Florida Durable Power of Attorney Law: The Need for Reform

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FLORIDA DURABLE POWER OF ATTORNEY LAW:
THE NEED FOR REFORM†

ROBERT CRAIG WATERS

The durable power of attorney provides a method of planning for illness or incapacity that is less expensive and restrictive than legal guardianship. Yet current Florida law appears to render durable powers either unenforceable or inaccessible to most of the state's population. In this Article, the author provides a history of the durable power, describes the shortcomings of current Florida law, and proposes broad reform.

TABLE OF CONTENTS

I. HISTORY OF THE DURABLE POWER ........................................ 522
   A. Development of the "Durable" Power of Attorney .................. 522
   B. Scope of the Uniform Act ............................................ 524
   C. Health Care Surrogacy .............................................. 526
   D. Florida Durable "Family" Power of Attorney .................... 531

II. PRIOR PROPOSALS FOR REFORM IN FLORIDA ......................... 534
   A. The 1989 Proposals for Reform ..................................... 535
   B. Shortcomings of the 1989 Proposals ............................. 538

III. A NEW PROPOSAL FOR REFORM ........................................... 539
    A. Overview: Findings & Definitions ............................... 540
    B. Scope of the New Durable Power .................................. 540
    C. Perfecting & Revoking a Durable Power ....................... 541
    D. Health Care Surrogacy .............................................. 542
    E. Alternate Attorneys in Fact & the Delegable Durable Power .... 544
    F. Court Hearings Involving the Durable Power ................... 544
    G. Phasing Out the Durable "Family" Power ....................... 545
    H. Relationship to Guardians ......................................... 545

IV. CONCLUSION ............................................................... 546

APPENDIX: A PROPOSED FLORIDA DURABLE POWER OF ATTORNEY ACT ................................................ 547

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FLORIDA DURABLE POWER OF ATTORNEY LAW: THE NEED FOR REFORM

ROBERT CRAIG WATERS*

THE EXTENSIVE revision of Florida guardianship law enacted in the 1989 Regular Session,1 while deserving of much praise, was marred by a troubling oversight. Under these reforms, the Legislature greatly liberalized the process by which courts may appoint guardians to look after all or part of an incapacitated person's affairs. Yet lawmakers did not extend those reforms into the area of the durable power of attorney2—the means by which individuals, without the need of expensive court hearings, may appoint someone to manage their

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affairs in the event of future illness or incapacity. Thus, the 1989 reforms offer little to those who are too poor to afford guardianship or those who simply want to plan ahead.

Existing durable power law in Florida affords only a limited and frequently unhelpful alternative to guardianship. Under a statute that has remained largely unchanged since 1974, a durable power of attorney is valid in Florida only when given to a spouse or to one of several specified persons related by birth or adoption, the so-called "durable family power of attorney." Florida is apparently the only state in the nation that confines the durable power to this narrow group of relatives. As a result, any Floridian who desires to plan for a future incapacity, and who lives a great distance from family members, is estranged from them, or is unlucky enough to have no trustworthy relatives, is left with no alternative but a guardianship.

3. A durable power of attorney is "an instrument authorizing the person designated as attorney-in-fact . . . to act in the place of the principal [the person signing the instrument]." Staff of Fla. H.R. Comm. on Judiciary, HB 1332 (1989) Staff Analysis 1 (original Apr. 4, 1989) (on file with committee). A durable power of attorney continues in effect even after the subsequent disability of the person signing the instrument. In effect, the "attorney in fact" becomes a special kind of agent of the person giving the durable power (the "principal"). The attorney in fact is an agent who may transact business or handle other affairs on behalf of the principal even if the principal becomes incapacitated. See Stetson Note, supra note 2, at 165.

4. Compare Fla. Stat. § 709.08 (1) (1989) (allowing appointment of spouses, brothers, sisters, nieces, nephews and any person related to the principal by lineal consanguinity, natural or adopted) with id. § 709.08 (1) (1975) (which allowed appointment of only the spouse, parent or child). Since its enactment in 1974, the statute has been amended only slightly to expand the class of blood or marital relatives who may be donees of the durable power of attorney. See id. § 709.08(1) (1977) (brothers and sisters added); id. § 709.08(1) (1983) (nieces and nephews added); id. § 709.08(1) (Supp. 1988) (all persons related by lineal consanguinity, whether natural or adopted, added).

5. It remains possible that the courts, as a matter of state common law, could declare a general durable power valid even if it did not fall within the requirements of the statute. This is so because the durable "family" power of attorney statute does not expressly proscribe other forms of durable powers. See id. § 709.08. However, this appears to be an unlikely avenue of reform in light of the Supreme Court of Florida's reluctance to abrogate common law doctrines that the Legislature has chosen to leave unchanged. See, e.g., Shands Teaching Hosp. & Clinics v. Smith, 497 So. 2d 644 (Fla. 1986) (leaving to the Legislature the decision to overrule the common law doctrine of necessaries, despite the court's acknowledgment that it is probably unconstitutional).

6. Fla. Stat. § 709.08(1) (1989) (allowing appointment of one's "spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity, whether natural or adopted").

7. Stetson Note, supra note 2, at 168.

8. Florida law does permit a few other very limited forms of surrogate decisionmaking. See, e.g., Fla. Stat. § 765.04 (1989) (permitting a living will). However, other than guardianship and the durable family power of attorney, there are no general forms of surrogate decisionmaking available in Florida.
This Article outlines the need to enact reforms that will provide a more widely available and less expensive alternative and supplement to guardianship. The Article begins by examining the history of durable power law. It reviews other possible approaches to the question, including statutes of other states and two specific proposals for reform that failed in the 1989 Regular Session. Finally, the Article explores the inadequacies of these approaches and of current Florida law, and concludes with a new proposal for reform.

I. HISTORY OF THE DURABLE POWER

Planning for illness or incapacity is one of the ways in which lawyers, through preventive law, can best help clients with their personal affairs. Without advance planning, there may be no one who can legally act as a surrogate decisionmaker if a person is suddenly injured or taken ill. Likewise, the lack of a clear-cut procedure for surrogate decisionmaking may cause disharmony among members of an incapacitated person’s family. Disputes among family members sometimes originate during the serious illness of one of their members, and often involve decisions about care, treatment, and control of assets.

A. Development of the “Durable” Power of Attorney

Guardianship is one of the ways in which lawyers, through preventive law, can best help clients with their personal affairs. Without advance planning, there may be no one who can legally act as a surrogate decisionmaker if a person is suddenly injured or taken ill. Likewise, the lack of a clear-cut procedure for surrogate decisionmaking may cause disharmony among members of an incapacitated person’s family. Disputes among family members sometimes originate during the serious illness of one of their members, and often involve decisions about care, treatment, and control of assets.

Guardianship is one possible means of solving such problems. Under settled common law doctrines now embodied in Florida statutory law, a guardian has unquestioned authority to engage in surrogate decisionmaking on behalf of the incapacitated “ward.” Indeed, the guardian’s authority over the ward can be plenary, covering almost all possible business and personal matters. Accordingly, the relationship of guardian to ward is much like that of parent to child: The former has unquestioned power to make decisions for the latter.

Nevertheless, guardianship has significant limitations when applied to planning for illness or incapacity. For example, a guardianship necessarily strips the ward of some or all decision-making capacity.

9. See infra notes 13-68 and accompanying text.
10. See infra notes 23-68 and accompanying text.
11. See infra notes 69-102 and accompanying text.
12. See infra notes 103-23 and accompanying text.
16. See, e.g., id. § 74, 1989 Fla. Laws at 210 (codified at Fla. Stat. § 744.444 (1989)).
Thus, the ward has little or no ability to control the lawful acts of the guardian. Another serious shortcoming is the necessity of filing a petition and of undergoing a formal court hearing, since a guardianship can be created only by a court. In the case of an emergency, guardianship may be a cumbersome remedy at best. The requirement of a court hearing often means that a guardianship cannot be created in time to meet the immediate needs of one who is unexpectedly injured or incapacitated.

Prior to the 1970s, most common law jurisdictions recognized just one general form of surrogate decisionmaking other than guardianship. Under this earlier law, a person (the “principal”) could appoint someone else (the “agent”) to act and make decisions on the person’s behalf. This particularly was true of a type of agent called an “attorney in fact” who, in a document called a “power of attorney,” was authorized to act in the place of the principal. The power included authority to sign binding legal documents and enter into contracts on behalf of the principal. Unlike the relationship of ward and guardian, the principal continued to exercise complete control over the acts of the attorney in fact. Thus, an “agency” relationship gave the principal wide latitude to direct the activities of the agent.

Nevertheless, a common-law power of attorney was useless as a method of surrogate decisionmaking in the event of an incapacitating illness or injury because, under the common law, the agent’s authority ceased to exist as soon as the principal became incapacitated. Even if the principal wanted the agent to continue making decisions, the common law proscribed any such authority. Thus, guardianship was the only workable means of surrogate decisionmaking for one who was either incapacitated or expected to become incapacitated, because it was the only form of surrogacy that was “durable.”

