



Civil Justice Subcommittee

Monday, March 14, 2011

4:00 PM

404 HOB

**Dean Cannon
Speaker**

**Eric Eisnaugle
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Monday, March 14, 2011 04:00 pm

End Date and Time: Monday, March 14, 2011 06:00 pm

Location: 404 HOB

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 391 Expert Testimony by Metz
HB 405 Employment Liability for Persons with Disabilities by Baxley
HB 459 Self-Service Storage Space by Caldwell
HB 647 Protection of Volunteers by McBurney
HB 815 Powers of Attorney by Harrison
HB 951 Recording of Real Property Documents by Albritton

NOTICE FINALIZED on 03/10/2011 16:12 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 391 Expert Testimony
SPONSOR(S): Metz; Weinstein
TIED BILLS: None IDEN./SIM. BILLS: CS/SB 822

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn <i>WJ</i>	Bond <i>NB</i>
2) Judiciary Committee			

SUMMARY ANALYSIS

An expert witness is a person who has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder. In evaluating whether testimony of a particular expert witness will be admitted in a Florida court, the court looks at whether or not the underlying basic principles of evidence are generally accepted within the scientific community. The standard is known as the *Frye* standard.

This bill rejects the *Frye* standard and provides a three-part test to determine whether or not expert testimony will be admitted in a particular case. This bill adopts a standard commonly referred to as the *Daubert* standard.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Expert Witness

An expert witness is a person, who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.¹ Previously, both Federal and Florida courts used the standard established in *Frye v. United States*² to determine whether or not scientific and expert testimony could be admitted into evidence. In *Frye*, the court established a test regarding admitting expert testimony of new or novel theories. The court held that "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery must be sufficiently established to have gained general acceptance in the particular field in which it belongs."³ Under the *Frye* standard, a judge must determine that the basic underlying principles of scientific evidence have been tested and accepted by the scientific community.

The Federal Rules of Evidence were formally promulgated in 1975. Federal courts still continued to use the *Frye* standard until 1993, though, when the United States Supreme Court held in *Daubert*⁴ that the *Frye* standard had been superseded by the Federal Rules of Evidence which provides in relevant part that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁵

The Florida Evidence Code was established in 1979 and was patterned after the Federal Rules of Evidence. Section 90.102, F.S., provides that the Florida Evidence Code replaces and supersedes existing statutory or common law in conflict with its provisions. Section 90.702, F.S., relates to the admissibility of expert witness testimony and provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.⁶

Florida courts still use the *Frye* standard, however, for expert testimony.⁷ The Florida Supreme court held in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert*... we have maintained the higher standard of reliability as dictated by *Frye*."⁸

In November 2007, the Florida Supreme Court decided *Marsh v. Valyou*.⁹ In the case, the court addressed a conflict between the 1st and the 5th Florida District Courts of Appeal regarding expert

¹ Bryan A. Garner, Black's Law Dictionary, 9th Edition (West Publishing Co. 2009), "expert."

² *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

³ *Id.*

⁴ *Daubert v. Merrell Dow Pharmaceuticals*, 509 US. 579 (1993).

⁵ Rule 702, Federal Rules of Evidence.

⁶ Section 90.702, F.S.

⁷ *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Hadden v. State*, 690 So. 2d 573 (Fla. 1997).

⁸ *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997).

⁹ *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).

testimony on fibromyalgia.¹⁰ The court held that the testimony should have come in under pure opinion testimony¹¹ and in the alternative should have also come in under *Frye*. In the concurring opinion, Justice Anstead questioned why Florida still uses the *Frye* standard, stating that "we have never explained how *Frye* has survived the adoption of the rules of evidence."¹² Both the concurring and dissenting opinions concluded that *Frye* was superseded by the adoption of Florida's Evidence Code.

Effect of the Bill

This bill provides a standard regarding witness testimony that is more closely related to *Daubert* and the Federal Code of Evidence than *Frye*. This bill provides a three-part test to be used in determining whether or not an expert may testify. The test provides that an expert may testify in the particular field in which he or she is qualified in the form of an opinion or otherwise if:

- The testimony is based on sufficient facts or data,
- The testimony is the product of reliable principles and methods, and
- The witness has applied the principles and methods reliably to the facts.

The bill requires the courts of this state to interpret and apply the requirements of subsection (1) and s. 90.704, F.S., in accordance with *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, and subsequent U.S. Supreme Court cases that reaffirm witness testimony under the *Daubert* standard. The bill also provides that *Frye v. United States* and subsequent Florida decisions applying and implementing *Frye* no longer apply to subsection (1) or s. 90.704, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 90.702, F.S., regarding testimony by experts.

Section 2 amends s. 90.704, F.S., regarding the basis of opinion testimony by experts.

Section 3 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

¹⁰ Fibromyalgia is a chronic condition characterized by widespread pain in the muscles, ligaments and tendons, as well as fatigue and multiple tender points. See <http://www.mayoclinic.com/health/fibromyalgia/DS00079> (last visited March 2, 2011).

¹¹ Pure opinion testimony is based on the expert's personal experience and training and does not have to meet the *Frye* standard. See *Flanagan*, 625 So. 2d at 828.

¹² *Marsh* at 551.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to expert testimony; amending s. 90.702,
 3 F.S.; providing that a witness qualified as an expert may
 4 testify as to the facts at issue in a case under certain
 5 circumstances; requiring the courts of this state to
 6 interpret and apply the specified provisions relating to
 7 expert testimony in conformity with specified United
 8 States Supreme Court decisions; amending s. 90.704, F.S.;
 9 prohibiting disclosure of facts or data that are otherwise
 10 inadmissible by an expert absent a finding that their
 11 probative value in assisting the jury to evaluate the
 12 expert's opinion substantially outweighs their prejudicial
 13 effect; providing an effective date.

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

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17 Section 1. Section 90.702, Florida Statutes, is amended to
 18 read:

19 90.702 Testimony by experts.—

20 (1) If scientific, technical, or other specialized
 21 knowledge will assist the trier of fact in understanding the
 22 evidence or in determining a fact in issue, a witness qualified
 23 as an expert by knowledge, skill, experience, training, or
 24 education may testify about it in the form of an opinion or
 25 otherwise if:

26 (a) The testimony is based upon sufficient facts or data;

27 (b) The testimony is the product of reliable principles

28 and methods; and

29 (c) The witness has applied the principles and methods
 30 reliably to the facts of the case; however, the opinion is
 31 admissible only if it can be applied to evidence at trial.

32 (2) The courts of this state shall interpret and apply the
 33 requirements of subsection (1) and s. 90.704 in accordance with
 34 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579
 35 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997);
 36 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); and
 37 Weisgram v. Marley Co., 528 U.S. 440 (2000). Frye v. United
 38 States, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida
 39 decisions applying or implementing Frye shall no longer apply to
 40 subsection (1) or s. 90.704.

41 Section 2. Section 90.704, Florida Statutes, is amended to
 42 read:

43 90.704 Basis of opinion testimony by experts.—The facts or
 44 data upon which an expert bases an opinion or inference may be
 45 those perceived by, or made known to, the expert at or before
 46 the trial. If the facts or data are of a type reasonably relied
 47 upon by experts in the subject to support the opinion expressed,
 48 the facts or data need not be admissible in evidence. Facts or
 49 data that are otherwise inadmissible shall not be disclosed to
 50 the jury by the proponent of the opinion or inference unless the
 51 court determines that their probative value in assisting the
 52 jury to evaluate the expert's opinion substantially outweighs
 53 their prejudicial effect.

54 Section 3. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405 Employment Liability for Persons with Disabilities

SPONSOR(S): Baxley; Gaetz

TIED BILLS: None IDEN./SIM. BILLS: SB 926

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn <i>W</i>	Bond <i>VB</i>
2) Health & Human Services Access Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Supported employment services are offered to help an individual with a developmental disability gain or maintain employment. The bill provides that an employer who employs a person with a developmental disability who received supported employment services is not liable for a negligent or intentional act or omission of the employee provided that the employer did not have actual notice of an act or omission creating an unsafe condition in the workplace.

The bill also provides that a not-for-profit supported employment service that has provided employment services to a person with a developmental disability is not liable for the actions or conduct of that person as an employee.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Developmental Disability

"Developmental Disability" is a term that is defined in s. 393.063, F.S., as:

A disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

The Agency for Persons with Disabilities (APD)¹ has been specifically tasked with serving the needs of Floridians with developmental disabilities. The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities.

Supported Employment Services

Supported employment services are services offered to help an individual gain or maintain employment. Generally, services involve job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines "supported employment services" as on-going support services provided by the designated state unit to achieve job stabilization.²

The Division of Vocational Rehabilitation (DVR) specifically defines "supported employment services" as "ongoing support services and other appropriate services needed to support and maintain a person who has a severe disability in supported employment."³ The service provided is based upon the needs of the eligible individual as specified in the person's individualized written rehabilitation program. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.⁴

Both DVR and APD provide supported employment services. They also connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to such services. However, these entities do not share information about their customers with the employers that employ their customers as supported employment. This is due to various reasons, including confidentiality concerns and contract agreements between the employer and the organization.

Employer Liability, In General

Under common law principles, an employer is liable for an act of its employee that causes injury to another person if the wrongful act was done while the employee was acting within the apparent scope

¹ For more information see <http://apd.myflorida.com/> (last visited March 3, 2011).

² 34 C.F.R. s. 363.6(c)(2)(iii). "What is the State Supported Employment Services Program? Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment. (Authority: 29 U.S.C. 795j)." 34 C.F.R. s. 363.1. See also, Supported Employment State Grants, at <http://www.ed.gov/programs/rsasupemp/index.html> (last visited 3/11/2009).

³ For DVR: "Supported employment" means competitive work in integrated working settings for persons who have severe disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of a severe disability. Persons who have severe disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work. Section 413.20(22), F.S. For APD: "Supported employment" means employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance. Section 393.063(37), F.S.

⁴ Section 413.20(27), F.S.

of employment and serving the interests of his or her employer. An employee is not acting within the scope of his or her employment, and thereby the employer is not liable, if the employee is acting to accomplish his or her own purposes and not to serve the interests of the employer.⁵ The test for determining if the conduct complained of occurred within the scope of employment is:

- Whether the employee was performing the kind of conduct he was employed to perform;
- The conduct occurred within the time and space limits of the employment; and
- The conduct was activated at least in part by a purpose to serve the employer.⁶

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer's business.⁷ An employer may be held liable for a negligent act of an employee committed within the scope of his or her employment even if the employer is without fault.⁸ An employer is liable for an employee's acts, intentional or negligent, if the employer had control over the employee at the time of the acts. "Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label 'employer' to impose strict liability under a theory of respondeat superior⁹ but instead look to the employer's control or right of control over the employee at the time of the negligent act."¹⁰ Employer fault is not an element of vicarious liability claims.¹¹

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as "an employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person would be harmed."¹² An action for negligent hiring is based on the direct negligence of the employer. However, in order to be liable for an employee's act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury. "The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."¹³ In *Williams v. Feather Sound, Inc.*, the Florida 2nd District Court of Appeal, in a case regarding negligent hiring, discussed the responsibility of the employer to be aware of an employee's propensity to commit an act at issue:

Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's

⁵ *Gowan v. Bay Count*, 744 So.2d 1136, 1138 (Fla. 1st DCA 1999).

⁶ *Id.*

⁷ *Garcy v. Broward Process Servers, Inc.* 583 So.2d 714, 716 (Fla. 4th DCA 1991). The term "intentional" means done with the aim of carrying out the act. Black's Law Dictionary (9th ed. 2010), intentional.

⁸ "This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer." *Makris v. Williams*. 426 So.2d 1186, 1189 (Fla. 4th DCA 1983). The term "negligent" is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. Black's Law Dictionary (9th ed. 2010), negligent. A negligent act is one that creates an unreasonable risk of harm to another. Black's Law Dictionary (9th ed. 2010), act.

⁹ Respondeat superior" means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. Black's Law Dictionary (9th ed. 2010), respondeat superior.

¹⁰ *Vasquez v. United Enterprises of Southwest Florida, Inc.* 811 So.2d 759, 761 (Fla. 3rd DCA 2002).

¹¹ *Makris v. Williams*. 426 So.2d 1186, 1189 (Fla. 4th DCA 1983).

¹² Black's Law Dictionary (9th ed. 2010), negligent hiring.

¹³ *Anderson Trucking Service, Inc. v. Gibson*. 884 So.2d 1046, 1052 (Fla. 5th DCA 2004).

propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.¹⁴

Section 768.096, F.S., provides an employer presumption against negligent hiring, "if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."¹⁵

Effect of the Bill

The bill creates s. 768.0965, F.S., entitled "Employees with Disabilities Opportunity Act," to provide that an employer is not liable, under certain conditions, for negligent or intentional acts or omissions by an employee with a developmental disability, as defined in s. 393.063, F.S. The employer is not liable if:

- The employee has received supported employment services through a public or private not-for-profit provider; and
- The employer does not have actual notice of an action or omission of the employee which creates an unsafe condition in the workplace.

The bill also provides that a not-for-profit supported employment services provider who provides supported employment services to an individual with a developmental disability is not liable for the actions or conduct of that individual that occurs within the scope of such individual's employment.

B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 creates s. 768.0965, F.S. regarding employer and not-for-profit supported employment service provider liability.

Section 3 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

¹⁴ *Williams v. Feather Sound, Inc.*, 386 So.2d 1238, 1239 - 1240 (Fla. 2nd DCA 1980).

¹⁵ Section 768.096, F.S., defines what a background investigation must include, like contacting references, interviewing the employee, and obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear whether this bill applies to causes of action that occur on or after the effective date, or whether the bill applies to all causes of action pending or possible on the effective date.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

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A bill to be entitled
 An act relating to employment liability for persons with
 disabilities; providing a short title; creating s.
 768.0965, F.S.; limiting the liability of employers of
 persons with developmental disabilities for acts or
 omissions of such employees in certain circumstances;
 providing that a not-for-profit supported employment
 service provider who has provided supported employment
 services to an individual with a developmental disability
 is not liable for the actions or conduct of that
 individual occurring within the scope of his or her
 employment; providing an effective date.

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

Section 1. This act may be cited as the "Employees with
 Disabilities Opportunity Act."

Section 2. Section 768.0965, Florida Statutes, is created
 to read:

768.0965 Limitation of employment liability for persons
 with disabilities.-

(1) An employer employing a person with a developmental
 disability as defined in s. 393.063 is not liable for the acts
 or omissions, negligent or intentional, of the employee, if:

(a) The employee has received supported employment
 services through a public or private not-for-profit provider;
 and

HB 405

2011

28 | (b) The employer does not have actual notice of actions or
29 | omissions of the employee which create unsafe conditions in the
30 | workplace.

