CHAPTER 2001-241

Committee Substitute for Senate Bill No. 886

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 a specified condition; providing immunity from criminal and civil liability for physicians making a determination of incapacity to manage property under certain conditions; 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 lack of capacity to manage property as defined in s. 744.102(10)(a), the durable power of attorney is exercisable upon the delivery of affidavits in paragraphs (4)(c) and (d) to the third party.

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

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

(b) Any third party may rely upon the authority granted in a durable power of attorney that is conditioned on the principal's lack of capacity to manage property as defined in s. 744.102(10)(a) only after receiving the affidavits provided in paragraphs (c) and (d), and such reliance shall end when the third party has received notice as provided in subsection (5). ~~Until a third party has received notice of revocation pursuant to subsection (5), partial or complete termination of the durable power of attorney by adjudication of incapacity, suspension by initiation of proceedings to determine~~

~~incapacity, death of the principal, or the occurrence of an event referenced in the power of attorney, the third party may act in reliance upon the authority granted in the durable power of attorney.~~

(c) ~~A third party that has not received written notice under subsection (5) may, but need not, require that the attorney in fact execute~~ An affidavit executed by the attorney in fact must state where the principal is domiciled, that the principal is not deceased, and ~~stating~~ that there has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian of the durable power of attorney at the time the power of attorney is exercised. A written affidavit executed by the attorney in fact under this paragraph may, but need not, be in the following form:

STATE OF
COUNTY OF

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

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

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

3.~~2.~~ To the best of the Affiant's knowledge after diligent search and inquiry:

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

b. There has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian ~~A petition to determine the incapacity of or to appoint a guardian for the Principal is not pending~~.

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

.....
...Affiant...

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

...(Signature of Notary Public-State of Florida)...
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification
...(Type of Identification Produced)...

(d) A determination that a principal lacks the capacity to manage property as defined in s. 744.102(10)(a) must be made and evidenced by the affidavit of a physician licensed to practice medicine pursuant to chapters 458 and 459 as of the date of the affidavit. A judicial determination that the principal lacks the capacity to manage property pursuant to chapter 744 is not required prior to the determination by the physician and the execution of the affidavit. For purposes of this section, the physician executing the affidavit must be the primary physician who has responsibility for the treatment and care of the principal. The affidavit executed by a physician must state where the physician is licensed to practice medicine, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the physician believes that the principal lacks the capacity to manage property as defined in s. 744.102(10)(a). The affidavit may, but need not, be in the following form:

STATE OF.....
COUNTY OF.....

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

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

2. Affiant is the primary physician who has responsibility for the treatment and care of ...(principal's name)....

3. To the best of Affiant's knowledge after reasonable inquiry, Affiant believes that the principal lacks the capacity to manage property, including taking those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.

.....

Affiant

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

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

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

Personally Known OR Produced Identification

....(Type of Identification Produced)....

(e) A physician who makes a determination of incapacity to manage property under paragraph (d) is not subject to criminal prosecution or civil liability and is not considered to have engaged in unprofessional conduct as a result of making such determination, unless it is shown by a preponderance of the evidence that the physician making the determination did not comply in good faith with the provisions of this section.

(f) A third party may not rely on the authority granted in a durable power of attorney conditioned on the principal's lack of capacity to manage property as defined in s. 744.102(10)(a) when any affidavit presented has been executed more than 6 months prior to the first presentation of the durable power of attorney to the third party.

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

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

(5) NOTICE.—

(a) A notice, including, but not limited to, a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, ~~suspension, or otherwise,~~ is not effective until written notice is served upon the attorney in fact or any third persons relying upon a durable power of attorney.

(b) Notice must be in writing and served on the person or entity to be bound by the ~~such~~ notice. Service may be by any form of mail that requires a signed receipt or by personal delivery as provided for service of process. Service is complete when received by interested persons or entities specified in this section and in chapter 48, where applicable. In the case of a financial institution as defined in chapter 655, notice, when not mailed, must be served during regular business hours upon an officer or manager of the financial institution's principal place of business in Florida and its office where the power of attorney or account was presented, handled, or administered. Notice by mail to a financial institution must be mailed to the financial institution's principal place of business in this state and its office where the power of attorney or account was presented, handled, or administered. Except for service of court orders, a third party served with notice must be given 14 calendar days after service to act

upon that notice. In the case of a financial institution, notice must be served before the occurrence of any of the events described in s. 674.303.

Section 2. This act shall take effect January 1, 2002.

Approved by the Governor June 15, 2001.

Filed in Office Secretary of State June 15, 2001.