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19. See infra notes 51-68 and accompanying text.
20. BLACK’S LAW DICTIONARY 118 (5th ed. 1979) defines “attorney in fact” as: [a] private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, not of a legal character. This authority is conferred by an instrument in writing, called a “letter of attorney,” or more commonly a “power of attorney.” Id. As indicated in the definition, an attorney in fact is not the same thing as an attorney at law, since the former need not be a legal practitioner. See id.
22. See, e.g., Millman v. First Fed. Savings & Loan Ass’n, 198 So. 2d 338, 340 (Fla. 4th DCA 1967); Collin & Meyers, supra note 2, at 282; Stout, supra note 2, at 278; see also RESTATEMENT (SECOND) OF AGENCY § 122(1) (1958).
Recognizing the inherent limitations of guardianship, all fifty states have adopted some form of nonjudicial alternative to guardianship and common law powers of attorney. In the majority of jurisdictions, these alternatives are simply called "durable" powers of attorney. Essentially all of the alternatives are a variation of the common law theory governing principals and agents, with the major exception being that they are "durable," and therefore survive the principal's incapacity.23 Those jurisdictions authorizing durable types of agencies thus have created a legal hybrid that combines attributes of both common-law agency and guardianship.

This statutory alteration of the common law is of recent vintage. Most states did not adopt statutes authorizing this durable type of agency until after 1969. In that year, the landmark Uniform Durable Power of Attorney Act (Uniform Act) was promulgated by the National Conference of Commissioners on Uniform State Laws (National Conference).24 Apparently, the only state that had adopted a durable form of agency before the promulgation of the Uniform Act was Virginia, which had enacted such a statute nineteen years earlier in 1950.25

The Uniform Act became the model for many jurisdictions. This fact explains the strong influence of common-law agency theories on statutes authorizing durable powers. Essentially, the Uniform Act's five sections constitute an evolution of agency theory into a more flexible form.

**B. Scope of the Uniform Act**

In its definitional section, the Uniform Act states that a durable power of attorney is simply a common-law power of attorney that continues in effect after the disability or incapacity of the principal.26 A separate section makes this definition operative by providing that

25. *Id*.
26. *Id.* § 5-501, 8 U.L.A. 103 (Supp. 1989). This section provides that:
   [a] durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

*Id.*
all acts performed by the attorney in fact during the disability or incapacity of the principal will be treated as if performed by the principal.\(^\text{27}\)

There are no limitations on who may be given the durable power, and there are no restrictions on the kinds of decisionmaking that might be delegated. As a result, the Uniform Act apparently applies equally to every form of decisionmaking, whether it involves personal, business, or medical concerns. It is significant that the National Conference has never attempted to address separately any particular issues that might be raised by surrogate health care decisionmaking.\(^\text{28}\)

The remaining provisions of the Uniform Act do nothing more than specify methods of revocation and define the relationship of the attorney in fact to court-appointed fiduciaries of the principal. With respect to revocation, the Uniform Act states only that a durable power is not revoked by the death of the principal unless the attorney in fact has actual knowledge of the principal's death or otherwise fails to act in good faith.\(^\text{29}\) The Uniform Act then provides a specific method for proving that a durable power has not been revoked.\(^\text{30}\) This proof is

\(^{27}\) Id. § 5-502. This section provides that:
[...]

\(^{28}\) See infra notes 35-50 and accompanying text.

\(^{29}\) UNIF. DURABLE POWER OF ATTORNEY ACT § 5-504, 8 U.L.A. 516 (1983). The section provides that:
(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.
(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

\(^{30}\) Id. § 5-505, 8 U.L.A. 517-18. This section provides that:
[...]

accomplished when the attorney in fact executes an affidavit stating that, at the time of the act in question, he had no actual knowledge that the power had been revoked or terminated. Such an affidavit provides conclusive proof that the power was not revoked.31

Finally, the Uniform Act recognizes that the attorney in fact is accountable to guardians and to other court-appointed fiduciaries in the same manner as would be the principal.32 Thus, the creation of a guardianship does not, standing alone, revoke the durable power, although the guardian may terminate the power at will.33 This feature implicitly recognizes that a durable power need not be considered inconsistent with a guardianship and may even supplement it. As a result, a guardian would be free to continue to use the services of an attorney in fact who was previously appointed by the principal. No other issues regarding revocation of durable powers are addressed by the Uniform Act.34 Most significantly, the Uniform Act does not deal with the potential problems that might arise when a principal attempts to revoke a durable power. Disputes might arise, for example, regarding the exact time of revocation. Similarly, the Uniform Act provides no way of proving whether revocation has occurred. As a result, third parties are left to guess as to the validity of a durable power and to risk a loss if the durable power is proven to have been revoked.

C. Health Care Surrogacy

As noted above,35 one of the major problems left unaddressed by the Uniform Act is surrogate decisionmaking for health care pur-
DURABLE POWER OF ATTORNEY

poses. The Uniform Act ignores the issue, apparently leaving health care decisionmaking to be governed by the same standards that govern durable powers in general. Some jurisdictions have found this approach unsatisfactory and have developed special guidelines for health care decisionmaking.36

The primary reason for this variation from the Uniform Act is that surrogate health care decisions involve unique issues involving the life and well-being of the principal. In some instances, a health care surrogate might be asked to make decisions that could result in the death of the principal. Also, some types of medical procedures justifiably may be regarded as so extreme as to be unfit for consideration by anyone other than the principal or a guardian.

California, reacting to these concerns, not only adopted the Uniform Act,37 but also created a completely separate act to govern health care decisionmaking (California Health Care Act).38 The form of surrogate decisionmaking authorized by the latter is called a "durable power of attorney for health care."39 The particular requirements of the California Health Care Act reveal several special concerns that distinguish surrogate health care decisionmaking from durable powers in general.

First, the attorney in fact cannot make "health care decisions" unless the durable power of attorney specifically delegates this power. As a result, even a plenary durable power of attorney is insufficient to authorize surrogate health care decisionmaking unless it does so expressly.40 This reflects a determination that surrogate health care decisionmaking should not be deemed authorized by implication, especially when a principal did not intend this result.

Second, the California Health Care Act limits the class of persons who may act as witnesses to the execution of a durable power of attorney for health care. Witnesses cannot include the attorney in fact and certain kinds of health care providers.41 In addition, at least one of the

36. Rhoden, supra note 2, at 433 n.255 (California, Colorado, Nevada, North Carolina, Pennsylvania & Rhode Island each have a statute specifically authorizing surrogate health care decisionmaking).
38. Id. §§ 2430-2444.
39. Id. § 2430(a).
40. Id. § 2432(a). The statute provides that:
   (a) An attorney in fact under a durable power of attorney may not make health care decisions unless all of the following requirements are satisfied:
      (1) The durable power of attorney specifically authorizes the attorney in fact to make health care decisions . . . .
   Id.
41. Id. § 2432(d). The statute provides that:
witnesses must not be related by blood, marriage, or adoption to the principal, nor entitled to any part of the principal's estate.  

Third, the California Health Care Act also limits the potential class of attorneys in fact who may make surrogate health care decisions. This class may not include the treating health care providers, their employees, or employees of certain residential facilities, unless these persons are related to the principal by blood, marriage, or adoption. It
is unclear why an exception was allowed for relatives, since a treating health care provider who is both the attorney in fact and a relative of the principal could be deemed to have a substantial conflict of interest.

Fourth, attorneys in fact acting under a California durable power of attorney for health care cannot authorize certain drastic medical procedures. These include commitment to a mental health treatment facility, convulsive or electroshock therapy, certain types of brain surgery, sterilization, abortion, or euthanasia. This requirement reflects a belief that some drastic procedures are not proper even for a surrogate to authorize, but should be left until such time as the principal is competent.

Another major limitation on surrogate health care decisionmaking involves methods of revocation. The California Health Care Act creates a presumption that a principal can revoke a durable power of attorney for health care at any time, even if the revocation is oral. This reflects a belief that any attempt by the principal to revoke a durable power of attorney for health care must be afforded the benefit of the doubt.

Finally, the California statute expressly provides for certain types of court hearings involving both general durable powers and durable

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44. Id. § 2435. The statute provides that:
A durable power of attorney may not authorize the attorney in fact to consent to any of the following on behalf of the principal:
(a) Commitment to or placement in a mental health treatment facility.
(b) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).
(c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).
(d) Sterilization.
(e) Abortion.

45. Id. § 2443. The statute provides that:
Nothing in this article shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than the withholding or withdrawal of health care pursuant to a durable power of attorney for health care so as to permit the natural process of dying. In making health care decisions under a durable power of attorney for health care, an attempted suicide by the principal shall not be construed to indicate a desire of the principal that health care treatment be restricted or inhibited.

46. Id. § 2437(c). The statute provides that "[i]t is presumed that the principal has the capacity to revoke a durable power of attorney for health care. This presumption is a presumption affecting the burden of proof." Id.

