**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.

**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.