31 | (2) A not-for-profit supported employment service provider
32 | who has provided supported employment services to an individual
33 | with a developmental disability as defined in s. 393.063 is not
34 | liable for the actions or conduct of the individual occurring
35 | within the scope of such individual's employment.

36 | Section 3. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 459 Self-Service Storage Space
SPONSOR(S): Caldwell
TIED BILLS: None IDEN./SIM. BILLS: SB 1772

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Billmeier <i>LMB</i>	Bond <i>NB</i>
2) Judiciary Committee			

SUMMARY ANALYSIS

The Self-storage Facility Act allows an owner to sell personal property in a storage facility if the tenant fails to pay rent for the storage facility. The owner is required to give notice of the intent to sell the property to the tenant before selling the property and is required to give notice to the tenant if the sale of the property results in more money than is necessary to pay the rent due. Notices must be delivered to the tenant or mailed by certified mail. The bill removes the requirement to use certified mail and allows notices to be provided to the tenant by first-class mail.

If a tenant does not respond to the notice of delinquency, the owner may sell the contents at a public auction. Current law requires publication of a notice of the sale. This bill removes the publication requirement.

This bill also provides that parties to a self-service storage contract may limit remedies for violations of the Self-storage Facility Act.

This bill does not appear to have a fiscal impact on state or local governments. The bill appears to have private party fiscal effects.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background - Notice Requirements

Sections 83.801- 83.809, F.S., are Florida's "Self-storage Facility Act" (the "Act"). The Act provides remedies for the owners of self-storage facilities¹ or self-contained storage units² in the event that tenants do not pay rent. The Act gives the owner the ability to deny a tenant's access to his or her property if the tenant is more than five days delinquent in paying rent.³ The Act provides that the owner of a self-storage facility or self-contained storage unit has a lien upon all personal property located at a self-service storage facility or in a self-contained storage unit for rent, labor charges, or other charges in relation to the personal property and for expenses necessary to preserve or dispose of the property.⁴

The owner's lien is enforced as follows:

- The tenant is notified by written notice⁵ delivered in person or by certified mail to the tenant's last known address and conspicuously posted at the self-service storage facility or on the self-contained storage unit. If mailed, the notice given is presumed delivered when it is deposited with the United States Postal Service and properly addressed with postage prepaid;
- After the expiration of the time given in the notice, an advertisement of the sale must be published once a week for 2 consecutive weeks in a newspaper of general circulation in the area where the self-service storage facility or self-contained storage unit is located. If there is no newspaper of general circulation in the area where the self-service storage facility or self-contained storage unit is located, the advertisement must be posted at least 10 days before the sale in at least three conspicuous places in the neighborhood where the self-service storage facility or self-contained storage unit is located.⁶

In the event of a sale, the owner may satisfy the lien from the proceeds of the sale.⁷ The balance, if any, is held by the owner for delivery on demand to the tenant.⁸ A notice of any balance must be delivered by the owner to the tenant in person or by certified mail.⁹ The balance is considered abandoned if the tenant does not claim it within two years.¹⁰

Current law also requires the owner to hold the sale proceeds for holders of liens against the property whose liens have priority over the owner's lien. The owner must provide notice of the amount of sale proceeds to such lienholders by either personal delivery or certified mail.¹¹

Current law requires that notices required by s. 83.806, F.S., be sent by certified mail. Certified mail is described by the U.S. Postal Service as follows:

¹ "Self-service storage facility" is defined by s. 83.803(1), F.S.

² "Self-contained storage unit" is defined by s. 83.803(2), F.S.

³ See s. 83.8055, F.S.

⁴ See s. 83.805, F.S.

⁵ The notice must contain a statement showing the amount due, the date it became due, a description of the property, a demand for payment within 14 days, and a conspicuous statement that, unless the claim is paid within the time stated in the notice, the personal property will be advertised for sale or other disposition and will be sold or otherwise disposed of at a specified time and place.

⁶ See s. 83.806, F.S.

⁷ See s. 83.806(8), F.S.

⁸ See s. 83.806(8), F.S.

⁹ See s. 83.806(8), F.S.

¹⁰ See s. 83.806(8), F.S.

¹¹ See s. 83.806(8), F.S.

With Certified Mail you can be sure your article arrived at its destination with access to online delivery information. When you use Certified Mail, you receive a receipt stamped with the date of mailing. A unique article number allows you to verify delivery online. As an additional security feature, the recipient's signature is obtained at the time of delivery and a record is maintained by the Post Office.¹²

Currently, the USPS charges \$2.80 for certified mail service in addition to applicable postage for the piece.¹³

Effect of the Bill - Notice Requirements

This bill provides that all notices required by s. 83.806, F.S., must either be delivered to the tenant or lienholder or mailed by first-class mail, rather than certified mail.

This bill removes the requirement that an owner advertise the sale of a tenant's property in a newspaper of general circulation in the area in advance of the sale. It also removes the requirement that the owner advertise the sale of a tenant's property by posting in the neighborhood if there is no newspaper in the area.

Background - Limitations on Liability

In *Muns v. Shurgard Income Properties Fund 16-Ltd. Partnership*, 682 So. 2d 166 (Fla. 4th DCA 1996), the court considered whether a contract limiting the liability for wrongful foreclosure on the contents of a storage unit was allowed under Florida law. In *Muns*, a tenant claimed to have placed at least \$50,000 worth of goods in a self-storage facility but signed a lease that contained an exculpatory provision limiting damages for wrongful foreclosure for nonpayment of rent to \$250.¹⁴ When the rent became delinquent by \$16, the owner sold the property for a "pittance" but did not comply with the notice requirements of s. 83.806, F.S., so the tenant did not have notice of the sale.¹⁵ The trial court dismissed *Muns*'s claims and the appellate court affirmed. The court did not address arguments that the exculpatory clause was unconscionable¹⁶ and held, in a subsequent case, that the a tenant has no private cause of action if an owner fails to comply with s. 83.806, F.S.¹⁷

Effect of the Bill - Limitations on Liability

This bill provides that the parties to a self-storage lease may create limitations on liability by contract. This would have the effect of codifying the result in *Muns* and allowing parties to provide for contract remedies in the event of a violation of s. 83.806, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 83.806, F.S., relating to enforcement of liens.

Section 2 amends s. 83.808, F.S., relating to contractual liens.

Section 3 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

¹² See <http://www.usps.com/send/waystosendmail/extraservices/certifiedmailservice.htm> (accessed March 10, 2011).

¹³ See <http://www.usps.com/prices/extra-services-prices.htm> (accessed March 10, 2011).

¹⁴ See *Muns*, 682 So. 2d at 167.

¹⁵ *Muns*, 682 So. 2d at 167.

¹⁶ *Muns*, 682 So. 2d at 167 (declining to address arguments that exculpatory clause was unconscionable because the issue was not properly before the court).

¹⁷ See *Shurgard Income Properties Fund 16-Ltd Partnership v. Muns*, 761 So. 2d 340 (Fla. 4th DCA 1999).

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Owners of self-service storage facilities and self-contained storage units will save the cost of certified mail service related to notices required by s. 83.806, F.S.

Owners of self-service storage facilities and self-contained storage units will also save the cost of legal advertisements of sales which will result in a corresponding loss of revenue by publishers of legal advertisements.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to self-service storage space; amending s.
 3 83.806, F.S.; revising notice requirements relating to the
 4 enforcement of liens; amending s. 83.808, F.S.; specifying
 5 nonapplication of certain provisions to limitations on
 6 liability; providing an effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Subsection (1) and subsections (4) through (8)
 11 of section 83.806, Florida Statutes, are amended to read:

12 83.806 Enforcement of lien.—An owner's lien as provided in
 13 s. 83.805 may be satisfied as follows:

14 (1) The tenant shall be notified by written notice
 15 delivered in person or by first-class ~~certified~~ mail to the
 16 tenant's last known address and conspicuously posted at the
 17 self-service storage facility or on the self-contained storage
 18 unit.

19 ~~(4) After the expiration of the time given in the notice,~~
 20 ~~an advertisement of the sale or other disposition shall be~~
 21 ~~published once a week for 2 consecutive weeks in a newspaper of~~
 22 ~~general circulation in the area where the self-service storage~~
 23 ~~facility or self-contained storage unit is located. Inasmuch as~~
 24 ~~any sale may involve property of more than one tenant, a single~~
 25 ~~advertisement may be used to dispose of property at any one~~
 26 ~~sale.~~

27 ~~(a) The advertisement shall include:~~

28 ~~1. A brief and general description of what is believed to~~

29 ~~constitute the personal property contained in the storage unit,~~
 30 ~~as provided in paragraph (2)(b).~~

31 ~~2. The address of the self-service storage facility or the~~
 32 ~~address where the self-contained storage unit is located and the~~
 33 ~~name of the tenant.~~

34 ~~3. The time, place, and manner of the sale or other~~
 35 ~~disposition. The sale or other disposition shall take place not~~
 36 ~~sooner than 15 days after the first publication.~~

37 ~~(b) If there is no newspaper of general circulation in the~~
 38 ~~area where the self-service storage facility or self-contained~~
 39 ~~storage unit is located, the advertisement shall be posted at~~
 40 ~~least 10 days before the date of the sale or other disposition~~
 41 ~~in not fewer than three conspicuous places in the neighborhood~~
 42 ~~where the self-service storage facility or self-contained~~
 43 ~~storage unit is located.~~

44 (4)~~(5)~~ Any sale or other disposition of the personal
 45 property shall conform to the terms of the notification as
 46 provided for in this section and shall be conducted in a
 47 commercially reasonable manner, as that term is used in s.
 48 679.610.

49 (5)~~(6)~~ Before any sale or other disposition of personal
 50 property pursuant to this section, the tenant may pay the amount
 51 necessary to satisfy the lien and the reasonable expenses
 52 incurred under this section and thereby redeem the personal
 53 property. Upon receipt of such payment, the owner shall return
 54 the property to the tenant and thereafter shall have no
 55 liability to any person with respect to such personal property.
 56 If the tenant fails to redeem the personal property or satisfy

57 | the lien, including reasonable expenses, he or she will be
 58 | deemed to have unjustifiably abandoned the self-service storage
 59 | facility or self-contained storage unit, and the owner may
 60 | resume possession of the premises for himself or herself.

61 | (6)~~(7)~~ A purchaser in good faith of the personal property
 62 | sold to satisfy a lien provided for in s. 83.805 takes the
 63 | property free of any claims, except those interests provided for
 64 | in s. 83.808, despite noncompliance by the owner with the
 65 | requirements of this section.

66 | (7)~~(8)~~ In the event of a sale under this section, the
 67 | owner may satisfy his or her lien from the proceeds of the sale,
 68 | provided the owner's lien has priority over all other liens in
 69 | the personal property. The lien rights of secured lienholders
 70 | are automatically transferred to the remaining proceeds of the
 71 | sale. The balance, if any, shall be held by the owner for
 72 | delivery on demand to the tenant. A notice of any balance shall
 73 | be delivered by the owner to the tenant in person or by first-
 74 | class ~~certified~~ mail to the last known address of the tenant. If
 75 | the tenant does not claim the balance of the proceeds within 2
 76 | years of the date of sale, the proceeds shall be deemed
 77 | abandoned, and the owner shall have no further obligation with
 78 | regard to the payment of the balance. In the event that the
 79 | owner's lien does not have priority over all other liens, the
 80 | sale proceeds shall be held for the benefit of the holders of
 81 | those liens having priority. A notice of the amount of the sale
 82 | proceeds shall be delivered by the owner to the tenant or
 83 | secured lienholders in person or by first-class ~~certified~~ mail
 84 | to their last known addresses. If the tenant or the secured

HB 459

2011

85 | lienholders do not claim the sale proceeds within 2 years of the
 86 | date of sale, the proceeds shall be deemed abandoned, and the
 87 | owner shall have no further obligation with regard to the
 88 | payment of the proceeds.

89 | Section 2. Section 83.808, Florida Statutes, is amended to
 90 | read:

91 | 83.808 Contractual liens.—This part does not impair or
 92 | affect ~~Nothing in ss. 83.801-83.809 shall be construed as in any~~
 93 | ~~manner impairing or affecting~~ the right of parties to create
 94 | liens and limitations on liability by special contract or
 95 | agreement or ~~nor shall it in any manner~~ impair or affect any
 96 | other lien arising at common law, in equity, or by any statute
 97 | of this state or any other lien not provided for in s. 83.805.

98 | Section 3. This act shall take effect July 1, 2011.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 459 (2011)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
2 Representative(s) Caldwell offered the following:

3
4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

6 Section 1. Subsection (6) of section 83.803, Florida
7 Statutes, is amended to read:

8 83.803 Definitions.—As used in ss. 83.801-83.809:

9 (6) "Last known address" means the street that address,
10 post office box, or electronic mail address provided by the
11 tenant in the latest rental agreement or in a subsequent written
12 change-of-address notice provided ~~the address provided by the~~
13 ~~tenant~~ by hand delivery, first-class mail, or electronic
14 ~~certified mail in a subsequent written notice of a change of~~
15 ~~address.~~

16 Section 2. Section 83.806, Florida Statutes, is amended to
17 read:

18 83.806 Enforcement of lien.—An owner's lien as provided in
19 s. 83.805 may be satisfied as follows:

Amendment No. 1

20 (1) The tenant shall be notified by written notice
21 delivered in person or by first-class certified mail, along with
22 a certificate of mailing, to the tenant's last known address and
23 conspicuously posted at the self-service storage facility or on
24 the self-contained storage unit.

25 (2) The notice shall include:

26 (a) An itemized statement of the owner's claim, showing
27 the sum due at the time of the notice and the date when the sum
28 became due.

29 (b) The same description, or a reasonably similar
30 description, of the personal property as provided in the rental
31 agreement.

32 (c) A demand for payment within a specified time not less
33 than 14 days after delivery of the notice.

34 (d) A conspicuous statement that, unless the claim is paid
35 within the time stated in the notice, the personal property will
36 be advertised for sale or other disposition and will be sold or
37 otherwise disposed of at a specified time and place.

38 (e) The name, street address, and telephone number of the
39 owner whom the tenant may contact to respond to the notice.

40 (3) Any notice given pursuant to this section shall be
41 presumed delivered when it is deposited with the United States
42 Postal Service, ~~registered,~~ and properly addressed with postage
43 prepaid.