47. Id. § 2437(a).
powers of attorney for health care. Persons who may bring a petition in court are named in the statute, and include the principal, the attorney in fact, guardians of the principal, and certain family members and potential heirs of the principal. As to general durable powers, the statute allows a court to hear disputes about termination of powers, the acts of the attorney in fact, and the failure of the attorney in fact to account for his acts. Similar judicial review is provided for acts of attorneys in fact for health care, except that the court also is empowered to consider the desires of the principal in reaching its decisions.  

48. Id. § 2411.  
49. Id. § 2412. The statute provides that:  
Except as provided in Section 2412.5 [quoted infra note 50], a petition may be filed under this article for any one or more of the following purposes:  
(a) Determining whether the power of attorney is in effect or has terminated.  
(b) Passing on the acts or proposed acts of the attorney in fact.  
(c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.  
(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:  
(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.  
(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.  
(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.  
Id.  
50. Id. § 2412.5. The statute provides that:  
With respect to a durable power of attorney for health care, a petition may be filed under this article for any one or more of the following purposes:  
(a) Determining whether the durable power of attorney for health care is in effect or has terminated.  
(b) Determining whether the acts or proposed acts of the attorney in fact are consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court or, where the desires of the principal are unknown or unclear, whether the acts or proposed acts of the attorney in fact are in the best interests of the principal.  
(c) Compelling the attorney in fact to report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person of the principal, or to any other person as the court in its discretion may require, if the attorney in fact has failed to submit such a report within 10 days after written request from the person filing the petition.  
(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court that the attorney in fact has made a health care decision for the principal that authorized anything illegal or upon a determination by the court of both of the following:  
(1) The attorney in fact has violated, has failed to perform, or is unfit to perform,
Taken as a whole, the California Health Care Act suggests one of the serious limitations of the Uniform Act. Specifically, procedures that may be adequate to regulate surrogate decisionmaking in business and other workaday matters may not be appropriate for health care. Indeed, society rightfully must question whether certain drastic types of medical procedures, such as sterilization, should ever be authorized by a surrogate. Even routine medical procedures may be very risky to the principal. If so, society has a definite interest in seeing that the principal has every opportunity to limit or revoke a durable power that authorizes such procedures. The Uniform Act fails to appreciate these problems.

D. Florida Durable "Family" Power of Attorney

Florida has done no better. In fact, the state’s current durable power statute, first adopted in 1974, shows both the heavy influence and shortcomings of the Uniform Act. The Florida statute tracks much of the operative language of the Uniform Act. For example, it provides that the power is exercisable notwithstanding disability or incapacity of the principal. Like the Uniform Act, the Florida statute does not provide a reliable method of proving whether a durable power of attorney has been revoked, thus encouraging needless litigation on this question.

\[\text{footnote}{\text{51.}}\text{ FLA. STAT.} \text{§ 709.08 (1975). This statute has been amended to broaden the class of relatives who may be appointed attorneys in fact. See supra note 4.}\]

\[\text{footnote}{\text{52.}}\text{ FLA. STAT.} \text{§ 709.08(1) (1989). The statute provides in pertinent part that:}\]

\[\begin{align*}
(1) & \text{ A principal may create a durable family power of attorney designating his spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity, whether natural or adopted, as his attorney in fact by executing a power of attorney. Such power of attorney shall be in writing, shall state the relationship of the parties, and shall include the words, ‘This durable family power of attorney shall not be affected by disability of the principal except as provided by statute’ or similar words clearly showing the intent of the principal that the power conferred on the attorney in fact shall be exercisable from the date specified in the instrument, notwithstanding a later disability or incapacity of the principal, unless otherwise provided by statute. All acts done by the attorney in fact pursuant to the power conferred during any period of disability or incompetence shall have the same effect, and inure to the benefit of and bind the principal or his heirs, devisees, and personal representatives, as if the principal were competent and not disabled.}
\end{align*}\]

\[\text{Id.}\]

\[\text{Id.}\]
Nor does the Florida statute address the special problems associated with health care decisionmaking. It leaves unsettled the question of whether surrogate health care decisionmaking falls within its provisions. One Florida case, however, suggests that the durable "family" power of attorney grants authority to perform "the same functions as would a court appointed guardian." This implies that the durable "family" power is broad enough to include health care surrogacy.

Nevertheless, the Florida statute differs in several major respects from both the Uniform Act and the California Health Care Act. For example, the Florida statute specifically requires that the durable power is nondelegable, is revoked by an adjudication of incompetency, and is suspended when a petition to determine competency of the principal is filed. This feature, which is the only provision for judicial review in the statute, opens the possibility that anyone who disagrees with the exercise of the durable power by the attorney in fact can nullify the durable power simply by filing a petition for involuntary guardianship. As a result, the Florida statute may encourage litigation among family members or others who are squabbling over control of assets or health care decisionmaking.

In addition, the Florida durable family power of attorney can never be a supplement to guardianship. This is because the court’s adjudication of incompetence or incapacity automatically revokes the power. The durable power cannot then be reinstated unless the principal is adjudged competent or unless the court approves a temporary reinstatement for "emergencies."

Under this approach, Florida heavily

53. See In re Estate of Schriver, 441 So. 2d 1105, 1107 (Fla. 5th DCA 1983). However, this statement is dicta. See id.

54. FLA. STAT. § 709.08(2) (1989). The statute provides that:
(2) The durable family power of attorney shall be nondelegable and shall be valid until such time as the donor shall die, revoke the power, or be adjudged incompetent. At any time a petition to determine competency of the donor or a petition to appoint a guardian for the donor has been filed, the durable family power of attorney shall be temporarily suspended. Notice of the pending petition shall be given to all known donees of the power. The power shall remain suspended until the petition is dismissed, withdrawn, or the donor is adjudged competent, at which time the power shall be automatically reinstated and any exercise of the power shall be valid. If the donor is adjudged incompetent, the power shall be automatically revoked.

Id.

55. This term has been replaced with the term "incapacitated" in the 1989 guardianship reforms. See ch. 89-96, 1989 Fla. Laws 173.

56. FLA. STAT. § 709.08(4) (1989). The statute provides that:
(4) Whenever an emergency arises between the time a petition is filed and an adjudication is made regarding the competency of the donor, the donee of the durable family power of attorney may petition the court for permission to exercise the power. The petition shall specify the emergency, the property involved, and the proposed action of the donee. No exercise of the power by the donee during this time period shall be valid.
favors guardianship by making it preeminent over the durable family power of attorney and by viewing the two as mutually inconsistent. As the Uniform Act recognized, this need not be the case.

While the Uniform Act specifically authorizes durable powers that do not take effect until incapacity, the Florida statute is silent on this subject. Thus, it is unclear whether a contingent or “springing” power of attorney—one that takes effect upon a future contingency—is authorized in Florida. If not, the attractiveness of the durable “family” power of attorney is greatly diminished. Many Floridians may be unwilling to execute a durable power that grants immediate authority to the attorney in fact.

As noted earlier, however, the most troubling restriction of the Florida statute is that the durable power can be granted only to specific family members. In the 1974 version of the statute, these were a “spouse, parent or child, whether natural or adopted,” of the principal. Over the years this list gradually has been expanded to include the principal’s “spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity, whether natural or adopted.” Thus, Florida residents are restricted to a handful of relatives as their potential choices for surrogate decisionmakers.

The reasons for this restriction are unclear in light of Florida’s needs. Florida has one of the largest populations of elderly retirees in the nation, and health care providers frequently must deal with unexpected emergencies involving an unconscious patient whose family members live far away. For example, one injured Florida resident remained untreated at a hospital for seven hours until a court appointed a guardian for him, because no relative could be found to consent to treatment. Many health care providers have complained of similar instances and have urged the Legislature to give Florida residents greater freedom to appoint surrogates in an emergency.

The problem is not confined merely to the elderly. Anyone who is suddenly taken ill, or who cannot rely on family members in an emer-
gency, may be left with no surrogate to grant consent for treatment. For example, Florida has the third highest number of people with Acquired Immune Deficiency Syndrome (AIDS) in the United States. Many of these men and women are estranged from their families or live far away from them. Florida law thus denies these people the opportunity to designate a surrogate decisionmaker through a durable power. For Floridians who have no family members upon whom to depend, the only possible alternative is guardianship.

II. PRIOR PROPOSALS FOR REFORM IN FLORIDA

Yet, as states like California have recognized, guardianship is not always the best vehicle for surrogate decisionmaking, whether for the ill or the elderly. One congressional committee studying the problem concluded that guardianship is overused, expensive, and often too restrictive of individual rights. In support of this proposition, the congressional committee cited numerous instances in which guardians bilked their wards out of assets, mistreated them, or subjected them to gross neglect.

