THE NEW FLORIDA POWER OF ATTORNEY ACT

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Matthew J. Ahearn, Esq.
Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.

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The Florida law governing powers of attorney and similar instruments is found in Chapter 709 of the Florida Statutes. The Florida legislature on May 4, 2011 voted to pass Senate Bill 670 which significantly revises Chapter 709 in an attempt to achieve greater consistency among the states by conforming Florida's power of attorney law to the Uniform Power of Attorney Act, with certain modifications. The Florida Power of Attorney Act[1] (the "Act") will take effect on October 1, 2011.

A. Generally

A power of attorney is a writing that grants authority to an agent to act in the place of the principal.[2] Under the Act, a principal[3] is an individual who grants authority to an agent in a power of attorney and an agent[4] is the person granted authority by the principal under a power of attorney. The Act only applies to powers created by individuals and does not apply to powers created by corporations or other non-natural persons.

The Act allows for both durable and nondurable powers of attorney. A durable power of attorney is one that is not terminated by the incapacity of the principal,[5] whereas a nondurable power of attorney is terminated upon the principal's incapacity. "Incapacity" is defined as the inability of an individual to take those actions necessary to obtain, administer and dispose of real estate and personal property, intangible property, business property, benefits and income.[6] For a power of attorney to be durable, it must state that it is not terminated by the subsequent incapacity of the principal, or similar words that evidence the principal's intent.[7]

The Act applies to all powers of attorney created by an individual except (i) a proxy or other delegation to exercise voting or management rights with respect to an entity, (ii) a power created on a form prescribed by a governmental agency or subdivision for a governmental purpose, (iii) a power coupled with an interest (e.g., a power given to a creditor to sell pledged collateral), and (iv) a power created by a person other than an individual.[8] Thus, except as specifically provided otherwise, the Act applies retroactively to powers in existence before the effective date of the Act.

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[1] Fla. Stat. §709.2101
[2] Fla. Stat. §709.2102(6)
[3] Fla. Stat. §709.2102(8)
[4] Fla. Stat. §709.2102(1)
[5] Fla. Stat. §709.2102(2)
[6] Fla. Stat. §709.2102(4)
[7] Fla. Stat. §709.2104
[8] Fla. Stat. §709.2103

The meaning and effectiveness of a power of attorney is governed by the Act if the power of attorney is used in Florida or states for which Florida law applies (even if the power of attorney was executed in another state).[9]

Except as modified by the Act or other Florida law, the common law of agency and principles of equity supplement the Act.[10]

B. The Instrument

1. Execution. Powers of attorney executed after the effective date of the Act (October 1, 2011) must be signed by the principal and by two subscribing witnesses, and be acknowledged by the principal before a notary public.[11] A power of attorney executed before October 1, 2011 is valid if its execution complied with the laws of Florida at the time it was executed.[12] Additionally, the Act considers a power of attorney executed in another state to be valid in Florida (even if it doesn't comply with the execution requirements of Florida) if it complied with the execution requirements of the state of execution at the time it was executed.[13] This is a significant change from the current Durable Power of Attorney Act; the Uniform Act has a goal to foster portability of powers of attorney between states which the new Act adopts. Also under the Act, a photocopy or electronic copy of a power of attorney has the same effect as the original, unless otherwise provided in the power of attorney.[14]

2. Springing Powers. A springing power of attorney is one which does not become effective until the incapacity of the principal. Prior to the effective date of the Act, springing powers of attorney are valid in Florida. Following the effective date of the Act, however, powers of attorney must be effective as of the time they are executed (except for certain military powers of attorney).[15] Springing powers of attorney in existence on the effective date of the Act remain effective under the Act.[16]

3. Revocation. A principal may revoke a power of attorney at any time by executing a new power of attorney or other signed writing evidencing the principal's intent to revoke the power of attorney.[17] The execution of a new power attorney alone does not revoke an existing power of attorney.[18] Note that under the Act, simply revoking the power of attorney can be accomplished without witnesses or notarization and the principal may, but is not required to, give notice of the revocation to the agent. Of course, it is highly advisable to provide notice of the revocation to the agent as well as all financial institutions where the principal has accounts. It is also advisable to have the revocation of a power of attorney notarized so that it can be recorded in any county where the principal owns real estate. Amendments to a power of attorney