44 ~~(4) After the expiration of the time given in the notice,~~
45 ~~an advertisement of the sale or other disposition shall be~~
46 ~~published once a week for 2 consecutive weeks in a newspaper of~~
47 ~~general circulation in the area where the self-service storage~~

Amendment No. 1

48 ~~facility or self-contained storage unit is located. Inasmuch as~~
49 ~~any sale may involve property of more than one tenant, a single~~
50 ~~advertisement may be used to dispose of property at any one~~
51 ~~sale.~~

52 ~~(a) The advertisement shall include:~~

53 ~~1. A brief and general description of what is believed to~~
54 ~~constitute the personal property contained in the storage unit,~~
55 ~~as provided in paragraph (2) (b).~~

56 ~~2. The address of the self-service storage facility or the~~
57 ~~address where the self-contained storage unit is located and the~~
58 ~~name of the tenant.~~

59 ~~3. The time, place, and manner of the sale or other~~
60 ~~disposition. The sale or other disposition shall take place not~~
61 ~~sooner than 15 days after the first publication.~~

62 ~~(b) If there is no newspaper of general circulation in the~~
63 ~~area where the self-service storage facility or self-contained~~
64 ~~storage unit is located, the advertisement shall be posted at~~
65 ~~least 10 days before the date of the sale or other disposition~~
66 ~~in not fewer than three conspicuous places in the neighborhood~~
67 ~~where the self-service storage facility or self-contained~~
68 ~~storage unit is located.~~

69 ~~(4)-(5)~~ Any sale or other disposition of the personal
70 property shall conform to the terms of the notification as
71 provided for in this section and shall be conducted in a
72 commercially reasonable manner, as that term is used in s.
73 679.610.

74 ~~(5)-(6)~~ Before any sale or other disposition of personal
75 property pursuant to this section, the tenant may pay the amount

Amendment No. 1

76 necessary to satisfy the lien and the reasonable expenses
77 incurred under this section and thereby redeem the personal
78 property. Upon receipt of such payment, the owner shall return
79 the property to the tenant and thereafter shall have no
80 liability to any person with respect to such personal property.
81 If the tenant fails to redeem the personal property or satisfy
82 the lien, including reasonable expenses, he or she will be
83 deemed to have unjustifiably abandoned the self-service storage
84 facility or self-contained storage unit, and the owner may
85 resume possession of the premises for himself or herself.

86 ~~(6)-(7)~~ A purchaser in good faith of the personal property
87 sold to satisfy a lien provided for in s. 83.805 takes the
88 property free of any claims, except those interests provided for
89 in s. 83.808, despite noncompliance by the owner with the
90 requirements of this section.

91 ~~(7)-(8)~~ In the event of a sale under this section, the
92 owner may satisfy his or her lien from the proceeds of the sale,
93 provided the owner's lien has priority over all other liens in
94 the personal property. The lien rights of secured lienholders
95 are automatically transferred to the remaining proceeds of the
96 sale. The balance, if any, shall be held by the owner for
97 delivery on demand to the tenant. A notice of any balance shall
98 be delivered by the owner to the tenant in person or by first-
99 class certified mail, along with a certificate of mailing, to
100 the last known address of the tenant. If the tenant does not
101 claim the balance of the proceeds within 2 years after ~~of~~ the
102 date of sale, the proceeds shall be deemed abandoned, and the
103 owner shall have no further obligation with regard to the

Amendment No. 1

104 payment of the balance. In the event that the owner's lien does
105 not have priority over all other liens, the sale proceeds shall
106 be held for the benefit of the holders of those liens having
107 priority. A notice of the amount of the sale proceeds shall be
108 delivered by the owner to the tenant or secured lienholders in
109 person or by first-class certified mail, along with a
110 certificate of mailing, to their last known addresses. If the
111 tenant or the secured lienholders do not claim the sale proceeds
112 within 2 years after ~~of~~ the date of sale, the proceeds shall be
113 deemed abandoned, and the owner shall have no further obligation
114 with regard to the payment of the proceeds.

115 Section 3. Section 83.808, Florida Statutes, is amended to
116 read:

117 83.808 Contractual liens. This part does not impair or
118 affect ~~Nothing in ss. 83.801-83.809 shall be construed as in any~~
119 ~~manner impairing or affecting~~ the right of parties to create
120 liens or limitations on liability by special contract or
121 agreement ~~or nor shall it in any manner~~ impair or affect any
122 other lien arising at common law, in equity, or by any statute
123 of this state or any other lien not provided for in s. 83.805.

124 Section 4. This act shall take effect July 1, 2011.

125

126

127

T I T L E A M E N D M E N T

128 Remove the entire title and insert:

129 An act relating to self-service storage facilities; amending s.
130 83.803, F.S.; redefining the term "last known address," to
131

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 459 (2011)

Amendment No. 1

132 conform to changes made by the act; amending s. 83.806, F.S.;

133 revising notice requirements related to enforcing an owner's

134 lien; allowing postal notice by first-class mail, along with a

135 certificate of mailing; allowing electronic mail notice;

136 deleting provisions relating to advertisement requirements;

137 amending s. 83.808, F.S.; clarifying provisions relating to the

138 right to create contractual liens or limitations on liability;

139 providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 647 Protection of Volunteers
SPONSOR(S): McBurney
TIED BILLS: None **IDEN./SIM. BILLS:** SB 930

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Billmeier	LAB Bond NTS
2) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Volunteer Protection Act provides that any person who volunteers to perform any service for any nonprofit organization without compensation is not civilly liable for any act or omission in certain situations. It is unclear whether compensation from an outside source, such as from an employer who might continue to pay an employee who does volunteer work for a nonprofit organization, affects liability protection.

This bill provides that a person who volunteers for a nonprofit organization and is not paid by the nonprofit organization, regardless of whether the person is receiving compensation from another source, has the same protections as any other volunteer.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background - The Florida Volunteer Protection Act

Section 768.1355, F.S., is titled the Florida Volunteer Protection Act (the "Act"). The Act provides that any person who volunteers to perform any service for any nonprofit organization¹ without compensation is considered an agent of the nonprofit organization when acting within the scope of any official duties. The volunteer is not civilly liable for any act or omission which results in personal injury or property damage if:

- The volunteer was acting in good faith within the scope of any official duties;
- The volunteer was acting as an ordinary reasonably prudent person would have acted under the same or similar circumstances; and
- The injury or damage was not caused by any wanton or willful misconduct of the volunteer in the performance of such duties.²

If a volunteer is determined to be not liable pursuant to the Act, the nonprofit organization for which the volunteer was performing services when the damages were caused is liable for the damages to the same extent as the nonprofit organization would have been liable if the liability limitation under the Act had not been provided.³

The Act provides that "compensation" does not include a stipend as provided by the Domestic Service Volunteer Act of 1973, as amended (Pub. L. No. 93-113), or other financial assistance, valued at less than two-thirds of the federal hourly minimum wage standard, paid to a person who would otherwise be financially unable to provide the volunteer service.⁴ The Act does not address situations where a person is being paid by an outside entity but performing volunteer services for the nonprofit organization without pay.

A court has explained the purpose of the Act:

The legislature's clear intent is not to immunize volunteers from liability, but rather to shift liability from the volunteer to the non-profit organization only where the volunteer is exercising reasonable care and meets the other statutory criteria. See § 768.1355(2). Equally, the legislature determined that non-profit organizations should not be the guarantors of the conduct of their volunteers where the volunteer fails to exercise reasonable care.⁵

Effect of the Bill

This bill amends the Act to provide that a person who volunteers for a nonprofit organization without pay from the nonprofit organization, regardless of whether the person is receiving compensation from another source, is an agent of the nonprofit organization while acting in the scope of the official duties performed as a volunteer. This bill further provides that such person, and the entity that is paying the person, has the same protections as any other volunteer under the Act.

¹For purposes of this act, the term "nonprofit organization" means any organization which is exempt from taxation pursuant to 26 U.S.C. s. 501, or any federal, state, or local governmental entity.

² See s. 768.1355(1), F.S.

³ See s. 768.1355(2), F.S.

⁴ See s. 768.1355(1)(b)2., F.S.

⁵ *Campbell v. Kessler*, 848 So. 2d 369, 371 (Fla. 4th DCA 2003).

Therefore, this bill provides that persons that provide volunteer services without receiving compensation from any source are treated the same as persons who perform volunteer services for a nonprofit organization but are being paid by another entity.

B. SECTION DIRECTORY:

Section 1 amends s. 768.1355, F.S., relating to the Florida Volunteer Protection Act.

Section 2 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides a July 1, 2011, effective date but does not specify whether the bill applies to causes of action that were pending on that date or causes of action that accrue after that date. If a party were to attempt to apply this case to pending litigation, a court would have to decide whether to apply the change in law to the pending action. "Absent a clearly expressed legislative purpose to the contrary, pending cases are only affected in relation to future proceedings from the point reached when the new law becomes operative."⁶

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to the protection of volunteers; amending
 3 s. 768.1355, F.S.; clarifying that in order to fall under
 4 the protection of the Florida Volunteer Protection Act, a
 5 person performing a service for a nonprofit organization
 6 may not receive compensation from the nonprofit
 7 organization for that service, regardless of whether the
 8 person is receiving compensation from another source;
 9 providing immunity for the source of any other such
 10 compensation; providing an effective date.

11

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

13

14 Section 1. Subsection (1) of section 768.1355, Florida
 15 Statutes, is amended to read:

16

768.1355 Florida Volunteer Protection Act.—

17

(1) Any person who volunteers to perform any service for
 18 any nonprofit organization, including an officer or director of
 19 such organization, without compensation from the nonprofit
 20 organization, regardless of whether the person is receiving
 21 compensation from another source, except reimbursement for
 22 actual expenses, shall be considered an agent of such nonprofit
 23 organization when acting within the scope of any official duties
 24 performed under such volunteer services. Such person, and the
 25 source of any such compensation, shall incur no civil liability
 26 for any act or omission by such person which results in personal
 27 injury or property damage if:

28

(a) Such person was acting in good faith within the scope

HB 647

2011

29 of any official duties performed under such volunteer service
 30 and such person was acting as an ordinary reasonably prudent
 31 person would have acted under the same or similar circumstances;
 32 and

33 (b) The injury or damage was not caused by any wanton or
 34 willful misconduct on the part of such person in the performance
 35 of such duties.

36 1. For purposes of this act, the term "nonprofit
 37 organization" means any organization which is exempt from
 38 taxation pursuant to 26 U.S.C. s. 501, or any federal, state, or
 39 local governmental entity.

40 2. For purposes of this act, the term "compensation" does
 41 not include a stipend as provided by the Domestic Service
 42 Volunteer Act of 1973, as amended (Pub. L. No. 93-113), or other
 43 financial assistance, valued at less than two-thirds of the
 44 federal hourly minimum wage standard, paid to a person who would
 45 otherwise be financially unable to provide the volunteer
 46 service.

47 Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 815 Powers of Attorney
SPONSOR(S): Harrison
TIED BILLS: None IDEN./SIM. BILLS: SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn <i>W</i>	Bond <i>MB</i>
2) Judiciary Committee			

SUMMARY ANALYSIS

A power of attorney is a legal document in which a principal authorizes a person or entity (the agent or attorney-in-fact) to act on his or her behalf. There are three basic types of power of attorney: general power of attorney, which ceases when the principal becomes incapacitated; durable power of attorney, which continues once the person becomes incapacitated; and springing or contingent power of attorney, which power of attorney becomes effective upon the occurrence of a specified event.

The bill is a comprehensive re-write of the statutes that regulate powers of attorney in the state of Florida based in large part on the Uniform Power of Attorney Act. The bill provides:

- All powers of attorney become effective upon execution, with the exception of powers of attorney based on military deployment.
- All powers of attorney must be signed by the principal and witnessed and signed by two people and also notarized.
- A power of attorney executed in another state is valid in Florida if the power of attorney complied with the laws of the state of execution.
- That it applies to all powers of attorney whether they were created on, before or after the effective date of October 1, 2011.
- When a power of attorney and the authority of an agent terminate.
- That only a qualified agent may receive compensation.
- When a third party may rely on power of attorney and the notice requirement for termination or suspension of power of attorney.
- What a third party may request from an agent in order to verify power of attorney.
- That a third person must accept or reject a power of attorney within a reasonable time.
- How a notice may be delivered to a third person regarding termination or suspension of the power of attorney.
- That a power of attorney must expressly provide what an agent can and cannot do and may not include a general provision granting the agent broad authority.
- That additional signatures or initials of the principal are required to exercise authority in certain areas.
- The duties and liabilities of an agent.
- That a principal may appoint two or more agents and that they may act independently and exercise full authority.
- That the principal may designate successor agents.
- Who may file a petition for judicial relief regarding a power of attorney.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Power of Attorney

A power of attorney is a legal document in which the client (the principal) authorizes a person or entity (the agent or attorney-in-fact)¹ to act on his or her behalf. What authority is granted depends on the specific language of the power of attorney. A person giving a power of attorney may provide very broad authority or may limit the authority to certain specific acts.

A power of attorney may be limited or general. A limited power of attorney may give the person acting on the power of attorney the ability to do only one function. An example would be a person giving power of attorney to another to sell a house or a car. The power of attorney would then terminate after the function was complete.

There are typically three general types of power of attorney:

- General power of attorney delegates to the agent the authority to act on behalf of the principal regarding specific acts on behalf of the principal. This power of attorney expires automatically upon the principal becoming mentally ill or otherwise incapacitated.²
- Durable power of attorney delegates specific types of powers, and is immediately effective and exercisable upon the date of execution. Durable power of attorney remains in effect if the principal subsequently becomes incapacitated, but expires immediately once the principal dies, is adjudicated legally incapacitated, or revokes the power of attorney.
- Contingent or springing power of attorney delegates specific types of powers but is not exercisable until the occurrence of a specified time or specified event. Until the specified time or event occurs, the contingent power of attorney is dormant and ineffective, and the principal retains sole control over his or her property and is able to exercise other rights.³

Uniform Power of Attorney Act

In 2006, the Uniform Law Commission of the National Conference of Commissioners on Uniform Laws completed a Uniform Power of Attorney Act (UPOAA). The catalyst for UPOAA was a national study which revealed a growing divergence in state power of attorney legislation. Since its completion, nine states and one territory have adopted the UPOAA.⁴ The goal of the UPOAA is to promote uniformity and portability of power of attorney across state lines.

Durable Power of Attorney in Florida

Durable power of attorney is recognized and regulated in Florida pursuant to s. 709.08, F.S. The statutory requirements include that:

- The durable power of attorney must be in writing:
- Executed with same formalities required by Florida law;⁵

¹ Chapter 709, F.S., uses the term "attorney-in-fact" to describe a person granted authority pursuant to a power of attorney. This bill uses the term "agent" to describe a person granted authority pursuant to a power of attorney.

² General power of attorney is the default power of attorney in the state.

³ Section 709.08(1), F.S., provides that a durable power of attorney may be effective upon a principal's incapacity.

⁴ See <http://www.nccusl.org/Act.aspx?title=Power%20of%20Attorney> for information regarding the UPOAA. Nine states have adopted the act and four states have proposed legislation to adopt the act this year. (Last visited March 11, 2011).

⁵ Section 689.01, F.S., requires the document to be signed by the person conveying, two subscribing witnesses and signed by the person receiving.