66. Letter from Ginny Robson, Tallahassee AIDS Support Services, Inc. (TASS), to Craig Waters (July 18, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). Robson stated that TASS, which provides volunteer and publicly-funded services to people with AIDS, has encountered instances of estrangement from family members:

TASS has found that, in some instances, a family will abandon its relative who is infected with HIV. In these cases, finding a family member willing to make decisions for the client is difficult, if not impossible. On the other hand, if a relative is found who will serve in this capacity, his/her reluctance to do so surely affects decisions made on behalf of the patient . . . .

Conversely, family systems reacting to knowledge about HIV status, and possibly about sexual preference and drug use, may result in the family denying the patient support from those established in his/her support network, i.e. roommates, lovers, friends, etc. While these people may be the best equipped to act on behalf of the patient, [current] restrictions make this impossible.

Because of the issues outlined above, creating a durable power of attorney that allows for the designation of non-family members is considered to be a critical step forward in the humane response to AIDS that Florida needs to take.

67. See id.
68. This is in contrast to states like California. For instance, a study of people with AIDS in San Francisco showed that 42% had executed a durable power of attorney for health care in favor of their life partner, a friend, or other non-relative. Rhoden, supra note 2, at 437 n.271 (1988) (citing Steinbrook, Lo, Moulton, Saika, Holland & Volberding, Preferences of Homosexual Men with AIDS for Life-Sustaining Treatment, 314 NEW ENG. J. MED. 457 (1986)).
69. CONGRESSIONAL REPORT, supra note 2, at One-1 to One-10.
70. Id. at One-1 to One-2.
The opportunity for this type of corruption is enhanced by the pre-eminence of the guardian over the ward. As a result, the committee concluded that these abuses indicate the need for increased reliance on alternatives such as the durable power of attorney, which "provide[] the greatest assurance of fulfillment of one's wishes beyond incapacity and, in many situations, obviate[] the need to ever resort to guardianship."\textsuperscript{71}

Indeed, the 1989 Florida guardianship reforms were prompted by the inadequacy of traditional forms of surrogate decisionmaking. The new "limited guardianship" concept embodied in the reforms rests on the common sense belief that a person's incapacity often does not affect every aspect of life.\textsuperscript{72} Thus, the ward may be unable to manage business affairs but completely capable of making health care decisions. Recognizing such possibilities, the new limited guardianship concept authorizes a court to limit the guardian's power to those specific matters the incapacitated person is unable to handle.\textsuperscript{73}

Yet even this form of surrogate decisionmaking may not be entirely satisfactory in all situations. Limited guardianship itself strips the ward of significant powers. In particular, the ward is unable to exercise much control over the lawful activities of the limited guardian. The guardian can make binding decisions within the confines of the guardianship order, and the ward has little or no veto power.\textsuperscript{74} To the extent of the limited guardian's powers, the ward is in much the same situation as a child dependent upon the decisionmaking of the parent.

Thus, although limited guardianship has an unquestioned role in planning for incapacity, it fails to recognize that a person's incapacity sometimes does not entirely diminish the ability to participate in decisionmaking or to express desires to a surrogate decisionmaker. If so, there is no reason why the law should discourage the person from directing the actions of the surrogate just as a principal directs an agent. Hence one way of further respecting the rights of those who are partially incapacitated is by giving them a say in decisionmaking. Yet this is precisely what current law denies to the residents of Florida.

A. The 1989 Proposals for Reform

The problem outlined in this Article has not gone unnoticed by the Legislature. In 1989, two separate proposals were introduced—one

\textsuperscript{71} Id. at One-19.


\textsuperscript{73} See id. § 35, 1989 Fla. Laws at 192-95.

\textsuperscript{74} See id. § 35, 1989 Fla. Laws at 194 (codified at Fla. Stat. § 744.331(5) (1989)).
dealing with durable powers in general\textsuperscript{75} and the other dealing with a limited durable power of attorney for health care\textsuperscript{76}—that would have created new and more flexible forms of surrogate decisionmaking, similar to those existing in California. Both failed to emerge from the 1989 Regular Session.

The first of these proposals was House Bill 1332 (Trammell Bill), introduced by Representative Robert Trammell.\textsuperscript{77} The Trammell Bill would have expanded the class of persons who could be appointed attorney in fact to include non-family members and corporations.\textsuperscript{78} This feature of the Trammell Bill thus solved the chief problem caused by current Florida law: the restriction of the potential class to family members.\textsuperscript{79} By authorizing the appointment of all persons, the Trammell Bill would have expanded current law to meet the needs of persons who are estranged from or distant to their families.

Another feature of the Trammell Bill was designed to address a major shortcoming of the Uniform Act: the difficulty of verifying whether a durable power is still valid. Under the Trammell Bill, a Florida durable power of attorney would have become valid only by being recorded in the county courthouse,\textsuperscript{80} and revocation would have been perfected against a third party only by a similar recordation.\textsuperscript{81} This provision of the Trammell Bill would have given third parties a reliable and easily accessible means of determining the validity of a durable power, simply by checking the courthouse records. As a result, the Trammell Bill might have diminished the unwillingness of some third parties to honor durable powers. It also would have reduced the likelihood of lawsuits over the use of durable powers, since the date of validity or of revocation would be a matter of public record.

The Trammell Bill had another major feature: unlike current Florida law,\textsuperscript{82} the Bill would have recognized durable powers as a possible supplement to guardianship.\textsuperscript{83} The current power of attorney statute states that the attorney in fact ceases to have authority to act as soon as the principal is declared incompetent.\textsuperscript{84} The Trammell Bill would

\textsuperscript{75} Fla. HB 1332 (1989).
\textsuperscript{76} Fla. CS for SB 900 (1989); Fla. CS for HB 1135 (1989).
\textsuperscript{77} Dem., Marianna.
\textsuperscript{78} Fla. HB 1332, § 1 (1989).
\textsuperscript{79} Fla. Stat. § 709.08(1) (1989).
\textsuperscript{80} Fla. HB 1332, § 1 (1989).
\textsuperscript{81} Id.
\textsuperscript{82} Fla. Stat. § 709.08(2) (1989).
\textsuperscript{83} See Fla. HB 1332, § 1 (1989).
\textsuperscript{84} Fla. Stat. § 709.08(2) (1989).
have allowed the durable power to continue after the creation of a guardianship, but would have authorized the guardian to revoke the durable power. 85 In this way, a guardian could have continued to employ the attorney in fact to assist in providing services to the ward.

The second of the proposals that failed in 1989, originally introduced by Representative Elaine Gordon 86 and Senator Jeanne Malchon 87 (the "Gordon-Malchon proposal"), would have created a form of health care surrogacy in Florida. 88 This proposal would have authorized the designation of a "health care surrogate" to make health care decisions for an incapacitated principal. The health care surrogate could have been any competent adult except treating health care providers, their employees, employees of a health care facility in which the patient resided, or guardians of the principal's property. 89

In addition, the health care surrogate would have been able to make health care decisions for the principal only if a special three-member committee certified that the principal was incapacitated. 90 A health care surrogate also would not have been permitted to authorize abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments and therapies, or voluntary admission to a mental health facility. 91

The overall thrust of the Gordon-Malchon proposal was similar to the California statute authorizing "durable powers of attorney for health care." 92 Both authorized surrogate health care decisionmaking but recognized that restrictions should apply to this area that do not apply to durable powers of attorney in general. This is in keeping with the special concerns associated with health care. 93 Unlike other durable powers, health care surrogacy might involve decisions affecting a person's health and longevity. Thus, the State has a legitimate interest in attaching special restrictions to the exercise of this form of surrogacy, just as the State has an interest in ensuring the proper administration of health care.

86. Dem., North Miami.
87. Dem., St. Petersburg.
90. The committee would consist of the attending physician, a psychiatrist not associated with the attending physician and "a responsible citizen." Fla. CS for HB 1135, § 5 (1989); Fla. CS for SB 900, § 5 (1989).
93. See, e.g., CAL. CIV. CODE § 2432(d) (West Supp. 1989).
The legislative history is unclear as to why both of these proposals failed in 1989. The Trammell Bill actually was added to the guardianship bill approved by the House of Representatives,94 but the Senate never concurred in this amendment.95 Because the final version of the guardianship bill was from the Senate, Trammell's proposal failed to reach the Governor's desk.96 The Gordon-Malchon proposal never emerged from committee in the House of Representatives or the Senate. Thus, it never was aired before either of the legislative houses.

B. Shortcomings of the 1989 Proposals

The proposals that failed in 1989, on the whole, would have been substantial improvements over current Florida law. The Trammell Bill in particular would have made durable powers available to all Florida residents and simultaneously would have eliminated some of the most vexing problems associated with the Uniform Act. In particular, the Trammell bill would have provided an easy, relatively inexpensive method of confirming the validity of durable powers: a quick check in the county courthouse records. This provision could have eliminated most problems associated with determining whether durable powers have been revoked.

If there was any shortcoming at all, it was that the Trammell Bill, like the Uniform Act, did not specifically address the question of health care surrogacy. The question remains whether a durable power under the Trammell Bill could ever encompass health care decision-making. Presumably it could, since the courts in dicta have construed the current durable "family" power of attorney to include any powers a guardian might have,97 which can include health care decision-making. The courts have reached this broad conclusion despite the current statute's failure to mention health care issues.