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[9] Fla. Stat. §709.2107
[10] Fla. Stat. §709.2301
[11] Fla. Stat. §709.2105(2)
[12] Fla. Stat. §709.2106(2)
[13] Fla. Stat. §709.2106(3)
[14] Fla. Stat. §709.2106(5)
[15] Fla. Stat. §709.2108(1)
[16] Fla. Stat. §709.2108(2)
[17] Fla. Stat. §709.2110(1)
[18] Fla. Stat. §709.2110(2)

are not permitted under the Act, which protects agents and third persons from relying on powers of attorney that may have been amended without their knowledge.

4. Suspension and Termination. The authority granted under a power of attorney is suspended upon the initiation of a judicial proceeding to determine the principal's incapacity or to appoint a guardian.[19] The suspension continues until the court dismisses the proceeding or enters an order adjudicating incapacity.[20] A power of attorney terminates upon the occurrence of any of the following events: (a) death of the principal; (b) incapacity of the principal when the power of attorney is not durable; (c) adjudication of incapacity of the principal by a court; (d) revocation of the power of attorney by the principal; (e) termination of the power of attorney pursuant to its terms; or (f) accomplishment of the purpose of the power of attorney.[21] Any termination or suspension is not effective as to an agent who, without knowledge of the termination or suspension, acts in good faith under the power of attorney, and an act so performed binds the principal and the principal's successors-in-interest.[22]

C. Agents

1. Qualification. The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in Florida, and is authorized to conduct trust business in Florida.[23]

2. Designation. A principal may designate a single agent or two or more persons to act as co-agents.[24] Unless the power of attorney provides otherwise, each co-agent may exercise its authority independently. This is a significant change from existing Chapter 709 which provides a default rule that two (2) agents must act unanimously and a majority of co-agents is required to take all acts when three (3) or more agents are appointed. Even when a power of attorney requires two or more persons to act together, one or more agents may delegate to a co-agent the authority to conduct banking transactions as provided in Section 709.2208(1). Additionally, a principal may designate one or more successor agents to act if the initial agent is no longer willing or authorized to serve.[25] The current Power of Attorney Act does not clearly set forth the ability to appoint successor agents. Unless the power of attorney provides otherwise, the successor agent will have the same authority as the original agent.[26]

3. Acceptance. There is no required method of acceptance contained in the Act. However, an agent must accept the power of attorney in the manner specified in that power of attorney. If no method of acceptance is set forth in the power of attorney, a person or financial institution accepts the appointment as agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.[27] Interestingly, an

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[19] Fla. Stat. §709.2109(3)
[20] Id.
[21] Fla. Stat. §709.2109(1)
[22] Fla. Stat. §709.2109(4)
[23] Fla. Stat. §709.2105(1)
[24] Fla. Stat. §709.2111(1)
[25] Fla. Stat. §709.2111(2)
[26] Id.
[27] Fla. Stat. §709.2113

acceptance does not automatically indicate an acceptance of all terms contained in the written power of attorney, but rather the scope of the agent's acceptance will be limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifest acceptance. In order to ensure that the agent has fully accepted a power of attorney at the time the power of attorney is executed by the principal, it is important for the power of attorney to set forth a method of acceptance and to have the agent comply with that method of acceptance.

4. Reimbursement and Compensation. The Act deals expressly with expenses and compensation, which is not explicitly covered under current Chapter 709. Unless the power of attorney provides otherwise, any agent is entitled to reimbursement for expenses reasonably incurred on behalf of the principal.[28] Only qualified agents, however, are entitled to compensation and that compensation must be reasonable under the circumstances.[29] A qualified agent is an agent who is the spouse or an heir of the principal, a financial institution with trust powers and a place of business in Florida, an attorney or accountant licensed in Florida, or a natural person who is a resident of Florida and who has never been an agent for more than three principals at the same time.[30] The restriction of compensation to only qualified agents is intended to protect principals against unlicensed and unregulated individuals seeking to serve as agents for profit.