- Must contain the words, 'This durable power of attorney is not affected by subsequent incapacity of the principal except as provided in 709.08, Florida Statutes,' or similar words.⁶

The durable power of attorney is exercisable at the date of execution unless the power of attorney is conditioned on the principal's lack of capacity to manage property.⁷

Pursuant to s. 709.08(2), F.S., a natural person, 18 years or older and of sound mind may serve as an agent. A financial institution with trust powers, having a place of business in this state and authorized to conduct trust business in the state may also serve as an agent.⁸ A not-for profit corporation may also serve as an agent.⁹

The agent may exercise the authority granted pursuant to the power of attorney until:

- The principal dies;
- Revokes the power; or
- A court determines that the principal is totally or partially incapacitated unless the court determines that certain authority granted by the power of attorney is to remain exercisable by the agent.¹⁰

If a person or entity initiates proceedings in any court to determine the principal's capacity, the power of attorney is suspended pending the outcome of the proceedings.¹¹

Effect of the Bill: Scope

The bill repeals ss. 709.01, 709.015, 709.08, and 709.11, F.S., and divides ch. 709, F.S., into two parts; Part I entitled "Powers of Appointment," which consists of current ss. 709.02-709.07, F.S., and Part II entitled "Powers of Attorney," which consists of ss. 709.2101-709.2402, F.S., which are created by the bill.

The bill is substantially based on the UPOAA with some modifications.

The bill creates s. 709.2102, F.S., which provides definitions for the act.

The bill creates s. 709.2103, F.S., which provides that "this part applies to all powers of attorney" created by an individual unless the power is:

- 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 government purpose; or
- 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.

⁶ See s. 709.08(1), F.S.

⁷ As defined in s. 744.102(12)(a), F.S., "To 'manage property' means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income." The durable power of attorney becomes exercisable upon the delivery of affidavits provided in 709.08(4)(c) and (d), F.S. This is referred to as springing power of attorney.

⁸ As defined in ch. 655, F.S., and s. 655.005(1)(h), F.S., "financial institution" means a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, or credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq.

⁹ Provided that the charity has been organized for charitable or religious purposes and has been appointed a court guardian prior to January 1, 1996 and is tax exempt under 26 U.S.C. s. 501(c)(3).

¹⁰ Section 709.08(3)(b), F.S.

¹¹ Section 709.08(3)(c)1., F.S.

The bill creates s. 709.2104, F.S., which provides that a power of attorney is durable only if the instrument contains the words "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in Chapter 709, Florida Statutes," or similar words. If the power of attorney does not contain this phrase or similar language the power of attorney will be presumed to be general. This section maintains that general power of attorney is the default power of attorney in the state of Florida.

The bill creates s. 709.2105, F.S., which provides the qualifications for an agent to be a natural person 18 years or older or a financial institution. The section also requires a power of attorney to be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public.

The bill creates s. 709.2106, F.S., which provides that a power of attorney executed on or after October 1, 2011, is valid if its execution complies with the requirements of s. 709.2103, F.S. The bill also provides that a power of attorney executed prior to October 1, 2011 is valid if the execution complied with the laws of this state at the time of execution. The bill provides that a power of attorney executed in another state is valid even if it does not comply with the execution requirements of Florida as long as the power of attorney complied with the laws of the state of execution.

The bill creates s. 709.2107, F.S., which provides that the meaning and effectiveness of the power of attorney is governed by this part if it is used in Florida or states that is to be governed by the laws of Florida.

The bill creates s. 709.2108, F.S., which provides that a power of attorney, with the exception of a springing power of attorney created prior to October 1, 2011, is exercisable when executed. The bill also provides that a power of attorney is not effective if it is conditioned on a future date or upon the occurrence of a future event or contingency. This section would not allow any springing or contingent powers of attorney after the effective date of the bill. The bill retains the exception for military deployment.

The bill creates s. 709.2402, F.S., which provides that this act applies to powers of attorney created before, on, or after October 1, 2011, and to the acts of an agent occurring on or after that date, but that this act does not apply to the acts of an agent that occurred prior to October 1, 2011.

The bill creates s. 709.2301, F.S., which provides that the common law of agency and principles of equity supplement these new provisions except as modified by the bill and other state law.

Effect of Bill: Acceptance of Appointment

The bill creates 709.2114, F.S., which provides the methods by which an agent may accept appointment. An agent may accept appointment by exercising authority as an agent or by any other assertion or conduct. The section provides that an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

Effect of Bill: Termination of Power of Attorney/Authority of Agent

The bill creates s. 709.2109, F.S., which provides when a power of attorney or agent's authority is suspended or terminated. The bill provides that the power of attorney is suspended or terminated when:

- The principal dies;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;

- The purpose of the power of the attorney is accomplished; or
- An agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority terminates when:

- The agent dies, becomes incapacitated, resigns, or is removed by a court;
- An action is filed for a dissolution or annulment of the agent's marriage to the principal for their legal separation, unless the power of attorney otherwise provides; or
- The power of attorney terminates.

The section also provides, consistent with current law, that if any person initiates judicial proceedings to determine the principal's incapacity or for the appointment of a guardian, then the authority granted pursuant to the power of attorney is suspended. The section also provides that the termination or suspension of an agent's authority or of power of attorney is not effective as to an agent who without knowledge acts in good faith under the power of attorney.

The bill creates s. 709.2110, F.S., which provides that a revocation of attorney must be done by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal.

Effect of Bill: Qualified Agent

The bill creates s. 709.2112, F.S., which provides that a qualified agent is entitled to reimbursement of expenses unless the power of attorney provides otherwise. The section defines a qualified agent as:

an agent who is the spouse of the principal, an heir of the principal within the meaning of s. 732.103, a financial institution that has trust powers and a place of business in this state, an attorney or certified public accountant who is licensed in this state, or a natural person who has never been an agent for more than three principals at the same time.

The section provides that only a qualified agent may receive compensation.

Third Party- Liability and Notice

Pursuant to current Florida law, a third party may rely upon the durable power of attorney until the third party has received notice.¹² A third party may also require the agent to execute the affidavit that is provided in s. 709.08(4)(c), F.S.,¹³ prior to accepting the agent's power of attorney.

Section 709.08(4)(g), F.S., provides that a third party who acts pursuant to the directions of the agent and relies on the authority granted in the power of attorney is to be held harmless by the principal, the principal's estate, beneficiaries or joint owners. This only applies if the acts happened prior to the third party receiving notice of the termination.

Section 709.08(5)(a), F.S., provides that notice is not effective until served upon the agent or any third persons relying upon a durable power of attorney. The notice must be in writing and served upon the person bound by the notice either through personal delivery or through a mail service that requires a signed receipt. In the case of a financial institution, a third party must be given 14 calendar days after service to act upon the notice.¹⁴

¹² Section 709.08(4)(a), F.S.

¹³ Section 709.08(4)(a), F.S.

¹⁴ Section 709.08(5)(b), F.S.

Effect of the Bill: Third Party Acceptance and Reliance

The bill creates s. 709.2119, F.S., which outlines third party acceptance and reliance on an agent's power of attorney. The section provides that:

A third person who in good faith accepts a power of attorney that appears to be executed in accordance with this part may rely upon the power of attorney and may enforce an authorized transaction against the principal's property as if:

1. The power of attorney were genuine, valid, and still in effect; and
2. The agent's authority were genuine, valid, and still in effect; and
3. The authority of the officer executing for or on behalf of a financial institution that has trust powers and acting as agent is genuine, valid, and still in effect.

The section also provides that a third person does not accept a power of attorney in good faith if the third person has notice that:

- The power of attorney is void, invalid, or terminated; or
- The purported agent's authority is void, invalid, suspended or terminated.

The section also provides that a third person may require an agent to execute an affidavit. The section provides a statutory form that may be used as the affidavit. The section provides that a third person may request and without further investigation rely on:

- A verified English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English;
- An opinion of counsel as to any matter of law concerning the power of attorney if the third party making the request provides in a writing or other record the reason for the request; or
- The form affidavit.

The section also provides that any third person is held harmless from any loss suffered before the receipt of written notice as provided in s. 709.2121, F.S.

The section also provides that a third person must accept or reject the power of attorney within a reasonable time and if they choose to reject the power of attorney they must state in writing the reason for the rejection. The section provides that a third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;
- A timely request by the third person for an affidavit, English translation, or opinion of counsel is refused by the agent;
- The third person believes in good faith that the power is not valid or that the agent does not have the authority to perform the act requested; or
- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person for or with the agent.

The section provides that a third person who violates this section is subject to a court order mandating that the power of attorney be honored and is liable for damages including attorneys fees and costs.

Effect of the Bill: Notice

The bill creates s. 709.212, F.S., regarding notice to the agent and to third parties. The section provides that a notice including:

- Notice of revocation;
- Notice of partial or complete termination by adjudication of incapacity;
- The occurrence of an event referenced in the power of attorney;
- Notice of death of the principal; or
- Notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian.

is not effective until written notice is provided to the agent or any third party persons relying upon a power of attorney. Permissible ways in which to deliver the notice include first-class mail, personal delivery, delivery to the person's last known address, or a properly delivered fax or other electronic message. The section also requires that a notice to a financial institution contain the name, address, and the last four digits of the principal's tax ID and be directed to a bank officer. The notice is effective when given, except the notice upon a financial institution, brokerage company, or title company is not effective until five days after it is received.

Powers and Limitations of the Agent

Section 709.08(7)(a), F.S., provides that an agent, except as limited by the power of attorney or by statute, has the authority to perform every act authorized and specifically enumerated in the durable power of attorney. These acts include, executing stock powers including delegating to a stock broker or a transfer agent the ability to register any stocks or bonds, and conveying and mortgaging homestead property.¹⁵ An agent may not perform the following duties:

- Perform duties under a contract that requires the exercise of personal services of the principal;
- Make any affidavit as to the personal knowledge of the principal;
- Vote in any public election on behalf of the principal;
- Execute or revoke any will or codicil for the principal;
- Create, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the principal; or
- Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.¹⁶

If specifically granted in the power of attorney, the agent may make all health care decisions for the principal.¹⁷

Effect of Bill: Authority of Agent

The bill creates s. 709.2201, F.S., which outlines the authority of an agent. The section provides that an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that grant of specific authority. The section provides that:

General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, is not an express grant of specific authority and does not grant authority to the agent.

¹⁵ Section 709.08(7)(a)2., F.S., requires the joinder of a spouse in order to convey or mortgage homestead property.

¹⁶ Section 709.08(7)(b), F.S.

¹⁷ Section 709.08(7)(c), F.S.

Pursuant to the bill, a power of attorney must specifically provide what the agent can and cannot do under the instrument. The requirement also prohibits incorporation by reference in the power of attorney.¹⁸ The section also provides that an agent may convey or mortgage homestead property, but if the principal is married the agent would need the joinder of the spouse.

The bill also provides that an agent may not:

- Perform duties under a contract that requires the exercise of personal services of the principal;
- Make any affidavit as to the personal knowledge of the principal;
- Vote in any public election on behalf of the principal;
- Execute or revoke any will or codicil for the principal; or
- Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

The bill provides that the authority granted to the agent by the principal is exercisable with respect to property that the principal owned when the instrument was executed and property acquired afterward, whether or not the property is located in the state. The bill also provides that the actions performed by the agent, pursuant to the power of attorney, have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had performed the act.

The bill creates s. 709.2202, F.S, which outlines agent authority that requires an additional signature from the principal in order for the agent to act unless the exercise is prohibited by another agreement or instrument. These include:

- Creation of an inter vivos trust;
- With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;
- Make a gift (subject to further restrictions involving gifts to the agent's or agent's relatives, gifts over the IRS tax level);
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- Disclaim property and powers of appointment.

The bill provides that this section does not apply to a power of attorney executed prior to October 1, 2011.

Effect of Bill: Banking and Investment Activities

The bill creates s. 709.2208, F.S., which provides that a power of attorney that includes the statement that the has "authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes," or "authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes" grants general authority to the agent with respect to banking transactions and investment transactions as enumerated in the section without specific enumeration in the power of the attorney. The section also defines investment instruments for the purposes of this section.

The bill creates s. 709.2301, F.S., which provides that this part does not supersede any other law applicable to financial institutions or other entities, and that law controls if inconsistent with this part.

¹⁸ There are two exceptions to this in the bill involving banking and investment transactions which refer to specific authority located in statute.

Standard of Care of the Agent

Section 709.08(8), F.S., provides that an agent is a fiduciary who must observe the standards of care applicable to trustees.¹⁹

The agent is also not liable to third parties for any act pursuant to the durable power of attorney if the act was authorized at the time. If the exercise of the power is improper, the agent is liable to the interested person.

Effect of Bill: Duties and Liabilities of an Agent

The bill creates s. 709.2114, F.S., which provides an agent's duties including that the agent:

- May not act contrary to the principal's reasonable expectations actually known to the agent;
- Must act in good faith;
- May not act in a manner that is contrary to the principal's best interest, except as provided in paragraph (2)(d)²⁰ and s. 709.2202;²¹
- To the extent actually known by the agent, must attempt to preserve the principal's estate plan if preserving the plan is consistent with the principal's best interest based on all relevant factors;²²
- May not delegate authority to a third person except as provided in s. 518.112, F.S.;²³
- Must keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and
- Must create and maintain an accurate inventory each time the agent accesses the principal's safe-deposit box, if the power of attorney authorizes the agent to access the box.

The section also provides that unless otherwise provided in the power of attorney the agent must:

- Act loyally for the sole benefit of the principal;
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- Act with care, competence, and diligence ordinarily exercised by agents in similar circumstances; and
- Cooperate with a person who has authority to make health care decisions for the principal in order to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

The section also provides that an agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

The bill creates s. 709.2115, F.S., which provides that a power of attorney may provides that the agent is not liable for any acts or decisions made by the agent in good faith and under the power of attorney except to the extent the provision:

- Relieves the agent of liability for breach of a duty committed dishonestly, with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

¹⁹ Section 709.08(8), F.S. refers to the duties of a trustee as described in s. 736.0901, F.S.

²⁰ This paragraph relates to cooperating with the person who has authority to make health care decisions for the principal.

²¹ This section refers to power of attorney that require separate signed enumeration including amending trusts, creating interests in the principal's property, and giving of gifts of the principal's property.

²² Factors include the value and nature of the principal's property, the principal's foreseeable obligations and need for maintenance, minimization of taxes, eligibility of statutory or regulatory benefit, and the principal's personal history of making or the joining of making of gifts.

²³ This refers to the prudent investor rule.