However, the courts might have construed the Gordon-Malchon proposal as an exception to the Trammell Bill if both of the proposals discussed here had passed in 1989. This would have been based on the settled rule of statutory construction that a specific bill will be deemed an exception to a general one if there are any inconsistencies.98 Yet such a construction would have resulted in some serious anomalies.

For instance, the Trammell Bill would have required that a durable power of attorney be filed in the courthouse records,99 but the Gor-

95. See Fla. CS for CS for SB 1305 (1989).
97. In re Estate of Schriver, 441 So. 2d 1105, 1106-07 (Fla. 5th DCA 1983).
The Gordon-Malchon proposal would have established no similar requirement for health care surrogacy. The reason for this difference, if any, is not clear. A courthouse filing requirement would have provided hospitals and health care providers a quick and easy method of verifying the validity of a health care surrogacy. Under the Gordon-Malchon proposal, the hospital may well have been left to guess on this question, or else to rely on the representations of the patient or the patient’s friends or family.

In addition to this shortcoming, the Gordon-Malchon proposal established a relatively cumbersome method of proving incapacity. Before a health care surrogacy could come into being, the approval of a three-member committee consisting of the treating physician, a psychiatrist or psychologist not associated with that physician, and a “responsible citizen” would have had to agree that the patient is incapacitated. Furthermore, there was no provision for emergencies. As a result, a patient who was acutely in need of surrogate decisionmaking simply might have had to wait until the committee could convene.

The chief shortcoming of both of the 1989 proposals, however, was their failure to appreciate that durable powers and health care surrogacy are really only two aspects of the same basic problem: how to conduct surrogate decisionmaking. The state would be far better served by a single, comprehensive statute. Most importantly, the basic procedural and filing requirements for both durable powers and health care surrogacy should be essentially the same. Variations are needed only to address the special problems of health care surrogacy. Such an approach will ensure that durable powers are better understood and more easily executed by the public. This Article outlines a proposal to achieve this result.

III. A NEW PROPOSAL FOR REFORM

The Proposal suggested by this Article is the basis of a Proposed Florida Durable Power of Attorney Statute included in the Appendix to this Article. This Proposal is a combination of the best features of all the statutes and bills previously discussed. The Proposal also addresses some concerns not covered by any of these prior laws or bills.

100. See Fla. CS for HB 1135 (1989); see also Fla. CS for SB 900 (1989).
101. See Fla. CS for HB 1135 (1989); see also Fla. CS for SB 900 (1989).
102. See Fla. CS for HB 1135 (1989); see also Fla. CS for SB 900 (1989).
A. Overview: Findings & Definitions

The general purpose of a durable power reform in Florida should be to provide greater flexibility in nonjudicial surrogate decisionmaking, just as the 1989 guardianship reforms now provide greater flexibility in court ordered surrogacy. Thus, a comprehensive Florida durable power statute should be based on explicit findings setting forth this purpose and the groups who will benefit from the legislation. The elderly, the terminally ill, and persons wishing to make adequate plans for the future would be better served by a general durable power statute. Such a general statute would include, above all else, the right to appoint any person as attorney in fact, whether a relative or not. To effectuate this purpose, the legislature should provide that the new statute be liberally construed by the courts to provide the greatest benefit to the people.

In addition, the statutory findings should state, as did the Trammell Bill, that durable powers are both an alternative and a supplement to guardianship. Guardians should be authorized to supervise prior durable powers and to appoint new attorneys in fact, if the need arises. This is to do no more than authorize the guardian to appoint deputies who then must operate under the procedural protections of the new durable power statute.

B. Scope of the New Durable Power

The new durable power statute should implement the findings by providing for a broad form of durable power, modeled in scope after the Uniform Act. The statute should provide for both a plenary and a limited form of durable power, much like the plenary and limited forms of guardianship now available under the 1989 guardianship reforms. In this way, the principal could delegate to the attorney in fact all or some of the former's decisionmaking capability in the event of illness or incapacity. This would greatly increase the flexibility of the durable power by permitting principals to delegate only those matters most in need of surrogate decisionmaking.

In addition, like the Uniform Act, the new statute should allow a durable power to be either "contingent" or "immediate." The for-

107. A "contingent" durable power is also called a "springing" durable power. Stetson Note, supra note 2, at 174.
mer would allow the durable power to take effect upon a future contingency, such as the incapacity of the principal. The latter would allow the durable power to take effect immediately, allowing the attorney in fact to act as the principal’s agent from that moment.

As in current law, the property subject to a durable power should include only a single exception: homestead property of a married principal, unless the spouse or the spouse’s representative consents. This exception reduces the possibility of unfairness to the spouse of an incapacitated principal. In addition, the statute should be given a comprehensive scope by explicitly authorizing all forms of surrogate decisionmaking, including health care surrogacy. These powers should include the authority to have access to records of the principal, to apply for benefits and insurance for the principal, and to have access to the principal’s person in the event of hospitalization.

Unless otherwise specified, the attorney in fact should have ultimate priority, with the exception of the guardian, to make decisions for an incapacitated principal. Indeed, the attorney in fact should be able to engage in all acts reasonably necessary to carry out the responsibilities to the principal and to overrule the inconsistent demands of other friends or relatives. Without this priority, the attorney in fact might be viewed as only one of several contenders for the right to make surrogate decisions for the principal, a possibility that would only encourage litigation.

C. Perfecting & Revoking a Durable Power

Of all the proposals discussed above, only the Trammell Bill provides a reliable means of determining if and when a durable power has become valid and when it has been revoked. This is an admirable trait, considering the confusion and lawsuits that might be generated without such a feature. Accordingly, the new Florida statute should require that a durable power, to become effective, must be recorded in the courthouse in a county of the principal’s choosing. Formalities such as witnessing and notarization should be encouraged as a way of pressing home the legal significance of the durable power and of providing for authentication in the event of a dispute.

Revocation should occur in two ways. The primary method should be by recording a document in the same courthouse in which the durable power was filed. Recordation thus would provide “constructive”
notice to the entire world, including the attorney in fact. This creates a sure, reliable method of proving revocation, and it gives third parties an easy method of determining the validity of a durable power.

However, two exceptions should exist. First, as to third parties acting in reliance on the validity of a durable power, the durable power should be deemed revoked when those persons have actual knowledge either of the principal’s death or of the revocation of the durable power. Thus, anyone who knows that the durable power has ceased to exist will not be privileged to take advantage of the principal’s failure to record a revocation. This feature will prevent some types of fraud that might occur when a third party learns that a durable power no longer is valid, but that a formal revocation, for whatever reason, has not yet been filed. In the context of health care surrogacy, this feature also will permit the principal to revoke the durable power simply by informing treating health care providers.

Second, the durable power should be deemed revoked as to attorneys in fact when they have actual knowledge of the principal’s death or when the principal or the principal’s guardian has informed the attorney in fact that the durable power is revoked. This will impose on the principal an obligation at least to inform the attorney in fact about revocation. At the same time, it will give the principal a significant protection against an attorney in fact who may be acting irresponsibly. In the case of health care surrogacy, for example, the principal could orally revoke the durable power by telling the attorney in fact about the revocation.

D. Health Care Surrogacy

The State has a legitimate interest in ensuring that durable powers are not abused in the area of surrogate health care decisionmaking. As a result, several special limitations should be placed on durable powers that appoint a “health care surrogate.” First, health care surrogacy should not be permitted unless the durable power expressly authorizes it. This feature, also used in California, guarantees that a health care surrogacy is not “implied” from a general or plenary durable power.

Second, limits should be placed on who may witness a durable power, and who may be the attorney in fact. In particular, persons who might have a conflict of interest should be excluded. For instance, treating health care providers should not act as a health care

112. See id. § 2432(d), (e).
surrogate even if they are relatives of the principal. Otherwise, a conflict of interest might be created that would diminish the objectivity of the health care surrogate. Similarly, persons witnessing a durable power creating a health care surrogacy should not be the attorney in fact or any health care provider. This feature will ensure that the witnesses are not likely to have a conflict of interest at the time the durable power is invoked.

As a third feature, the statute should create a presumption that the principal is able to make health care decisions. This presumption would be defeated only through a certification process in which the principal, after proper examination, is determined to be incapacitated. After certification, the incapacity should not be presumed to be indefinite, but should continue only for the period of time in which the principal is truly unable to make health care decisions.

The unwieldy certification process of the Gordon-Malchon proposal should be avoided. Principals should be allowed to establish whatever certification process they wish, or in the absence of any process, to be certified by the concurrence of at least two licensed physicians. However, an exception should be created for bona fide emergencies, during which any treating physician could certify the principal's incapacity. Also, each separate procedure performed on the principal's body should be separately certified. This would require a constant rechecking to verify that the principal really is incapacitated.