5. Resignation. Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal, to the principal's guardian if one has been appointed, or to any co-agent. If no co-agent is serving, the agent may resign by giving notice to the next successor agent.[31]

6. Termination of Agent's Authority. An agent's authority under a power of attorney continues until such authority is terminated because: (a) the agent dies, becomes incapacitated, resigns or is removed by a court; (b) an action is filed for dissolution, annulment or legal separation of the agent's marriage to the principal (unless the power of attorney provides otherwise); or (c) the power of attorney terminates.[32]

D. Duties of Agents

The Act goes much further than existing Chapter 709 to define the duties of Agents. The Act divides the duties of agents into two categories, those duties that apply notwithstanding a contrary provision in the power of attorney ("Mandatory Duties") and those duties that apply in the absence of a contrary provision in the power of attorney ("Default Duties").

1. Mandatory Duties. Regardless of the terms contained in the power of attorney, an agent who has accepted appointment must act only within the scope of authority granted in the power of attorney, which means the agent may not act contrary to the principal's reasonable expectations actually known by the agent, must act in good faith, may not act in a

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[28] Fla. Stat. §709.2112(2)
[29] Fla. Stat. §709.2112(3)
[30] Fla. Stat. §709.2112(4)
[31] Fla. Stat. §709.2118
[32] Fla. Stat. §709.2109(2)

manner that is contrary to the principal's best interest (except as provided with respect to the agent's duty to cooperate with a person who has authority to make health care decisions for the principal and with respect to estate planning matters), and must attempt to preserve the principal's estate plan when preservation of the plan is in the best interests of the principal (to the extent it is known by the agent, which means an agent is not under a duty to ascertain such plan).[33] Additionally, the agent may not delegate authority granted under the power of attorney to a third person (except the agent may delegate investment functions in accordance with Florida's Prudent Investor Rule), the agent must keep a record of all receipts, disbursements and transactions made on behalf of the principal and, if the power of attorney authorizes the agent to access the principal's safe-deposit box, the agent must create and maintain an accurate inventory each time the agent accesses the box.[34] However, an agent is not required to disclose such records unless ordered by court or requested by the principal, a court appointed guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate.[35] An agent has sixty (60) days to comply with such a request or request in writing an additional sixty (60) days.[36]

2. Default Duties. The default duties are the ones that apply unless the power of attorney provides otherwise. These duties provide that an agent who has accepted appointment shall act loyally and for the sole benefit of the principal, shall not act so as to create a conflict of interest that may impair the agent's ability to act in the principal's best interest, shall act with the care, competence and diligence ordinarily exercised by agents, and shall cooperate with any person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations known by the agent.[37] For an agent who has accepted authority to make investment decisions for the principal, the agent must comply with Florida's Prudent Investor Rule.[38]

A principal may modify the duties to act loyally and for the sole benefit of the principal and may waive conflicts of interest; however, a provision that authorizes an agent to engage in a conflicted transaction is invalid if it was inserted into the power of attorney as a result of an abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate.[39] An affiliate includes (i) the agent's spouse, (ii) the agent's descendants, siblings, parents, or their spouses, (iii) a corporation or other entity in which the agent, or a person who owns a significant interest in the agent, has an interest that might affect the agent's best judgment, (iv) a person or entity that owns a significant interest in the agent, or (v) the agent acting in a fiduciary capacity for someone other than the principal.[40] In a judicial proceeding concerning conflicts of interest, the agent or affiliate has a burden of proving, by clear and convincing evidence, that the agent acted (i) solely in the interest of the principal or (ii) in good

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[33] Fla. Stat. §709.2114(1)
[34] Id.
[35] Fla. Stat. §709.2114(6)
[36] Id.
[37] Fla. Stat. §709.2114(2)
[38] Fla. Stat. §§518.10 and 518.11
[39] Fla. Stat. §709.2116(5)(a)
[40] Fla. Stat. §709.2116(5)(b)

faith in the principal's best interest and the conflict of interest was expressly authorized in the power of attorney.[41]

E. Authority of Agents

1. Generally. The Act also makes clear that an agent may only exercise the authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to effectuate the express authority granted in the power of attorney (except as otherwise limited by the Act).[42] Court approval is not required for the agent to take action in furtherance of an express grant of specific authority. Note, however, that general provisions in a power of attorney which do not identify the specific authority granted, do not grant authority to the agent (e.g., a provision purporting to give the agent authority to do all acts that the principal can do would not grant any authority to the agent). Interestingly, the Act does not contain any default authorities, which is a departure from the Uniform Power of Attorney Act. The drafters of the Act did not want powers of attorney to be able to incorporate by reference certain default authorities in an effort to ensure that principals execute powers of attorney that they fully understand.