Multiple Agents: Joint Action Required

If a principal authorizes more than one agent, unless the durable power of attorney provides otherwise, concurrence of both is required on all acts in the exercise of power.²⁴ If three or more agents are designated than a majority agreement is needed.²⁵ An agent is also not liable for the acts of the other agents if that agent does not concur with the actions or did join in the action but expressed dissent in writing.²⁶ An agent who accepts appointment is liable for failure to participate in the administration of assets or for the failure to attempt to prevent a breach of fiduciary duty.²⁷

If one or more of the named agents dies, unless expressly provided otherwise in the durable power of attorney, the other agents may continue to exercise the authority.²⁸

Effect of Bill: Designation of Two or more Agents

The bill creates s. 709.2111, F.S., which provides that a principal may designate two or more persons to act as co-agents or designate successor agents. The section provides that:

Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.

The section also provides that an agent is not liable for a co-agent who breaches his or her fiduciary duty if he or she did not participate or conceal the breach. The section also provides that if the agent has actual knowledge of the fiduciary breach he or she must act reasonably to safeguard the principal's best interest. Notice to the principal satisfies the reasonable requirement.

Effect of Bill: Judicial Relief

The bill creates s. 709.2116, F.S., which provides judicial relief and conflict of interest relief. Pursuant to this section, a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant appropriate relief. A petition for judicial relief may be made by:

- A principal;
- An agent;
- A guardian, conservator, trustee or other fiduciary acting for the principal or the principal's estate;
- A health care decision maker;
- A governmental agency having regulatory authority to protect the principal's welfare;
- A person who is asked to honor the power of attorney; or
- Any other interested person who demonstrates that they are interested in the principal's welfare and have a good faith belief that intervention by the court is necessary.

The bill provides that the court may award taxable costs and attorneys fees as in chancery actions.

B. SECTION DIRECTORY:

Section 1 gives direction to the Division of Statutory Revision.

Section 2 gives direction to the Division of Statutory Revision.

²⁴ Section 709.08(9)(a), F.S.

²⁵ Section 709.08(9)(b), F.S.

²⁶ Section 709.08(9)(c), F.S.

²⁷ Section 709.08(9)(d), F.S.

²⁸ Section 709.08(10), F.S.

Section 3 creates s. 709.2101, F.S., regarding a short title.

Section 4 creates s. 709.2102, F.S., providing definitions.

Section 5 creates s. 709.2103, F.S., providing for applicability of Part Two of ch. 709, F.S.

Section 6 creates s. 709.2104, F.S., regarding durable power of attorney.

Section 7 creates s. 709.2105, F.S., regarding qualifications of an agent and execution of power of attorney.

Section 8 creates s. 709.2106, F.S., regarding validity of power of attorney.

Section 9 creates s. 709.2107, F.S., regarding meaning and effectiveness of power of attorney.

Section 10 creates s. 709.2108, F.S., regarding when power of attorney is effective.

Section 11 creates s. 709.2109, F.S., regarding termination of power of attorney and agent's authority.

Section 12 creates s. 709.2110, F.S., regarding revocation of power of attorney.

Section 13 creates s. 709.2111, F.S., regarding co-agents and successor agents.

Section 14 creates s. 709.2112, F.S., regarding reimbursement and compensation of an agent.

Section 15 creates s. 709.2113, F.S., regarding agent's acceptance of appointment.

Section 16 creates s. 709.2114, F.S., regarding agent's duties.

Section 17 creates s. 709.2115, F.S., regarding exoneration of an agent.

Section 18 creates s. 709.2116, F.S., regarding judicial relief and conflicts of interest.

Section 19 creates s. 709.2117, F.S., regarding agent's liability.

Section 20 creates s. 709.2118, F.S., regarding agent's resignation.

Section 21 creates s. 709.2119, F.S., regarding acceptance and reliance upon power of attorney.

Section 22 creates s. 709.2120, F.S., regarding refusal to accept power of attorney.

Section 23 creates s. 709.2121, F.S., regarding notice.

Section 24 creates s. 709.2201, F.S., regarding authority of an agent.

Section 25 creates s. 709.2202, F.S., regarding authority that requires separate singed enumeration.

Section 26 creates s. 709.2208, F.S., regarding banks and other financial institutions.

Section 27 creates s. 709.2301, F.S., regarding principles of law and equity.

Section 28 creates s. 709.2302, F.S., regarding laws applicable to financial institutions.

Section 29 creates s. 709.2303, F.S., regarding remedies under other laws.

Section 30 creates s. 709.2401, F.S., regarding electronic signatures.

Section 31 creates s. 709.2402, F.S., regarding effects on existing power of attorney.

Section 32 amends s. 736.0602, F.S., regarding a cross reference to power of attorney.

Section 33 repeals ss. 709.01, 709.015, 709.08, and 709.11, F.S.

Section 34 provides an effective date of October 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

On line 208 of the bill, the reference to s. 709.2103 should be changed to reference s. 709.2105.

On line 1012 of the bill, the reference to s. 709.2206 should be changed to reference s. 709.2202.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to powers of attorney; providing
 3 directives to the Division of Statutory Revision; creating
 4 s. 709.2101, F.S.; providing a short title; creating s.
 5 709.2102, F.S.; providing definitions; creating s.
 6 709.2103, F.S.; providing applicability; providing
 7 exceptions; creating s. 709.2104, F.S.; providing for a
 8 durable power of attorney; creating s. 709.2105, F.S.;
 9 specifying the qualifications for an agent; providing
 10 requirements for the execution of a power of attorney;
 11 creating s. 709.2106, F.S.; providing for the validity of
 12 powers of attorney created by a certain date or in another
 13 jurisdiction; providing for the validity of a military
 14 power of attorney; providing for the validity of a
 15 photocopy or electronic copy of a power of attorney;
 16 creating s. 709.2107, F.S.; providing for the meaning and
 17 effectiveness of a power of attorney; creating s.
 18 709.2108, F.S.; specifying when a power of attorney is
 19 effective; providing limitations with respect to a future
 20 power of attorney; creating s. 709.2109, F.S.; providing
 21 for the termination or suspension of a power of attorney
 22 or an agent's authority; creating s. 709.2110, F.S.;
 23 providing for the revocation of a power of attorney;
 24 creating s. 709.2111, F.S.; providing for the designation
 25 of co-agents and successor agents; specifying the
 26 responsibility of a successor agent for a predecessor
 27 agent; authorizing a co-agent to delegate certain banking
 28 transaction to a co-agent; creating s. 709.2112, F.S.;

29 providing for the reimbursement and compensation of
 30 agents; creating s. 709.2113, F.S.; providing for the
 31 agent's acceptance of appointment; creating s. 709.2114,
 32 F.S.; providing for an agent's duties; limiting an agent's
 33 liability, absent a breach of duty; requiring that an
 34 agent make certain disclosures upon order of a court, upon
 35 the death of the principal, or under certain other
 36 circumstances; creating s. 709.2115, F.S.; providing for
 37 the exoneration of an agent; providing exceptions;
 38 creating s. 709.2116, F.S.; providing for judicial relief;
 39 authorizing the award of attorney's fees and costs;
 40 providing for a judicial challenge to an agent's exercise
 41 of power based on a conflict of interest; specifying the
 42 burden of proof required to overcome that challenge;
 43 creating s. 709.2117, F.S.; providing for an agent's
 44 liability; creating s. 709.2118, F.S.; providing for an
 45 agent's resignation; creating s. 709.2119, F.S.; providing
 46 for the acceptance of and reliance upon a power of
 47 attorney; authorizing a third party to require an
 48 affidavit; providing for the validity of acts taken on
 49 behalf of a principal who is reported as missing by a
 50 branch of the United States Armed Forces; providing a
 51 restriction on the conveyance of homestead property held
 52 by such a principal; creating s. 709.2120, F.S.; providing
 53 for liability if a third person refuses to accept a power
 54 of attorney under certain circumstances; providing for an
 55 award of damages and attorney's fees and costs; creating
 56 s. 709.2121, F.S.; requiring that notice of certain events

57 | be provided to an agent or other third person; specifying
 58 | the form of the notice and when it is effective; creating
 59 | s. 709.2201, F.S.; providing for the authority of an
 60 | agent; providing limitations; providing that an agent's
 61 | authority extends to property later acquired by the
 62 | principal; creating s. 709.2202, F.S.; specifying that
 63 | certain authority requires separate signed enumeration;
 64 | restricting the amount of certain gifts made by an agent;
 65 | specifying certain acts that do not require specific
 66 | authority if the agent is authorized to conduct banking
 67 | transactions; limiting the application of such provision;
 68 | creating s. 709.2208, F.S.; providing for authority to
 69 | conduct banking and security transactions; creating s.
 70 | 709.2301, F.S.; specifying the role of common law;
 71 | creating s. 709.2302, F.S.; providing for the preemption
 72 | of laws relating to financial institutions; creating s.
 73 | 709.2303, F.S.; providing for the recognition of other
 74 | remedies; creating s. 709.2401, F.S.; specifying the
 75 | relationship of the act to federal law regulating
 76 | electronic signatures; creating s. 709.2402, F.S.;
 77 | providing for powers of attorney executed before the
 78 | effective date of the act; amending s. 736.0602, F.S.;
 79 | conforming a cross-reference; repealing s. 709.01, F.S.,
 80 | relating to the authority of an agent when the principal
 81 | is dead; repealing s. 709.015, F.S., relating to the
 82 | authority of an agent when the principal is missing;
 83 | repealing s. 709.08, F.S., relating to durable powers of
 84 | attorney; repealing s. 709.11, F.S., relating to a

85 deployment-contingent power of attorney; providing an
86 effective date.

87
88 Be It Enacted by the Legislature of the State of Florida:

89
90 Section 1. The Division of Statutory Revision is requested
91 to create part I of chapter 709, Florida Statutes, consisting of
92 ss. 709.02-709.07, entitled "POWERS OF APPOINTMENT."

93 Section 2. The Division of Statutory Revision is requested
94 to create part II of chapter 709, Florida Statutes, consisting
95 of ss. 709.2101-709.2402, entitled "POWERS OF ATTORNEY."

96 Section 3. Section 709.2101, Florida Statutes, is created
97 to read:

98 709.2101 Short title.—This part may be cited as the
99 "Florida Power of Attorney Act."

100 Section 4. Section 709.2102, Florida Statutes, is created
101 to read:

102 709.2102 Definitions.—As used in this part, the term:

103 (1) "Agent" means a person granted authority to act for a
104 principal under a power of attorney, whether denominated an
105 agent, attorney in fact, or otherwise. The term includes an
106 original agent, co-agent, and successor agent.

107 (2) "Durable" means, with respect to a power of attorney,
108 not terminated by the principal's incapacity.

109 (3) "Electronic" means technology having electrical,
110 digital, magnetic, wireless, optical, electromagnetic, or
111 similar capabilities.

112 (4) "Financial institution" has the same meaning as in s.

113 655.005.

114 (5) "Incapacity" means the inability of an individual to
 115 take those actions necessary to obtain, administer, and dispose
 116 of real and personal property, intangible property, business
 117 property, benefits, and income.

118 (6) "Knowledge" means a person has actual knowledge of the
 119 fact, has received a notice or notification of the fact, or has
 120 reason to know the fact from all other facts and circumstances
 121 known to the person at the time in question. An organization
 122 that conducts activities through employees has notice or
 123 knowledge of a fact involving a power of attorney only from the
 124 time information was received by an employee having
 125 responsibility to act on matters involving the power of
 126 attorney, or would have had if brought to the employee's
 127 attention if the organization had exercised reasonable
 128 diligence. An organization exercises reasonable diligence if the
 129 organization maintains reasonable routines for communicating
 130 significant information to the employee having responsibility to
 131 act on matters involving the power of attorney and there is
 132 reasonable compliance with the routines. Reasonable diligence
 133 does not require an employee to communicate information unless
 134 the communication is part of the individual's regular duties or
 135 the individual knows that a matter involving the power of
 136 attorney would be materially affected by the information.

137 (7) "Power of attorney" means a writing that grants
 138 authority to an agent to act in the place of the principal,
 139 whether or not the term is used in that writing.

140 (8) "Presently exercisable general power of appointment"

141 means, with respect to property or a property interest subject
 142 to a power of appointment, power exercisable at the time in
 143 question to vest absolute ownership in the principal
 144 individually, the principal's estate, the principal's creditors,
 145 or the creditors of the principal's estate. The term includes a
 146 power of appointment not exercisable until the occurrence of a
 147 specified event, the satisfaction of an ascertainable standard,
 148 or the passage of a specified period only after the occurrence
 149 of the specified event, the satisfaction of the ascertainable
 150 standard, or the passage of the specified period. The term does
 151 not include a power exercisable in a fiduciary capacity or only
 152 by will.

153 (9) "Principal" means an individual who grants authority
 154 to an agent in a power of attorney.

155 (10) "Property" means anything that may be the subject of
 156 ownership, whether real or personal, legal or equitable, or any
 157 interest or right therein.

158 (11) "Record" means information that is inscribed on a
 159 tangible medium or that is stored in an electronic or other
 160 medium and is retrievable in perceivable form.

161 (12) "Sign" means having present intent to authenticate or
 162 adopt a record to:

163 (a) Execute or adopt a tangible symbol; or

164 (b) Attach to, or logically associate with the record an
 165 electronic sound, symbol, or process.

166 (13) "Third person" means any person other than the
 167 principal, or the agent in the agent's capacity as agent.

168 Section 5. Section 709.2103, Florida Statutes, is created

HB 815

2011

169 to read:

170 709.2103 Applicability.—This part applies to all powers of
 171 attorney except:

172 (1) A proxy or other delegation to exercise voting rights
 173 or management rights with respect to an entity;

174 (2) A power created on a form prescribed by a government
 175 or governmental subdivision, agency, or instrumentality for a
 176 governmental purpose;

177 (3) A power to the extent it is coupled with an interest
 178 in the subject of the power, including a power given to or for
 179 the benefit of a creditor in connection with a credit
 180 transaction; and

181 (4) A power created by a person other than an individual.

182 Section 6. Section 709.2104, Florida Statutes, is created
 183 to read:

184 709.2104 Durable power of attorney.—Except as otherwise
 185 provided under this part, a power of attorney is durable if it
 186 contains the words: "This durable power of attorney is not
 187 terminated by subsequent incapacity of the principal except as
 188 provided in chapter 709, Florida Statutes," or similar words
 189 that show the principal's intent that the authority conferred is
 190 exercisable notwithstanding the principal's subsequent
 191 incapacity.

192 Section 7. Section 709.2105, Florida Statutes, is created
 193 to read:

194 709.2105 Qualifications of agent; execution of power of
 195 attorney.—

196 (1) The agent must be a natural person who is 18 years of

197 age or older or a financial institution that has trust powers,
 198 has a place of business in this state, and is authorized to
 199 conduct trust business in this state.

200 (2) A power of attorney must be signed by the principal
 201 and by two subscribing witnesses and be acknowledged by the
 202 principal before a notary public or as otherwise provided in s.
 203 695.03.