Fourth, the statute should specifically authorize the health care surrogate to have several powers related to health care. A health care surrogate, for instance, should have a right of access to all medical, employment, and financial records necessary to apply for benefits or insurance or to make an informed health care decision. Similarly, the health care surrogate should be allowed to withhold consent to treatment. If authorized by the durable power, the health care surrogate should be allowed to remove a dying principal to a setting of the principal's choosing, with adequate provision for medical care. Likewise, the health care surrogate should have authority to make funeral arrangements if the principal has expressly delegated this authority, even if these arrangements are completed after the principal's death.

Fifth, the statute should specify that the acts of a health care surrogate performed under a valid durable power of attorney, for legal pur-

113. But see id. § 2432.5.
114. See id. § 2432(d).
115. Accord id. § 2432(a).
117. Accord Collin & Meyers, supra note 2, at 284.
poses, are deemed to be acts of the principal. No health care surrogate should be held criminally or civilly liable for reasonably prudent health care decisions made under a valid durable power of attorney. Similarly, health care providers should not be held liable for relying on the surrogate's consent unless they also would have been liable if the consent had been given by the principal.

Sixth, several types of decisionmaking should not be performed by a health care surrogate. These should include decisions about withholding life support, commitment to or placement in a mental health facility, convulsive or electroshock therapy, sterilization, abortion and lobotomy, or any surgery that would permanently alter the structure or function of the brain.118

Finally, health care providers should be expressly prohibited from requiring patients to appoint a health care surrogate upon admission or as a condition of treatment.119 This will prevent abuses by health care providers who otherwise might coerce the ill or dying into executing specific kinds of surrogacy. Health care surrogates should operate at the behest of the principal, not at the behest of the treating health care provider.

E. Alternate Attorneys in Fact & the Delegable Durable Power

The statute should explicitly authorize the principal to appoint alternate attorneys in fact. The statute should allow principals to select several persons who may act as a surrogate, thus increasing the likelihood that one will be available when needed. In addition, the statute should allow principals to make powers of attorney delegable, provided this is done expressly. This feature will permit the attorney in fact to delegate the power if the need arises, perhaps to a class of persons identified by the principal in the durable power of attorney.

F. Court Hearings Involving the Durable Power

An avenue for judicial review should be provided, similar to that adopted in California.120 Specifically, the Florida circuit courts should be empowered to hear disputes involving termination, failure of attorneys in fact to account for their acts, and unfitness of the attorney in fact.

In the case of a health care surrogate, the court should have several special powers. For instance, the court should be authorized to com-

119. Accord id. § 2441.
120. See id. §§ 2412, 2412.5.
pel a health care provider to honor a valid durable power of attorney. This provision will help ensure that the principal’s wishes are not stymied by the unreasonable actions of third parties. In addition, the courts should be allowed to determine whether the health care surrogate is acting according to the desires or best interests of the principal and if the surrogate is not so acting, to terminate the health care surrogacy.

G. Phasing Out the Durable "Family" Power

Because this Proposal would constitute a substantial change in present law, the Legislature should phase out the durable "family" power of attorney over a period of one year. During this period, durable "family" powers of attorney would remain enforceable as though they had met the requirements of the new statute. This would give residents of Florida an opportunity to execute new durable powers in compliance with the new law. An exception should be made, however, for durable powers that went into effect because of the principal’s incapacity either before or during the one year grace period. These durable powers should remain in force until the principal is no longer incapacitated.

H. Relationship to Guardians

Finally, the new statute should specify the relationship of attorneys in fact to guardians of the principal. Plenary guardians, those with unlimited powers,121 should “stand in the shoes” of the ward/principal unless a court determines otherwise. Thus, plenary guardians would be able to revoke and grant durable powers on behalf of the ward/principal. Moreover, the ward/principal would not be deemed incapacitated unless the plenary guardian was also incapacitated. Thus, the attorney in fact would remain under the guardians’ direction. This is based on the policy that the guardian, not the attorney in fact, should make the ultimate decisions if so able.

Similar powers should inhere in limited guardians.122 However, limited guardians should not be permitted to grant or revoke durable powers unless the court creating the guardianship has authorized it. This will prevent limited guardians from exercising authority over matters that may fall entirely outside of their powers. For example, a limited guardian handling only business matters should not be allowed

to exercise authority over a health care surrogate. Since health care decisions remain within the power of the principal, the principal should continue to exercise control over the health care surrogate. However, whenever a court determines that the attorney in fact is answerable to a limited guardian, the limited guardian should "stand in the shoes" of the ward/principal in the same manner as discussed above for plenary guardians.123

V. Conclusion

Adoption of the Proposal presented in this Article and its Appendix will accomplish two central goals: (1) making durable powers of attorney more accessible to Floridians and (2) bringing the law on this subject into harmony with the 1989 guardianship reforms. Certainly, this proposal is not the only conceivable way of achieving these results. Others unquestionably exist. Accordingly, the author does not present this Article as the only available solution to the problems of surrogate decisionmaking in Florida.

Rather, the central concerns of this Article are the policies underlying Florida durable power law. The current durable "family" power of attorney embodies a policy that is, at best, perplexing. On the one hand and for no apparent reason, the present statute restricts the class of attorneys in fact to a narrow group of relatives. Yet having done this, the statute then provides virtually no procedural safeguards to ensure that the power is properly exercised by the family members who receive it. Nor does the statute establish any method of encouraging third parties to honor durable powers, such as by requiring that durable powers be recorded in the public records. As a result, current Florida law seems to encourage abuse and render durable powers either unenforceable or inaccessible to most of the residents of Florida.

This is nonsensical. The general thrust of the proposals aired in 1989 by Representatives Trammell and Gordon and Senator Malchon deserve reconsideration in future sessions of the Florida Legislature. However, when this occurs, the Legislature should address all forms of nonjudicial surrogate decisionmaking in a single comprehensive bill. This will avoid confusion by allowing development of a coherent philosophy about the role of surrogate decisionmaking in our society. To this end, the present Article is intended not as a final solution, but as a starting point that identifies concerns that have been overlooked in the past.

123. See supra note 121 and accompanying text.
APPENDIX

A PROPOSED FLORIDA DURABLE POWER OF ATTORNEY ACT

Be it Enacted by the Legislature of the State of Florida:
Section 1. Section 709.08, Florida Statutes, is repealed.
Section 2. Section 709.20, Florida Statutes, is created to read:

709.20 Durable Power of Attorney.—
This Act consists of ss. 709.20-.30, Florida Statutes, and may be cited as the Florida Durable Power of Attorney Act.
Section 3. Section 709.21, Florida Statutes, is created to read:

709.21 Findings; intent; construction.—
(1) The Legislature finds and declares that the needs of the elderly, the terminally ill, and persons wishing to make adequate plans for future incapacity, require a broadening of the existing law governing the durable power of attorney. It is the intent of the Legislature to enable all the residents of this state to create a durable power of attorney adequate to meet their needs, with adequate safeguards to ensure that the durable power of attorney is not abused and is properly enforced according to the wishes of those who create a durable power of attorney.
(2) This Act is intended as an alternative or supplement to formal court proceedings by which a guardian or other fiduciary is appointed by a court to manage the property, health care decisions and affairs of a disabled or incapacitated person. The Legislature intends for the residents of this state to have access to a method of planning for illness or incapacity that is less expensive and restrictive than guardianship, and that may be a useful supplement to guardianship.
(3) This Act shall be liberally construed to achieve its intent and purpose.
Section 4. Section 709.22, Florida Statutes, is created to read:

709.22 Definitions.—As used in this Act:
(1) The term “Act” means ss. 709.20-.30, Florida Statutes.
(2) An “attorney in fact” is the donee of a durable power of attorney.
(3) A “common law power of attorney” is any power of attorney that is not a durable power of attorney.
(4) A “durable power of attorney” or “power” is a power of attorney executed as provided in this Act, by which a principal designates another his attorney in fact, in a writing that contains the words:
(a) “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time,” or
(b) “This power of attorney shall become effective upon the disability or incapacity of the principal,” or
(c) Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

(5) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition, and all matters related to any of the foregoing or necessary for the proper execution of any of the foregoing.

(6) A "health care decision" is consent, refusal of consent, or withdrawal of consent to health care; the decision to apply for private, public, government or Veteran's benefits to defray the cost of health care; the right of access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits; the right of access to the person of the principal at all reasonable times; and acting on behalf of the principal in all matters relating to health care, including but not limited to insurance, payment of insurance premiums, and other related matters.

(7) A "health care provider" is any person licensed by the state to engage in a health-related profession; any facility licensed or certified by the state to provide medical care or treatment, nursing home services or health-related services of any type or description; and any employee or agent of such a person or facility.

(8) A "health care surrogate" is the donee of a durable power of attorney that grants to the attorney in fact the authority to make health care decisions for the principal.

(9) An "instrument" is the writing creating a durable power of attorney.

(10) "Limited guardian" shall be construed as provided in s. 744.102(8)(a), Fla. Stat.

(11) A "limited guardianship" exists when a limited guardian has been appointed for a person.