2. Financial Institutions. As an exception to the "no incorporation by reference" rule, the power of attorney may provide that the agent has "authority to conduct banking transactions as provided in Section 709.2208(1), Florida Statutes," which grants general authority to the agent to engage in a laundry list of banking transactions.[43] In addition, a power of attorney may provide that the agent has "authority to conduct investment transactions as provided in Section 709.2208(2), Florida Statutes," which grants general authority to the agent to take any one or more of a laundry list of investment actions.[44]

3. Affected Property. An agent may exercise authority granted in a power of attorney with respect to property owned by the principal when the power of attorney is executed and property that is later acquired by the principal.[45] The agent may exercise such power whether or not the property is located in Florida and whether or not the authority is exercised or the power of attorney is executed in Florida.[46]

4. Prohibited Authorities. The Act does not allow an agent to exercise specific authority pursuant to a power of attorney to take the following actions: perform duties under a power of attorney that require the personal services of the principal; make any affidavit as to the personal knowledge of the principal; vote in any public election on behalf of the principal; execute or revoke any will or codicil for the principal; or exercise authority granted to the principal as trustee or court-appointed fiduciary.[47]

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[41] Fla. Stat. §709.2116(4)
[42] Fla. Stat. §709.2201(1)
[43] Fla. Stat. §709.2208(1)
[44] Fla. Stat. §709.2208(2)
[45] Fla. Stat. §709.2201(5)
[46] Id.
[47] Fla. Stat. §709.2201(3)

5. Authority Requiring Separate Signed Enumeration. In a dramatic deviation from existing Chapter 709, the Act provides that there are certain authorities that the agent may exercise only if the principal signs or initials next to the specific enumeration of the authority in the power of attorney (initialing or signing a page is not sufficient), such authority is consistent with the agent's duties and the exercise is not otherwise prohibited by another instrument.[48]

(a) Authorities. These additional requirements apply to the authority to create an inter vivos trust, to amend, revoke or terminate a trust created by the principal, to make a gift, to create or change rights of survivorship, to create or change a beneficiary designation, to waive the principal's right to be a beneficiary of a joint and survivor annuity, and to disclaim property and powers of appointment.[49]

(b) Further Restrictions. Notwithstanding the separate signed enumeration of authority to do any of the acts specified in Paragraph E5(a) above, an agent who is not an ancestor, spouse or descendant of the principal may not exercise authority to create in the agent, or in someone the agent is legally obligated to support, any interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise, unless the power of attorney provides otherwise.[50] In addition, an agent may amend, modify, revoke, or terminate a trust for which the principal is the settlor only if the trust instrument explicitly provides that authority to the settlor's agent.[51] If the power of attorney authorizes an agent to conduct banking or investment transactions, then making a deposit to or a withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account or any other account held jointly or otherwise held in survivorship or payable on death, is not considered to be a change to the survivorship feature or beneficiary designation, and no further specific authority is required for the agent to exercise such authority.[52]

(c) Gifts. Unless the power of attorney provides otherwise, a general grant of authority in a power of attorney to make gifts only authorizes the agent to make gifts of the principal's property outright to, or for the benefit of, a person in an amount per donee not to exceed the federal gift tax annual exclusion amount (or twice that amount if the principal's spouse agrees to gift splitting).[53]

(d) Applicability. Because the requirements above are new, powers of attorney created before the Act will not comply with them. As a result, the specific requirements and limitations listed herein do not apply to powers granted before the effective date of the Act.