204 Section 8. Section 709.2106, Florida Statutes, is created
 205 to read:

206 709.2106 Validity of power of attorney.-

207 (1) A power of attorney executed on or after October 1,
 208 2011, is valid if its execution complies with s. 709.2103.

209 (2) A power of attorney executed before October 1, 2011,
 210 is valid if its execution complied with the law of this state at
 211 the time of execution.

212 (3) A power of attorney executed in another state which
 213 does not comply with the execution requirements of this part is
 214 valid in this state if, when the power of attorney was executed,
 215 the power of attorney and its execution complied with the law of
 216 the state of execution. A third person who is requested to
 217 accept a power of attorney that is valid in this state solely
 218 because of this subsection may in good faith request, and rely
 219 upon, without further investigation, an opinion of counsel as to
 220 any matter of law concerning the power of attorney, including
 221 the due execution and validity of the power of attorney. An
 222 opinion of counsel requested under this subsection must be
 223 provided at the principal's expense. A third person may accept a
 224 power of attorney that is valid in this state solely because of

225 this subsection if the agent does not provide the requested
 226 opinion of counsel, and in such case, a third person has no
 227 liability for refusing to accept the power of attorney. This
 228 subsection does not affect any other rights of a third person
 229 who is requested to accept the power of attorney under this
 230 part, or any other provisions of applicable law.

231 (4) A military power of attorney is valid if it is
 232 executed in accordance with 10 U.S.C. s. 1044b, as amended. A
 233 deployment-contingent power of attorney may be signed in
 234 advance, is effective upon the deployment of the principal, and
 235 shall be afforded full force and effect by the courts of this
 236 state.

237 (5) Except as otherwise provided in the power of attorney,
 238 a photocopy or electronically transmitted copy of an original
 239 power of attorney has the same effect as the original.

240 Section 9. Section 709.2107, Florida Statutes, is created
 241 to read:

242 709.2107 Meaning and effectiveness of power of attorney.—
 243 The meaning and effectiveness of a power of attorney is governed
 244 by this part if the power of attorney:

245 (1) Is used in this state; or

246 (2) States that it is to be governed by the laws of this
 247 state.

248 Section 10. Section 709.2108, Florida Statutes, is created
 249 to read:

250 709.2108 When power of attorney is effective.—

251 (1) Except as provided in this section, a power of
 252 attorney is exercisable when executed.

253 (2) If a power of attorney executed before October 1,
 254 2011, is conditioned on the principal's lack of capacity to
 255 manage property as defined in s. 744.102(12)(a), and the power
 256 of attorney has not become exercisable before that date, the
 257 power of attorney is exercisable upon the delivery of the
 258 affidavit of a physician who has primary responsibility for the
 259 treatment and care of the principal and who is licensed to
 260 practice medicine pursuant to chapter 458 or chapter 459 as of
 261 the date of the affidavit. The affidavit must state where the
 262 physician is licensed to practice medicine, that the physician
 263 is the primary physician who has responsibility for the
 264 treatment and care of the principal, and that the physician
 265 believes that the principal lacks the capacity to manage
 266 property.

267 (3) Except as provided in subsection (2) and section
 268 709.2106(4), a power of attorney is ineffective if the power of
 269 attorney provides that it is to become effective at a future
 270 date or upon the occurrence of a future event or contingency.

271 Section 11. Section 709.2109, Florida Statutes, is created
 272 to read:

273 709.2109 Termination or suspension of power of attorney or
 274 agent's authority.-

275 (1) A power of attorney terminates when:

276 (a) The principal dies;

277 (b) The principal becomes incapacitated, if the power of
 278 attorney is not durable;

279 (c) The principal is adjudicated totally or partially
 280 incapacitated by a court, unless the court determines that

281 certain authority granted by the power of attorney is to be
 282 exercisable by the agent;

283 (d) The principal revokes the power of attorney;

284 (e) The power of attorney provides that it terminates;

285 (f) The purpose of the power of attorney is accomplished;

286 or

287 (g) The agent's authority terminates and the power of
 288 attorney does not provide for another agent to act under the
 289 power of attorney.

290 (2) An agent's authority is exercisable until the
 291 authority terminates. An agent's authority terminates when:

292 (a) The agent dies, becomes incapacitated, resigns, or is
 293 removed by a court;

294 (b) An action is filed for the dissolution or annulment of
 295 the agent's marriage to the principal or for their legal
 296 separation, unless the power of attorney otherwise provides; or

297 (c) The power of attorney terminates.

298 (3) If any person initiates judicial proceedings to
 299 determine the principal's incapacity or for the appointment of a
 300 guardian advocate, the authority granted under the power of
 301 attorney is suspended until the petition is dismissed or
 302 withdrawn or the court enters an order authorizing the agent to
 303 exercise one or more powers granted under the power of attorney.

304 (a) If an emergency arises after initiation of proceedings
 305 to determine incapacity and before adjudication regarding the
 306 principal's capacity, the agent may petition the court in which
 307 the proceeding is pending for authorization to exercise a power
 308 granted under the power of attorney. The petition must set forth

309 the nature of the emergency, the property or matter involved,
 310 and the power to be exercised by the agent.

311 (b) Notwithstanding the provisions of this section, unless
 312 otherwise ordered by the court, a proceeding to determine
 313 incapacity does not affect the authority of the agent to make
 314 health care decisions for the principal, including, but not
 315 limited to, those provided in chapter 765. If the principal has
 316 executed a health care advance directive designating a health
 317 care surrogate, the terms of the directive control if the
 318 directive and the power of attorney are in conflict unless the
 319 power of attorney is later executed and expressly states
 320 otherwise.

321 (4) Termination or suspension of an agent's authority or
 322 of a power of attorney is not effective as to an agent who,
 323 without knowledge of the termination or suspension, acts in good
 324 faith under the power of attorney. An act so performed, unless
 325 otherwise invalid or unenforceable, binds the principal and the
 326 principal's successors in interest.

327 Section 12. Section 709.2110, Florida Statutes, is created
 328 to read:

329 709.2110 Revocation of power of attorney.-

330 (1) A principal may revoke a power of attorney by
 331 expressing the revocation in a subsequently executed power of
 332 attorney or other writing signed by the principal. The principal
 333 may give notice of the revocation to an agent who has accepted
 334 authority under the revoked power of attorney.

335 (2) Except as provided in subsection (1), the execution of
 336 a power of attorney does not revoke a power of attorney

337 previously executed by the principal.

338 Section 13. Section 709.2111, Florida Statutes, is created
339 to read:

340 709.2111 Co-agents and successor agents.-

341 (1) A principal may designate two or more persons to act
342 as co-agents. Unless the power of attorney otherwise provides,
343 each co-agent may exercise its authority independently.

344 (2) A principal may designate one or more successor agents
345 to act if an agent resigns, dies, becomes incapacitated, is not
346 qualified to serve, or declines to serve. Unless the power of
347 attorney otherwise provides, a successor agent:

348 (a) Has the same authority as that granted to the original
349 agent; and

350 (b) May not act until the predecessor agents have
351 resigned, have died, have become incapacitated, are no longer
352 qualified to serve, or have declined to serve.

353 (3) Except as otherwise provided in the power of attorney
354 and subsection (4), an agent who does not participate in or
355 conceal a breach of fiduciary duty committed by another agent,
356 including a predecessor agent, is not liable for the actions or
357 omissions of the other agent.

358 (4) An agent who has actual knowledge of a breach or
359 imminent breach of fiduciary duty by another agent, including a
360 predecessor agent, must take any action reasonably appropriate
361 in the circumstances to safeguard the principal's best
362 interests. If the agent in good faith believes that the
363 principal is not incapacitated, giving notice to the principal
364 is a sufficient action. An agent who fails to take action as

365 required by this subsection is liable to the principal for the
 366 principal's reasonably foreseeable damages that could have been
 367 avoided if the agent had taken such action.

368 (5) A successor agent does not have a duty to review the
 369 conduct or decisions of a predecessor agent. Except as provided
 370 in subsection (4), a successor agent does not have a duty to
 371 institute any proceeding against a predecessor agent, or to file
 372 any claim against a predecessor agent's estate, for any of the
 373 predecessor agent's actions or omissions as agent.

374 (6) If a power of attorney requires that two or more
 375 persons act together as co-agents, notwithstanding the
 376 requirement that they act together, one or more of the agents
 377 may delegate to a co-agent the authority to conduct banking
 378 transactions as provided in s. 709.2208(1), whether the
 379 authority to conduct banking transactions is specifically
 380 enumerated or incorporated by reference to that section in the
 381 power of attorney.

382 Section 14. Section 709.2112, Florida Statutes, is created
 383 to read:

384 709.2112 Reimbursement and compensation of agent.—

385 (1) Unless the power of attorney otherwise provides, an
 386 agent is entitled to reimbursement of expenses reasonably
 387 incurred on behalf of the principal.

388 (2) Unless the power of attorney otherwise provides, a
 389 qualified agent is entitled to compensation that is reasonable
 390 under the circumstances.

391 (3) Notwithstanding any provision in the power of
 392 attorney, an agent may not be paid compensation unless the agent

393 | is a qualified agent.

394 | (4) For purposes of this section, the term "qualified
 395 | agent" means an agent who is the spouse of the principal, an
 396 | heir of the principal within the meaning of s. 732.103, a
 397 | financial institution that has trust powers and a place of
 398 | business in this state, an attorney or certified public
 399 | accountant who is licensed in this state, or a natural person
 400 | who is a resident of this state and who has never been an agent
 401 | for more than three principals at the same time.

402 | Section 15. Section 709.2113, Florida Statutes, is created
 403 | to read:

404 | 709.2113 Agent's acceptance of appointment.—Except as
 405 | otherwise provided in the power of attorney, a person accepts
 406 | appointment as an agent by exercising authority or performing
 407 | duties as an agent or by any other assertion or conduct
 408 | indicating acceptance. The scope of an agent's acceptance is
 409 | limited to those aspects of the power of attorney for which the
 410 | agent's assertions or conduct reasonably manifests acceptance.

411 | Section 16. Section 709.2114, Florida Statutes, is created
 412 | to read:

413 | 709.2114 Agent's duties.—

414 | (1) An agent is a fiduciary. Notwithstanding the
 415 | provisions in the power of attorney, an agent who has accepted
 416 | appointment:

417 | (a) Must act only within the scope of authority granted in
 418 | the power of attorney. In exercising that authority, the agent:

419 | 1. May not act contrary to the principal's reasonable
 420 | expectations actually known by the agent;

- 421 2. Must act in good faith;
- 422 3. May not act in a manner that is contrary to the
 423 principal's best interest, except as provided in paragraph
 424 (2) (d) and s. 709.2202; and
- 425 4. To the extent actually known by the agent, must attempt
 426 to preserve the principal's estate plan if preserving the plan
 427 is consistent with the principal's best interest based on all
 428 relevant factors, including:
- 429 a. The value and nature of the principal's property;
- 430 b. The principal's foreseeable obligations and need for
 431 maintenance;
- 432 c. Minimization of taxes, including income, estate,
 433 inheritance, generation-skipping transfer, and gift taxes;
- 434 d. Eligibility for a benefit, a program, or assistance
 435 under a statute or rule; and
- 436 e. The principal's personal history of making or joining
 437 in making gifts;
- 438 (b) May not delegate authority to a third person except as
 439 provided in s. 518.112;
- 440 (c) Must keep a record of all receipts, disbursements, and
 441 transactions made on behalf of the principal; and
- 442 (d) Must create and maintain an accurate inventory each
 443 time the agent accesses the principal's safe-deposit box, if the
 444 power of attorney authorizes the agent to access the box.
- 445 (2) Except as otherwise provided in the power of attorney,
 446 an agent who has accepted appointment shall:
- 447 (a) Act loyally for the sole benefit of the principal;
- 448 (b) Act so as not to create a conflict of interest that

449 impairs the agent's ability to act impartially in the
 450 principal's best interest;

451 (c) Act with the care, competence, and diligence
 452 ordinarily exercised by agents in similar circumstances; and

453 (d) Cooperate with a person who has authority to make
 454 health care decisions for the principal in order to carry out
 455 the principal's reasonable expectations to the extent actually
 456 known by the agent and, otherwise, act in the principal's best
 457 interest.

458 (3) An agent who acts in good faith is not liable to any
 459 beneficiary of the principal's estate plan for failure to
 460 preserve the plan.

461 (4) If an agent is selected by the principal because of
 462 special skills or expertise possessed by the agent or in
 463 reliance on the agent's representation that the agent has
 464 special skills or expertise, the special skills or expertise
 465 must be considered in determining whether the agent has acted
 466 with care, competence, and diligence under the circumstances.

467 (5) Absent a breach of duty to the principal, an agent is
 468 not liable if the value of the principal's property declines.

469 (6) Except as otherwise provided in the power of attorney,
 470 an agent is not required to disclose receipts, disbursements,
 471 transactions conducted on behalf of the principal, or safe-
 472 deposit box inventories, unless ordered by a court or requested
 473 by the principal, a court-appointed guardian, another fiduciary
 474 acting for the principal, a governmental agency having authority
 475 to protect the welfare of the principal, or, upon the death of
 476 the principal, by the personal representative or successor in

HB 815

2011

477 interest of the principal's estate. If requested, the agent must
 478 comply with the request within 60 days or provide a writing or
 479 other record substantiating why additional time is needed and
 480 comply with the request within an additional 60 days.

481 Section 17. Section 709.2115, Florida Statutes, is created
 482 to read:

483 709.2115 Exoneration of agent.—A power of attorney may
 484 provide that the agent is not liable for any acts or decisions
 485 made by the agent in good faith and under the power of attorney,
 486 except to the extent the provision:

487 (1) Relieves the agent of liability for breach of a duty
 488 committed dishonestly, with improper motive, or with reckless
 489 indifference to the purposes of the power of attorney or the
 490 best interest of the principal; or

491 (2) Was inserted as a result of an abuse of a confidential
 492 or fiduciary relationship with the principal.

493 Section 18. Section 709.2116, Florida Statutes, is created
 494 to read:

495 709.2116 Judicial relief; conflicts of interests.—

496 (1) A court may construe or enforce a power of attorney,
 497 review the agent's conduct, terminate the agent's authority,
 498 remove the agent, and grant other appropriate relief.

499 (2) The following persons may petition the court:

500 (a) The principal or the agent, including any nominated
 501 successor agent.

502 (b) A guardian, conservator, trustee, or other fiduciary
 503 acting for the principal or the principal's estate.

504 (c) A person authorized to make health care decisions for

HB 815

2011

505 the principal if the health care of the principal is affected by
 506 the actions of the agent.

507 (d) Any other interested person if the person demonstrates
 508 to the court's satisfaction that the person is interested in the
 509 welfare of the principal and has a good faith belief that the
 510 court's intervention is necessary.

511 (e) A governmental agency having regulatory authority to
 512 protect the welfare of the principal.