(12) "Plenary guardian" shall be construed as provided in s. 744.102(8)(b), Fla. Stat.

(13) A "plenary guardianship" exists when a plenary guardian has been appointed for a person.

(14) A "principal" is the donor of a durable power of attorney.

Section 5. Section 709.23, Florida Statutes, is created to read:

709.23 Scope of durable power of attorney; limitations.—

(1) All acts performed by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal shall have the same effect and inure to the benefit of and
bind the principal and his successors in interest as if the principal were competent and not disabled or incapacitated.

(2) Unless the instrument states a time of termination, the durable power of attorney is exercisable notwithstanding the lapse of time since the execution of the instrument.

(3) The scope of the durable power of attorney may be either:

(a) Plenary, in which event the attorney in fact may exercise all delegable legal and equitable rights and powers of the principal, except as otherwise provided herein or by other applicable law; or

(b) Limited, in which event the attorney in fact may exercise only the legal and equitable rights and powers specifically delegated by the principal, except as otherwise provided herein or by other applicable law.

(4) A durable power of attorney, whether plenary or limited, may be either:

(a) Contingent, in which event the durable power of attorney shall become effective only upon the occurrence of an event or at a time described in the instrument creating the power, except as otherwise provided herein; or

(b) Immediate, in which event the durable power of attorney shall become effective on the date on which the instrument is properly executed and recorded as provided in this Act.

(5) Upon becoming effective and subject to all other applicable law, a durable power of attorney operates as a common law power of attorney during any period in which the principal is not incapacitated.

(6) A durable power of attorney that fails to meet the requirements of this Act nevertheless may operate as a common law power of attorney to the extent permitted by any other applicable law.

(7) Property subject to a durable power of attorney may, subject to any limitations specified in the instrument itself, include all real and personal property, all tangible and intangible property or interests, all equitable interests and powers of appointment, leaseholds, intellectual property, the donor's interest in any of the foregoing, and any other interest treated as property under any applicable law, but does not include homestead property of a married principal without the consent of:

(a) The principal's spouse, if competent, or

(b) The spouse's legal guardian, if the spouse of the principal is not competent, or

(c) The donee of a valid durable power of attorney executed by the spouse of the principal.

(8) (a) The donee of a durable power of attorney may, subject to any limitations specified in the instrument itself, be delegated author-
ity to make binding decisions affecting the general safety, welfare, living arrangements, or any personal or business affairs of the principal, except as otherwise provided in this Act.

(b) Subject to any limitations specified in the instrument itself, a durable power of attorney may delegate to the attorney in fact authority to act as a health care surrogate only if the instrument complies with the requirements of s. 709.26, Fla. Stat. A plenary durable power of attorney does not authorize the attorney in fact to act as a health care surrogate unless the requirements of s. 709.26, Fla. Stat., are met.

(9) The attorney in fact appointed under a durable power of attorney is a fiduciary of the principal or of the principal's estate or guardian.

(10) Subject to any limitations contained in the instrument, the attorney in fact appointed under a durable power of attorney shall have priority over any other person in making decisions for the principal, except the principal or the plenary guardian of the principal, or except as limited by the order of a court.

Section 6. Section 709.24, Florida Statutes, is created to read:

709.24 Form of durable power of attorney; recordation.—

(1) A durable power of attorney shall be in writing as provided herein, signed or the signature acknowledged by the principal or his guardian in the presence of two subscribing witnesses and of a subscribing notary or other officer authorized to administer oaths, recorded as provided herein, and delivered to the attorney in fact.

(2) (a) A durable power of attorney shall contain a statement designating the county in which the power is to be recorded. To become valid and effective, the durable power of attorney must first be recorded in the office of the clerk of the circuit court for the county designated in the instrument.

(b) A durable power of attorney shall contain the full name, address and all available telephone numbers of the person designated as attorney in fact or, if applicable, the person designated as a health care surrogate.

(3) A durable power of attorney shall not be recorded in any county other than the one designated in the instrument. Nothing in this section precludes a principal from:

(a) Recording two or more separately executed durable powers of attorney in separate counties, provided each instrument properly designates the county in which the instrument is actually filed.

(b) Recording two or more separately executed durable powers of attorney in the same county, except that to the extent of any inconsistency the most recently recorded instrument shall prevail.
Section 7. Section 709.25, Florida Statutes, is created to read:
709.25 Revocation of durable power.—
(1) As to the entire world, including the attorney in fact, the durable power of attorney is revoked when a written revocation, executed in substantially the manner provided in s. 709.24, Fla. Stat., is recorded in the public records of the county designated in the durable power of attorney.
(2) In addition to the method of revocation in subsection (1), a durable power of attorney is revoked as follows:
(a) As to any person, except the attorney in fact, acting in reliance upon the validity of a durable power of attorney, the durable power of attorney is revoked when such persons have actual knowledge that the principal is dead or that the principal or the principal's guardian has revoked the durable power of attorney.
(b) As to the attorney in fact alone, the durable power of attorney is revoked when he has actual knowledge that the principal is dead or when the principal or the principal's guardian informs the attorney in fact that the durable power of attorney is revoked.
(3) When separate durable powers of attorney have been properly recorded in the same county or in two or more counties, each must be separately revoked.
Section 8. Section 709.26, Florida Statutes, is created to read:
709.26 Health care surrogates.—
(1) Any durable power of attorney may designate the attorney in fact as a health care surrogate provided it does so expressly. It shall be sufficient that the instrument creating the power includes the words
(a) "The attorney in fact may act as health care surrogate," or
(b) "The attorney in fact may make health care decisions," or
(c) Similar words indicating similar intent.
(2) Subject to the requirements of this section and this Act, a durable power of attorney may delegate to the attorney in fact powers in addition to the powers of a health care surrogate.
(3) The attorney in fact named as a health care surrogate shall not be a treating health care provider.
(4) Persons witnessing a durable power of attorney appointing a health care surrogate shall not be the attorney in fact or a health care provider.
(5) For purposes of this section:
(a) The principal shall be presumed to have the capacity to make health care decisions unless determined to be incapable of doing so as provided in this section.
(b) Incapacity shall be certified by whatever method is specified in the instrument naming a health care surrogate, except that:
(i) When the instrument creating the durable power provides no procedure for determining incapacity, that determination shall be made by two physicians licensed in Florida who have examined the principal and who certify in writing in the principal's medical records that the principal is unable to make health care decisions and is in immediate need of a health care surrogate; or

(ii) In a bona fide medical emergency, the attending physician may certify in the principal's medical records, either before or after treatment is administered, that the principal was suffering from an acute medical condition for which immediate treatment was necessary, that the principal was unable to make health care decisions and that the principal was in immediate need of a health care surrogate.

(c) Each procedure or treatment performed upon the body of the principal pursuant to the authorization of a health care surrogate shall be separately certified as required in subsection (b) and separately authorized by the health care surrogate. However, in a bona fide medical emergency, the attending physician may rely in good faith upon a prior valid certification and authorization.

(d) Incapacity of the principal shall not be considered indefinite, but only for such length of time as the principal is unable to make health care decisions.

(e) Subject to any limitations in the instrument creating the durable power of attorney, the health care surrogate may refuse to consent to any health care in the same manner as the principal if the principal were not incapacitated.

(f) If specified in the instrument creating the durable power of attorney, the health care surrogate may make arrangements for a terminally ill principal to die in a setting of the principal's choosing, if adequate medical attention is provided.

(g) If specified in the instrument creating the durable power of attorney, the health care surrogate may make, oversee and complete funeral arrangements for the principal, in keeping with the principal's wishes, notwithstanding the fact that some or all of the acts necessary for completing such funeral arrangements occur after the principal's death.

(6) Consent for medical procedures or treatments given by a health care surrogate in compliance with this section shall be regarded as consent given by the principal.

(7) Physicians and health care providers relying upon the consent of a health care surrogate pursuant to a valid durable power of attorney shall be liable criminally or in tort only to the extent that they would have been so liable had the principal given the consent.
(8) A health care surrogate shall not be civilly or criminally liable for reasonably prudent health care decisions made in good faith according to the terms of a valid durable power of attorney executed as provided in this Act and this section.

(9) A health care surrogate may not:

(a) Execute a living will on behalf of the principal or decide to terminate health care that within a reasonable degree of medical certainty will result in the principal continuing to live indefinitely; but the health care surrogate may be authorized to disclose the existence of a living will to health care providers and relatives of the principal.

(b) Consent to any of the following on behalf of the principal:

(i) Commitment to or placement in a mental health treatment facility;

(ii) Convulsive or electroshock therapy;

(iii) Sterilization;

(iv) Abortion;

(v) Lobotomy or any procedure intended to permanently alter the structure or function of the brain.

(10) Subject to any limitations of the instrument itself, a durable power of attorney may authorize a health care surrogate to have access to the principal’s financial records, insurance records, payroll receipts, state or federal tax records, medical records, employment records, or any other information reasonably necessary for the health care surrogate to make a health care decision, and the health care surrogate may consent to the disclosure of any of the foregoing, to the same extent that the principal would have been able to do so if not incapacitated.