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[48] Fla. Stat. §709.2202(1)
[49] Id.
[50] Fla. Stat. §709.2202(2)
[51] Fla. Stat. §§709.2202(1)(b) and 736.0602(5)
[52] Fla. Stat. §709.2202(4)
[53] Fla. Stat. §709.2202(3)

F. Liability of Agents

1. Generally. Existing Chapter 709 provides generally that an agent must observe the standards of care applicable to trustees and can be held liable to interested persons for damages resulting from a breach of fiduciary duty. The Act goes much further in describing the agent as a fiduciary who owes specific duties to the principal (see Section D above) and who can be held liable for improper acts or omissions. Furthermore, the Act provides that (a) absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines[54] and (b) an agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.[55] Also note that an agent cannot be liable for preservation of the principal's estate plan unless the agent has actual knowledge of the estate plan.

2. Damages and Costs. The Act clearly defines the scope of damages and costs recoverable for a breach of duty. Specifically, an agent who violates its duties is liable to the principal or the principal's successors-in-interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred and to reimburse the principal or the principal's successors-in-interest for the attorneys fees and costs paid from the principal's funds on the agent's behalf in defense of the agent's actions.[56] The remedies under the Act are not exclusive and do not abrogate any right or remedy under any other law other than the Act.[57]

3. Actions of Co-Agents. The Act imposes on an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent an obligation to take reasonable action to safeguard the principal's best interests.[58] If the agent in good faith believes the principal is not incapacitated, notifying the principal of the breach or imminent breach is sufficient action.[59] Except as otherwise provided in the power of attorney, an agent who does not have actual knowledge of a breach or pending breach and who does not participate in or conceal a breach of fiduciary duty committed by another agent is not liable for the actions or omissions of the other agent.[60]

4. Successor Agents. Under the Act, successor agents do not have a duty to review the conduct or decisions of predecessor agents.[61] Absent actual knowledge of a breach of fiduciary duty by a predecessor agent, a successor agent does not have a duty to institute any proceeding against a predecessor agent or such agent's estate for any actions or omissions as agent.[62]

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[54] Fla. Stat. §709.2114(5)
[55] Fla. Stat. §709.2114(3)
[56] Fla. Stat. §709.2117
[57] Fla. Stat. §709.2303
[58] Fla. Stat. §709.2111(4)
[59] Id.
[60] Fla. Stat. §709.2111(3)
[61] Fla. Stat. §709.2111(5)
[62] Id.

5. Others. An agent may properly delegate investment functions pursuant to Florida's Prudent Investor Rule, and provided the agent exercises reasonable care, judgment, and caution in selecting the delegee, establishing the scope in terms of the delegation, and in periodically reviewing the delegee's actions, the delegating agent is not liable for an act, error of judgment, or default of the delegee.[63]

6. Exoneration. The Act also provides that a power of attorney may exonerate an agent for liability for any acts or decisions made by the agent in good faith and pursuant to the authority granted in the power of attorney.[64] Such a provision is effective to the extent it (a) does not relieve the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purpose of the power or the best interest of the principal and (b) was not inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.[65]

G. Third Persons

1. Acceptance. The Act imposes a requirement that a third person must accept or reject a power of attorney within a reasonable time.[66] For financial institutions, four business days is presumed to be a reasonable time.[67] For other third persons, reasonableness will depend on the circumstances and the terms of the power of attorney. The third person must accept the power of attorney as is,[68] but may require the agent to execute an affidavit setting forth certain facts establishing the continuing validity of the power.[69] A third person may also in good faith request an English translation of any power not wholly in English and an opinion of counsel as to any matter of law concerning the power of attorney.[70]

2. Rejection. The Act also imposes a requirement that a third person who rejects a power of attorney must state in writing the reasons for the rejection.[71] A third person is not required to accept a power of attorney if: (a) the third person is not otherwise required to engage in the transaction with the principal; (b) the third person has knowledge of the termination or suspension of the agent's authority or the power of attorney; (c) a timely request by the third person for an affidavit, English translation or opinion of counsel is refused by the agent; (d) the third person believes in good faith that the power is not valid or the agent does not have authority; or (e) the third person has knowledge of a report to adult protective services stating a good faith belief that the principal may be subject to physical or financial abuse by the agent or someone acting for or with the agent.[72]