513 (f) A person asked to honor the power of attorney.

514 (3) In any proceeding commenced by filing a petition under
 515 this section, including, but not limited to, the unreasonable
 516 refusal of a third person to allow an agent to act pursuant to
 517 the power of attorney, and in challenges to the proper exercise
 518 of authority by the agent, the court shall award reasonable
 519 attorney's fees and costs.

520 (4) If an agent's exercise of a power is challenged in a
 521 judicial proceeding brought by or on behalf of the principal on
 522 the grounds that the exercise of the power was affected by a
 523 conflict of interest, and evidence is presented that the agent
 524 or an affiliate of the agent had a personal interest in the
 525 exercise of the power, the agent or affiliate has the burden of
 526 proving, by clear and convincing evidence that the agent acted:

527 (a) Solely in the interest of the principal; or

528 (b) In good faith in the principal's best interest, and
 529 the conflict of interest was expressly authorized in the power
 530 of attorney.

531 (5) For purposes of subsection (4):

532 (a) A provision authorizing an agent to engage in a

533 transaction affected by a conflict of interest which is inserted
 534 into a power of attorney as the result of the abuse of a
 535 fiduciary or confidential relationship with the principal by the
 536 agent or the agent's affiliate is invalid.

537 (b) Affiliates of an agent include:

538 1. The agent's spouse;

539 2. The agent's descendants, siblings, parents, or their
 540 spouses;

541 3. A corporation or other entity in which the agent, or a
 542 person who owns a significant interest in the agent, has an
 543 interest that might affect the agent's best judgment;

544 4. A person or entity that owns a significant interest in
 545 the agent; or

546 5. The agent acting in a fiduciary capacity for someone
 547 other than the principal.

548 Section 19. Section 709.2117, Florida Statutes, is created
 549 to read:

550 709.2117 Agent's liability.—An agent who violates this
 551 part is liable to the principal or the principal's successors in
 552 interest for the amount required to:

553 (1) Restore the value of the principal's property to what
 554 it would have been had the violation not occurred; and

555 (2) Reimburse the principal or the principal's successors
 556 in interest for the attorney's fees and costs paid from the
 557 principal's funds on the agent's behalf in defense of the
 558 agent's actions.

559 Section 20. Section 709.2118, Florida Statutes, is created
 560 to read:

561 709.2118 Agent's resignation.—Unless the power of attorney
 562 provides a different method for an agent's resignation, an agent
 563 may resign by giving notice to the principal, to the guardian if
 564 the principal is incapacitated and one has been appointed for
 565 the principal, and to any co-agent, or if none, the next
 566 successor agent.

567 Section 21. Section 709.2119, Florida Statutes, is created
 568 to read:

569 709.2119 Acceptance of and reliance upon power of
 570 attorney.—

571 (1) (a) A third person who in good faith accepts a power of
 572 attorney that appears to be executed in accordance with this
 573 part may rely upon the power of attorney and may enforce an
 574 authorized transaction against the principal's property as if:

575 1. The power of attorney were genuine, valid, and still in
 576 effect;

577 2. The agent's authority were genuine, valid, and still in
 578 effect; and

579 3. The authority of the officer executing for or on behalf
 580 of a financial institution that has trust powers and acting as
 581 agent is genuine, valid, and still in effect.

582 (b) For purposes of this subsection, and without limiting
 583 what constitutes good faith, a third person does not accept a
 584 power of attorney in good faith if the third person has notice
 585 that:

586 1. The power of attorney is void, invalid, or terminated;

587 or

588 2. The purported agent's authority is void, invalid,

589 suspended, or terminated.

590 (2) A third person may require:

591 (a) An agent to execute an affidavit stating where the
592 principal is domiciled; that the principal is not deceased; that
593 there has been no revocation, or partial or complete termination
594 by adjudication of incapacity or by the occurrence of an event
595 referenced in the power of attorney; that there has been no
596 suspension by initiation of proceedings to determine incapacity,
597 or to appoint a guardian, of the principal; and, if the affiant
598 is a successor agent, the reasons for the unavailability of the
599 predecessor agents, if any, at the time the authority is
600 exercised.

601 (b) An officer of a financial institution acting as agent
602 to execute a separate affidavit, or include in the form of the
603 affidavit, the officer's title and a statement that the officer
604 has full authority to perform all acts and enter into all
605 transactions authorized by the power of attorney for and on
606 behalf of the financial institution in its capacity as agent. A
607 written affidavit executed by the agent under this subsection
608 may, but need not, be in the following form:

609
610 STATE OF.....

611 COUNTY OF.....

612
613 Before me, the undersigned authority, personally appeared
614 ...(attorney in fact)... ("Affiant"), who swore or affirmed
615 that:

616 1. Affiant is the attorney in fact named in the Durable

617 Power of Attorney executed by ... (principal)... ("Principal") on
618 ...(date)....

619 2. This Power of Attorney is currently exercisable by
620 Affiant. The principal is domiciled in ... (insert name of state,
621 territory, or foreign country)....

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

624 a. The Principal is not deceased;

625 b. Affiant's authority has not been suspended by
626 initiation of proceedings to determine incapacity or to appoint
627 a guardian or a guardian advocate; and

628 c. There has been no revocation, or partial or complete
629 termination, of the power of attorney or of the Affiant's
630 authority.

631 4. The Affiant is acting within the scope of authority
632 granted in the power of attorney.

633 5. The Affiant is the successor to ... (insert name of
634 predecessor agent)...., who has resigned, died, become
635 incapacitated, is no longer qualified to serve, has declined to
636 serve as agent, or is otherwise unable to act, if applicable.

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

642

643

644

.....
...(Affiant)...

645
 646 Sworn to (or affirmed) and subscribed before me this
 647 day of ...(month)..., ...(year)..., by ...(name of person making
 648 statement)...

649
 650 ...(Signature of Notary Public-State of Florida)...

651
 652 ...(Print, Type, or Stamp Commissioned Name of Notary Public)...

653
 654 Personally Known OR Produced Identification
 655 ...(Type of Identification Produced)...

656
 657 (3) A third person who is asked to accept a power of
 658 attorney that appears to be executed in accordance with s.
 659 709.2103 may in good faith request, and rely upon, without
 660 further investigation:

661 (a) A verified English translation of the power of
 662 attorney if the power of attorney contains, in whole or in part,
 663 language other than English;

664 (b) An opinion of counsel as to any matter of law
 665 concerning the power of attorney if the third person making the
 666 request provides in a writing or other record the reason for the
 667 request; or

668 (c) The affidavit described in subsection (2).

669 (4) An English translation or an opinion of counsel
 670 requested under this section must be provided at the principal's
 671 expense unless the request is made after the time specified in
 672 s. 709.2120(1) for acceptance or rejection of the power of

673 attorney.

674 (5) Third persons who act in reliance upon the authority
 675 granted to an agent and in accordance with the instructions of
 676 the agent shall be held harmless by the principal from any loss
 677 suffered or liability incurred as a result of actions taken
 678 before the receipt of written notice as provided in s. 709.2121.
 679 A third person who acts in good faith upon any representation,
 680 direction, decision, or act of the agent is not liable to the
 681 principal or the principal's estate, beneficiaries, or joint
 682 owners for those acts.

683 (6) The acts of an agent under a power of attorney are as
 684 valid and binding on the principal or the principal's estate as
 685 if the principal were alive and competent if, in connection with
 686 any activity pertaining to hostilities in which the United
 687 States is then engaged, the principal is officially listed or
 688 reported by a branch of the United States Armed Forces in a
 689 missing status as defined in 37 U.S.C. s. 551 or 5 U.S.C. s.
 690 5561, regardless of whether the principal is dead, alive, or
 691 incompetent. Homestead property held as tenants by the
 692 entireties may not be conveyed by a power of attorney regulated
 693 under this provision until 1 year after the first official
 694 report or listing of the principal as missing or missing in
 695 action. An affidavit of an officer of the Armed Forces having
 696 maintenance and control of the records pertaining to those
 697 missing or missing in action that the principal has been in that
 698 status for a given period is conclusive presumption of the fact.

699 Section 22. Section 709.2120, Florida Statutes, is created
 700 to read:

HB 815

2011

701 | 709.2120 Refusal to accept power of attorney.—
 702 | (1) Except as provided in subsection (2):
 703 | (a) A third person must accept or reject a power of
 704 | attorney within a reasonable time. A third person who rejects a
 705 | power of attorney must state in writing the reason for the
 706 | rejection.
 707 | (b) Four days, excluding Saturdays, Sundays, and legal
 708 | holidays, are presumed to be a reasonable time for a financial
 709 | institution to accept or reject a power of attorney with respect
 710 | to:
 711 | 1. A banking transaction, if the power of attorney
 712 | expressly contains authority to conduct banking transactions
 713 | pursuant to s. 709.2208(1); or
 714 | 2. A security transaction, if the power of attorney
 715 | expressly contains authority to conduct security transactions
 716 | pursuant to s. 709.2208(2).
 717 | (c) A third person may not require an additional or
 718 | different form of power of attorney for authority granted in the
 719 | power of attorney presented.
 720 | (2) A third person is not required to accept a power of
 721 | attorney if:
 722 | (a) The third person is not otherwise required to engage
 723 | in a transaction with the principal in the same circumstances;
 724 | (b) The third person has knowledge of the termination or
 725 | suspension of the agent's authority or of the power of attorney
 726 | before exercising the power;
 727 | (c) A timely request by the third person for an affidavit,
 728 | English translation, or opinion of counsel under s. 709.2119(4)

729 is refused by the agent;

730 (d) Except as provided in paragraph (b), the third person
 731 believes in good faith that the power is not valid or that the
 732 agent does not have authority to perform the act requested; or

733 (e) The third person makes, or has knowledge that another
 734 person has made, a report to the local adult protective services
 735 office stating a good faith belief that the principal may be
 736 subject to physical or financial abuse, neglect, exploitation,
 737 or abandonment by the agent or a person acting for or with the
 738 agent.

739 (3) A third person who, in violation of this section,
 740 refuses to accept a power of attorney is subject to:

741 (a) A court order mandating acceptance of the power of
 742 attorney; and

743 (b) Liability for damages, including reasonable attorney's
 744 fees and costs, incurred in any action or proceeding that
 745 confirms, for the purpose tendered, the validity of the power of
 746 attorney or mandates acceptance of the power of attorney.

747 Section 23. Section 709.2121, Florida Statutes, is created
 748 to read:

749 709.2121 Notice.—

750 (1) A notice, including a notice of revocation, notice of
 751 partial or complete termination by adjudication of incapacity or
 752 by the occurrence of an event referenced in the power of
 753 attorney, notice of death of the principal, notice of suspension
 754 by initiation of proceedings to determine incapacity or to
 755 appoint a guardian, or other notice, is not effective until
 756 written notice is provided to the agent or any third persons

757 relying upon a power of attorney.

758 (2) Notice must be in writing and must be accomplished in
 759 a manner reasonably suitable under the circumstances and likely
 760 to result in receipt of the notice or document. Permissible
 761 methods of notice or for sending a document include first-class
 762 mail, personal delivery, delivery to the person's last known
 763 place of residence or place of business, or a properly directed
 764 facsimile or other electronic message.

765 (3) Notice to a financial institution must contain the
 766 name, address, and the last four digits of the principal's
 767 taxpayer identification number and be directed to an officer or
 768 a manager of the financial institution in this state.

769 (4) Notice is effective when given, except that notice
 770 upon a financial institution, brokerage company, or title
 771 insurance company is not effective until 5 days, excluding
 772 Saturdays, Sundays, and legal holidays, after it is received.

773 Section 24. Section 709.2201, Florida Statutes, is created
 774 to read:

775 709.2201 Authority of agent.—

776 (1) Except as provided in this section or other applicable
 777 law, an agent may only exercise authority specifically granted
 778 to the agent in the power of attorney and any authority
 779 reasonably necessary to give effect to that express grant of
 780 specific authority. General provisions in a power of attorney
 781 which do not identify the specific authority granted, such as
 782 provisions purporting to give the agent authority to do all acts
 783 that the principal can do, is not an express grant of specific
 784 authority and does not grant any authority to the agent. Court

785 | approval is not required for any action of the agent in
 786 | furtherance of an express grant of specific authority.

787 | (2) As a confirmation of the law in effect in this state
 788 | when this part became effective, such authorization may include,
 789 | without limitation, authority to:

790 | (a) Execute stock powers or similar documents on behalf of
 791 | the principal and delegate to a transfer agent or similar person
 792 | the authority to register any stocks, bonds, or other securities
 793 | into or out of the principal's or nominee's name.

794 | (b) Convey or mortgage homestead property. However, if the
 795 | principal is married, the agent may not mortgage or convey
 796 | homestead property without joinder of the principal's spouse or
 797 | the spouse's guardian. Joinder by a spouse may be accomplished
 798 | by the exercise of authority in a power of attorney executed by
 799 | the joining spouse, and either spouse may appoint the other as
 800 | his or her agent.

801 | (c) If such authority is specifically granted in a durable
 802 | power of attorney, make all health care decisions on behalf of
 803 | the principal, including, but not limited to, those set forth in
 804 | chapter 765.

805 | (3) Notwithstanding the provisions of this section, an
 806 | agent may not:

807 | (a) Perform duties under a contract that requires the
 808 | exercise of personal services of the principal;

809 | (b) Make any affidavit as to the personal knowledge of the
 810 | principal;

811 | (c) Vote in any public election on behalf of the
 812 | principal;

HB 815

2011

813 (d) Execute or revoke any will or codicil for the
 814 principal; or

815 (e) Exercise powers and authority granted to the principal
 816 as trustee or as court-appointed fiduciary.

817 (4) Subject to s. 709.2202, if the subjects over which
 818 authority is granted in a power of attorney are similar or
 819 overlap, the broadest authority controls.

820 (5) Authority granted in a power of attorney is
 821 exercisable with respect to property that the principal has when
 822 the power of attorney is executed and to property that the
 823 principal acquires later, whether or not the property is located
 824 in this state and whether or not the authority is exercised or
 825 the power of attorney is executed in this state.

826 (6) An act performed by an agent pursuant to a power of
 827 attorney has the same effect and inures to the benefit of and
 828 binds the principal and the principal's successors in interest
 829 as if the principal had performed the act.

830 Section 25. Section 709.2202, Florida Statutes, is created
 831 to read:

832 709.2202 Authority that requires separate signed
 833 enumeration.-

834 (1) Notwithstanding s. 709.2201, an agent may exercise the
 835 following authority only if the principal signed or initialed
 836 next to each specific enumeration of the authority, the exercise
 837 of the authority is consistent with the agent's duties under s.
 838 709.2114, and the exercise is not otherwise prohibited by
 839 another agreement or instrument:

840 (a) Create an inter vivos trust;

841 (b) With respect to a trust created by or on behalf of the
 842 principal, amend, modify, revoke, or terminate the trust, but
 843 only if the trust instrument explicitly provides for amendment,
 844 modification, revocation, or termination by the settlor's agent;

845 (c) Make a gift, subject to subsection (3);

846 (d) Create or change rights of survivorship;

847 (e) Create or change a beneficiary designation;

848 (f) Waive the principal's right to be a beneficiary of a
 849 joint and survivor annuity, including a survivor benefit under a
 850 retirement plan; or

851 (g) Disclaim property and powers of appointment.