(11) A health care surrogate shall have first priority of access to the principal at all times when acting as a health care surrogate.

(12) (a) A health care provider shall be subject to professional discipline or revocation of license if the health care provider, as a condition of treatment or admission, requires an individual to execute a durable power of attorney designating a health care surrogate.

(b) The Department of Health and Rehabilitative Services and the Department of Professional Regulation shall adopt rules to implement this subsection.

Section 9. Section 709.27, Florida Statutes, is created to read:

709.27 Alternate attorneys in fact and health care surrogates; delegation of power.—

(1) A durable power of attorney may designate alternate attorneys in fact or health care surrogates and may specify the conditions upon which the alternates shall assume the power.
(2) A durable power of attorney shall not be delegable unless the instrument creating the power so specifies. Delegation of the durable power shall occur only under such conditions as are provided in the instrument creating the power.

Section 10. Section 709.28, Florida Statutes, is created to read:

709.28 Petition for determination; purposes.—

(1) A petition may be filed under this section by any of the following:

(a) The attorney in fact or health care surrogate;
(b) The principal;
(c) The spouse or any child of the principal;
(d) The guardian of the principal, whether limited or plenary;
(e) Any person who would take property of the principal under the laws of intestate succession if the principal were dead at the time the petition is filed, whether or not the principal has a will;
(f) A treating health care provider with respect to a durable power of attorney appointing a health care surrogate;
(g) A parent of the principal with respect to a durable power of attorney appointing a health care surrogate.

(2) Except as provided in subsection (3), a petition for determination in equity may be filed in the circuit court under this Act for any one or more of the following purposes:

(a) Determining whether the durable power of attorney is in effect or has been terminated;
(b) Passing on the acts or proposed acts of the attorney in fact;
(c) Compelling the attorney in fact to account and report for his acts to the principal, the spouse of the principal, the guardian of the principal, the estate of the principal, or such other person as the court in its discretion may require. A petition shall not be filed unless the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition;
(d) Declaring that an alternate attorney in fact appointed by the principal shall succeed to the powers delegated by the durable power of attorney upon a determination by the court of all the following:
   (i) The present attorney in fact has violated or is unfit to perform the fiduciary duties under the durable power of attorney,
   (ii) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney, and
   (iii) The determination is in the best interests of the principal or the principal’s estate;
(e) Declaring that the durable power of attorney is terminated upon a determination by the court of all of the following:
(i) The attorney in fact has violated or is unfit to perform the fiduciary duties under the durable power of attorney,
(ii) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney,
(iii) The termination of the power of attorney is in the best interest of the principal or the principal's estate, and
(iv) The principal has not named an alternate attorney in fact who is available to succeed to the powers delegated by the durable power of attorney.

(3) With respect to a durable power of attorney appointing a health care surrogate, a petition may also be filed under this section for any one or more of the following purposes:
(a) Determining whether the durable power of attorney is in effect or has terminated;
(b) Compelling a health care provider to honor a valid durable power of attorney;
(c) Determining whether the acts or proposed acts of the health care surrogate are, in fact, consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court or, where the desires of the principal are unknown or unclear, whether the acts or proposed acts of the health care surrogate are in the best interest of the principal;
(d) Compelling the health care surrogate to report his or her acts as health care surrogate to the principal, spouse of the principal, guardian of the principal, or to any other person the court in its discretion may require, if
   (i) The health care surrogate has failed to submit such a report within 10 days after the written request from the person filing the petition, or
   (ii) The health care surrogate has refused to provide an immediate justification for a decision of the health care surrogate alleged to be life-threatening to the principal;
(e) Declaring that an alternate health care surrogate appointed by the principal shall succeed to the powers delegated under the durable power of attorney upon a determination by the court of either of the following:
   (i) The present health care surrogate has made a health care decision for the principal that authorized anything illegal, or
   (ii) The present health care surrogate has violated, has failed to perform, or is unfit to perform, the duty under the durable power of attorney to act consistent with the desires of the principal or, where the desires of the principal are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the best inter-
ests of the principal; and at the time of the determination by the court, the principal lacks the capacity to give or to revoke a durable power of attorney;

(f) Declaring that the durable power of attorney, to the extent it appoints a health care surrogate, is terminated upon a determination by the court of both of the following:

(i) No alternate health care surrogate has been named who is available to succeed to the powers delegated under the durable power of attorney, and

(ii) The health care surrogate has made a health care decision for the principal that authorized anything illegal or upon a determination by the court that:

(A) The health care surrogate has violated, has failed to perform, or is unfit to perform, the duty under the durable power of attorney to act consistent with the desires of the principal or, where the desires of the principal are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the best interests of the principal, and

(B) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a durable power of attorney.

(4) Proceedings under this section shall be heard in equity in the circuit court of the county in which the attorney in fact or health care surrogate is a resident, in the county in which the principal is presently located or in the county in which the durable power of attorney is recorded, and shall be conducted according to rules adopted by the Supreme Court of Florida to implement this section.

Section 11. Section 709.29, Florida Statutes, is created to read:

709.29 Relation of attorney in fact to guardian.—

(1) (a) An attorney in fact is answerable to a plenary guardian of the principal as though the plenary guardian were the principal.

(b) A plenary guardian may execute a durable power of attorney on behalf of the ward as though the plenary guardian were the ward, unless the court creating the guardianship has determined otherwise as provided in s. 744.3115, Fla. Stat.

(2) (a) An attorney in fact is answerable to a limited guardian of the principal as though the limited guardian were the principal only if the court appointing the limited guardian has so authorized.

(b) A limited guardian may grant a durable power of attorney on behalf of the ward only to the extent authorized by the court creating the guardianship, in which event the attorney in fact shall be answerable to the guardian as though the guardian were the principal.

(3) The fact that a guardian of the principal has been appointed does not of itself revoke a prior durable power of attorney granted by
the principal unless the court creating the guardianship has so ordered.

(4) For purposes of this Act alone, the principal shall not be deemed incapacitated unless the principal's guardian, if one has been appointed, also is incapacitated.

Section 12. Section 709.30 is created to read:

709.30 Effect on other forms of durable powers.—

(1) No durable power of attorney executed in this state after the effective date of this Act shall be valid or enforceable unless the durable power of attorney complies with the requirements of this Act.

(2) A durable power of attorney executed in this state prior to the effective date of this Act, if it was valid and enforceable under any law in force at the time and in the jurisdiction of execution, shall be deemed valid and enforceable for a period of one year after the effective date of this Act notwithstanding the fact that the durable power of attorney does not comply with the requirements of this Act.

(3) After one year has elapsed from the effective date of this Act, no durable power of attorney executed in this state prior to the effective date of this Act shall be deemed valid and enforceable unless:

(a) The durable power of attorney has complied with the requirements of this Act; or

(b) The durable power of attorney was valid and enforceable under the law in force at the time and in the jurisdiction of execution, the principal has become incapacitated, and the attorney in fact has validly assumed duties delegated by the durable power of attorney under the law in force at the time the duties were assumed; but any durable power of attorney made valid by this subsection shall continue in force only so long as the principal is incapacitated.

(4) All durable powers of attorney made enforceable by operation of this section despite failure to conform to the requirements of this Act shall be subject to s. 709.28, Fla. Stat.

Section 13. Section 744.345, Florida Statutes, is amended to read:

744.345 Letters of guardianship.—

Letters of guardianship shall be issued to the guardian and shall specify whether the guardianship pertains to the person, or the property, or both, of the ward. The letters must state whether the guardianship is plenary or limited, and, if limited, the letters must state the powers and duties of the guardian. The letters must state whether the guardian is authorized to grant durable powers of attorney on behalf of the ward; and, if the guardianship is limited, must state the extent to which the guardian is authorized to act on behalf of the ward with regard to any durable powers of attorney previously executed by the
Failure to issue letters shall not affect the validity of the order appointing the guardian.

Section 14. Section 744.3115 is created to read:

744.3115 Durable power of attorney.—

(1) In every proceeding by which a guardian is appointed under this chapter, the court shall determine whether the ward prior to his incapacity has executed any valid durable power of attorney, including any durable power of attorney appointing a health care surrogate, under any applicable law. If any such durable power of attorney exists, the court in its discretion shall:

(a) Specify in its order and letters of guardianship what authority, if any, the guardian shall exercise over the attorney in fact; or

(b) With notice to the attorney in fact and any other appropriate parties, order revocation of the durable power of attorney; and the order shall be entered as a revocation of the durable power of attorney in the records of the clerk of the court in the county in which the durable power of attorney has been recorded.

(2) A plenary guardian may execute or revoke any durable power of attorney on behalf of the ward unless the court, in its discretion, has specified otherwise in its order or letters of guardianship.

(3) A limited guardian is not authorized to execute or revoke any durable power of attorney on behalf of the ward unless expressly authorized by the court in its order creating the guardianship or in the letters of guardianship.