852 (2) Notwithstanding a grant of authority to do an act
 853 described in subsection (1), unless the power of attorney
 854 otherwise provides, an agent who is not an ancestor, spouse, or
 855 descendant of the principal may not exercise authority to create
 856 in the agent, or in an individual to whom the agent owes a legal
 857 obligation of support, an interest in the principal's property,
 858 whether by gift, right of survivorship, beneficiary designation,
 859 disclaimer, or otherwise.

860 (3) Unless the power of attorney otherwise provides, a
 861 provision in a power of attorney granting general authority with
 862 respect to gifts authorizes the agent to only:

863 (a) Make outright to, or for the benefit of, a person a
 864 gift of any of the principal's property, including by the
 865 exercise of a presently exercisable general power of appointment
 866 held by the principal, in an amount per donee not to exceed the
 867 annual dollar limits of the federal gift tax exclusion under 26
 868 U.S.C. s. 2503(b), as amended, without regard to whether the

869 federal gift tax exclusion applies to the gift, or if the
 870 principal's spouse agrees to consent to a split gift pursuant to
 871 26 U.S.C. s. 2513, as amended, in an amount per donee not to
 872 exceed twice the annual federal gift tax exclusion limit; and

873 (b) Consent, pursuant to 26 U.S.C. s. 2513, as amended, to
 874 the splitting of a gift made by the principal's spouse in an
 875 amount per donee not to exceed the aggregate annual gift tax
 876 exclusions for both spouses.

877 (4) Notwithstanding subsection (1), if a power of attorney
 878 is otherwise sufficient to grant an agent authority to conduct
 879 banking transactions, as provided in s. 709.2208(1), conduct
 880 investment transactions as provided in s. 709.2208(2), or
 881 otherwise make additions to or withdrawals from an account of
 882 the principal, making a deposit to or withdrawal from an
 883 insurance policy, retirement account, individual retirement
 884 account, benefit plan, bank account, or any other account held
 885 jointly or otherwise held in survivorship or payable on death,
 886 is not considered to be a change to the survivorship feature or
 887 beneficiary designation, and no further specific authority is
 888 required for the agent to exercise such authority. A bank or
 889 other financial institution does not have a duty to inquire as
 890 to the appropriateness of the agent's exercise of that authority
 891 and is not liable to the principal or any other person for
 892 actions taken in good faith reliance on the appropriateness of
 893 the agent's actions. This subsection does not eliminate the
 894 agent's fiduciary duties to the principal with respect to any
 895 exercise of the power of attorney.

896 (5) This section does not apply to a power of attorney

897 executed before October 1, 2011.

898 Section 26. Section 709.2208, Florida Statutes, is created
899 to read:

900 709.2208 Banks and other financial institutions.—

901 (1) A power of attorney that includes the statement that
902 the agent has "authority to conduct banking transactions as
903 provided in section 709.2208(1), Florida Statutes" grants
904 general authority to the agent to engage in the following
905 transactions with financial institutions without additional
906 specific enumeration in the power of attorney:

907 (a) Establish, continue, modify, or terminate an account
908 or other banking arrangement with a financial institution.

909 (b) Contract for services available from a financial
910 institution, including renting a safe-deposit box or space in a
911 vault.

912 (c) Withdraw, by check, order, electronic funds transfer,
913 or otherwise, money or property of the principal deposited with
914 or left in the custody of a financial institution.

915 (d) Receive statements of account, vouchers, notices, and
916 similar documents from a financial institution and act with
917 respect to them.

918 (e) Purchase cashier's checks, official checks, counter
919 checks, bank drafts, money orders, and similar instruments.

920 (f) Endorse and negotiate checks, cashier's checks,
921 official checks, drafts, and other negotiable paper of the
922 principal or payable to the principal or the principal's order,
923 transfer money, receive the cash or other proceeds of those
924 transactions, and accept a draft drawn by a person upon the

925 principal and pay it when due.

926 (g) Apply for, receive, and use debit cards, electronic
 927 transaction authorizations, and traveler's checks from a
 928 financial institution.

929 (h) Use, charge, or draw upon any line of credit, credit
 930 card, or other credit established by the principal with a
 931 financial institution.

932 (i) Consent to an extension of the time of payment with
 933 respect to commercial paper or a financial transaction with a
 934 financial institution.

935 (2) A power of attorney that specifically includes the
 936 statement that the agent has "authority to conduct investment
 937 transactions as provided in section 709.2208(2), Florida
 938 Statutes" grants general authority to the agent with respect to
 939 securities held by financial institutions to take the following
 940 actions without additional specific enumeration in the power of
 941 attorney:

942 (a) Buy, sell, and exchange investment instruments.

943 (b) Establish, continue, modify, or terminate an account
 944 with respect to investment instruments.

945 (c) Pledge investment instruments as security to borrow,
 946 pay, renew, or extend the time of payment of a debt of the
 947 principal.

948 (d) Receive certificates and other evidences of ownership
 949 with respect to investment instruments.

950 (e) Exercise voting rights with respect to investment
 951 instruments in person or by proxy, enter into voting trusts, and
 952 consent to limitations on the right to vote.

953 (f) Sell commodity futures contracts and call and put
 954 options on stocks and stock indexes.

955
 956 For purposes of this subsection, the term "investment
 957 instruments" means stocks, bonds, mutual funds, and all other
 958 types of securities and financial instruments, whether held
 959 directly, indirectly, or in any other manner, including shares
 960 or interests in a private investment fund, including, but not
 961 limited to, a private investment fund organized as a limited
 962 partnership, a limited liability company, a statutory or common
 963 law business trust, a statutory trust, or a real estate
 964 investment trust, joint venture, or any other general or limited
 965 partnership; derivatives or other interests of any nature in
 966 securities such as options, options on futures, and variable
 967 forward contracts; mutual funds; common trust funds; money
 968 market funds; hedge funds; private equity or venture capital
 969 funds; insurance contracts; and other entities or vehicles
 970 investing in securities or interests in securities whether
 971 registered or otherwise, except commodity futures contracts and
 972 call and put options on stocks and stock indexes.

973 Section 27. Section 709.2301, Florida Statutes, is created
 974 to read:

975 709.2301 Principles of law and equity.—The common law of
 976 agency and principles of equity supplement this part, except as
 977 modified by this part or other state law.

978 Section 28. Section 709.2302, Florida Statutes, is created
 979 to read:

980 709.2302 Laws applicable to financial institutions and

981 entities.—This part does not supersede any other law applicable
 982 to financial institutions or other entities, and that law
 983 controls if inconsistent with this part.

984 Section 29. Section 709.2303, Florida Statutes, is created
 985 to read:

986 709.2303 Remedies under other law.—The remedies under this
 987 part are not exclusive and do not abrogate any right or remedy
 988 under any other law other than this part.

989 Section 30. Section 709.2401, Florida Statutes, is created
 990 to read:

991 709.2401 Relation to electronic signatures in federal
 992 law.—This part modifies, limits, and supersedes the federal
 993 Electronic Signatures in Global and National Commerce Act, 15
 994 U.S.C. s. 7001 et seq., but does not modify, limit, or supersede
 995 s. 101(c) of that act, or authorize electronic delivery of any
 996 of the notices described in s. 103(b) of that act.

997 Section 31. Section 709.2402, Florida Statutes, is created
 998 to read:

999 709.2402 Effect on existing powers of attorney.—Except as
 1000 otherwise provided in this part:

1001 (1) This part applies to a power of attorney created
 1002 before, on, or after October 1, 2011, and to acts of the agent
 1003 occurring on or after that date.

1004 (2) An act of the agent occurring before October 1, 2011,
 1005 is not affected by this part.

1006 Section 32. Subsection (5) of section 736.0602, Florida
 1007 Statutes, is amended to read:

1008 736.0602 Revocation or amendment of revocable trust.—

HB 815

2011

1009 (5) A settlor's powers with respect to revocation,
 1010 amendment, or distribution of trust property may be exercised by
 1011 an agent under a power of attorney only as authorized by s.
 1012 709.2206 ~~709.08~~.

1013 Section 33. Sections 709.01, 709.015, 709.08, and 709.11
 1014 Florida Statutes, are repealed.

1015 Section 34. This act shall take effect October 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 951 Recording of Real Property Documents

SPONSOR(S): Albritton

TIED BILLS: None IDEN./SIM. BILLS: None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn <i>W</i>	Bond <i>NB</i>
2) Judiciary Committee			

SUMMARY ANALYSIS

Instruments affecting title to real property are recorded in the public records in order to provide a public record of the chain of title to the property, together with a record of encumbrances against the title.

Prior law only allowed original papers, properly signed, to be presented for recording. Recently, state law was amended to allow for electronic recording of real property instruments. However, several of the clerks of the court and county recorders were accepting electronic recordings relating to real property prior to the 2007 adoption of the Uniform Real Property Electronic Recording Act. Others began accepting electronic documents for recording before rules contemplated in the Act were formally adopted.

The bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, whether or not the electronic documents were in strict compliance with the statutory or regulatory framework in effect at that time. This bill provides that all such recorded documents are deemed to provide constructive notice or ownership and encumbrances. The bill also clarifies that changes made by the bill do not alter the duty of a clerk or county recorder to comply with the Uniform Real Property Electronic Recording Act or rules adopted by the Department of State pursuant to that act.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Record of Conveyance of Real Estate

Chapter 965, F.S., provides that a record of a conveyance of real property, a mortgage of real property, or any other related document affecting title to real property, is valid when recorded with the clerk of the court (or county recorder) in the county in which the real property lies. Prior law required that a person present for recording an original signed paper documenting the transfer or encumbrance. With the advent of technology, clerk's offices began to accept electronic recordings.

Uniform Electronic Transaction Act and Uniform Real Property Electronic Recording Act

In 2000, the Legislature adopted the Uniform Electronic Transaction Act (UETA).¹ This act was based on work by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Many, including NCCUSL, believed the UETA allowed the electronic creation, submission, and recording of electronic documents affecting real property.

Some county recorders began accepting electronic recordings based on the authority facially granted under the UETA. As such, a significant number of electronic documents were filed.

Some legal commentators disagreed, feeling the UETA alone did not authorize the recording of electronic documents affecting title to real property. That disagreement, and the natural conservative nature of most real estate professionals, resulted in a limitation on the use and acceptability of electronic documents in real estate transactions.

To address this problem, NCCUSL promulgated a separate uniform law to address these perceived shortcomings. A variation of the NCCUSL uniform law was adopted by the Legislature in 2007 and is referred to as the Uniform Real Property Electronic Recording Act (URPERA).²

The adoption of the URPERA, as a matter of statutory interpretation, called into question the efficacy of electronic documents recorded pursuant to UETA. The URPERA requires the Department of State, by rule, to prescribe standards to implement the act in consultation with the Electronic Recording Advisory Committee.³ URPERA also provides that any county recorder who elects to receive, index, store, archive, and transmit electronic documents to do so in compliance with standards established by rules adopted by the Department of State.⁴

Before the Department of State could begin establishing rules, several county recorders began accepting electronic recordings and, as a result, discovered significant cost and labor savings. Rule 1B-31 of the Florida Administrative Code implements the URPERA and provides guidelines for accepting electronic documents.

Effect of the Bill

The bill creates s. 695.28, F.S., to retroactively and prospectively ratify the validity of all electronic documents affecting title to real property submitted to and accepted by a clerk of court or county recorder for recordation, notwithstanding possible technical defects.

¹ See s. 668.50, F.S.

² See s. 695.27, F.S.

³ Section 695.27(5)(a), F.S. This section creates the Electronic Recording Advisory Committee. It also requires the Florida Association of Court Clerks and Comptrollers to provide administrative support to the Department of State and the committee at no charge. The committee is composed of nine members who serve one year terms.

⁴ Section 695.27(4)(b), F.S.

The bill provides that all documents, previously or hereafter accepted by a clerk of court or county recorder for recordation electronically, whether under the UETA or the URPERA, are deemed to be validly recorded and provide notice to all persons notwithstanding that:

- Such documents may have been received and recorded before the formal adoption of rules by the Department of State; or
- Defects in, deviations from, or the inability to demonstrate strict compliance with any statute, rule, or procedure to electronically record documents that may have been in effect at the time the electronic documents were submitted for recording.

The bill also provides that the newly created s. 695.28, F.S., does not alter the duty of the clerk or recorder to comply with the URPERA or rules adopted by the Department of State pursuant to that act.

B. SECTION DIRECTORY:

Section 1 creates s. 695.28, F.S., regarding validity of recorded electronic documents.

Section 2 provides that the act is intended to clarify and applies prospectively and retroactively.

Section 3 provides that the act shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

This bill provides that it is intended to be clarifying and remedial and shall apply retroactively. Retroactive application of legislation can implicate the due process provisions of the Constitution.⁵ As a general matter, statutes which do not alter vested rights but relate only to remedies or procedure can be applied retroactively.⁶

The Florida Supreme Court has ruled that statutes enacted soon after a controversy over the meaning of legislation may be considered a legislative interpretation of the original law and not substantive change:

When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.⁷

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

⁵ See *State Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981).

⁶ See *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So.2d. 494 (Fla. 1999).

⁷ *Lowry v. Parole and Probation Commission*, 473 So.2d 1248, 1250 (Fla. 1985)(internal citations omitted).

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A bill to be entitled
An act relating to the recording of real property documents; creating s. 695.28, F.S.; establishing that certain electronic documents accepted for recordation are validly recorded; providing legislative intent; providing for prospective and retroactive application; providing an effective date.

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

Section 1. Section 695.28, Florida Statutes, is created to read:

695.28 Validity of recorded electronic documents.—

(1) A document that is otherwise entitled to be recorded and that was or is submitted to the clerk of the court or county recorder by electronic means and accepted for recordation is deemed validly recorded and provides notice to all persons notwithstanding:

(a) That the document was received and accepted for recordation before the Department of State adopted standards implementing s. 695.27; or

(b) Any defects in, deviations from, or the inability to demonstrate strict compliance with any statute, rule, or procedure to submit or record an electronic document in effect at the time the electronic document was submitted for recording.

(2) This section does not alter the duty of the clerk or recorder to comply with s. 695.27 or rules adopted pursuant to that section.

HB 951

2011

29 Section 2. This act is intended to clarify existing law
30 and applies prospectively and retroactively.

31 Section 3. This act shall take effect upon becoming a law.