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[63] Fla. Stat. §518.112(1)(4)
[64] Fla. Stat. §709.2115
[65] Id.
[66] Fla. Stat. §709.2120(1)(a)
[67] Fla. Stat. §709.2120(1)(b)
[68] Fla. Stat. §709.2120(1)(c)
[69] Fla. Stat. §709.2119(2)
[70] Fla. Stat. §709.2119(3)
[71] Fla. Stat. §709.2120(1)(a)
[72] Fla. Stat. §709.2120(2)

3. Liability. A third person who, in violation of the Act, refuses to accept a power of attorney is subject to a court order mandating acceptance of the power of attorney and liability for damages, including attorney's fees and costs, incurred in any proceeding that confirms the validity of the power of attorney or mandates its acceptance.[73]

4. Reliance. A third person who in good faith accepts a power of attorney may rely upon the power and the actions of the agent which are reasonably within the scope of the agent's authority.[74] A third person who acts in reliance upon the authority granted to an agent will be held harmless by the principal for any loss or liability incurred as a result of actions taken before the receipt of notice that the agent no longer has authority.[75] A third person who acts in good faith upon any representation, direction or action of the agent is not liable to the principal or the principal's estate, beneficiaries or joint owners for such acts.[76]

H. Judicial Relief

1. Generally. The Act more clearly defines the role of the courts in proceedings relating to powers of attorneys. Specifically, a court is empowered under the Act to construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other applicable relief.[77] The Act not only applies to judicial proceedings initiated after the effective date of the Act, but also to judicial proceedings commenced before that date.

2. Who May Petition. The following persons are authorized under the Act to petition for judicial relief: (a) the principal or the agent; (b) a guardian, conservator, trustee or other fiduciary acting for the principal or the principal's estate; (c) a person authorized to make health care decisions for the principal (if the principal's health care is at issue); (d) any other interested person who can demonstrate that they are interested in the welfare of the principal or has a good faith belief that the court's intervention is necessary; (e) a governmental agency having regulatory authority to protect the principal's welfare; and (f) a person asked to honor the power of attorney.[78]

3. Fees and Costs. In any judicial proceeding instituted pursuant to the Act, the court is required to award reasonable attorney's fees and costs.[79]

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[73] Fla. Stat. §709.2120(3)
[74] Fla. Stat. §709.2119(1)(a)
[75] Fla. Stat. §709.2119(5)
[76] Id.
[77] Fla. Stat. §709.2116(1)
[78] Fla. Stat. §709.2116(2)
[79] Fla. Stat. §709.2116(3)

FLORIDA POWER OF ATTORNEY ACT

2011670e1

A bill to be entitled

An act relating to powers of attorney; providing directives to the Division of Statutory Revision; creating s. 709.2101, F.S.; providing a short title; creating s. 709.2102, F.S.; providing definitions; creating s. 709.2103, F.S.; providing applicability; providing exceptions; creating s. 709.2104, F.S.; providing for a durable power of attorney; creating s. 709.2105, F.S.; specifying the qualifications for an agent; providing requirements for the execution of a power of attorney; creating s. 709.2106, F.S.; providing for the validity of powers of attorney created by a certain date or in another jurisdiction; providing for the validity of a military power of attorney; providing for the validity of a photocopy or electronic copy of a power of attorney; creating s. 709.2107, F.S.; providing for the meaning and effectiveness of a power of attorney; creating s. 709.2108, F.S.; specifying when a power of attorney is effective; providing limitations with respect to a future power of attorney; creating s. 709.2109, F.S.; providing for the termination or suspension of a power of attorney or an agent's authority; creating s. 709.2110, F.S.; providing for the revocation of a power of attorney; creating s. 709.2111, F.S.; providing for the designation of co-agents and successor agents; specifying the responsibility of a successor agent for a predecessor agent; authorizing a co-agent to delegate certain banking transaction to a

co-agent; creating s. 709.2112, F.S.; providing for the reimbursement and compensation of agents; creating s. 709.2113, F.S.; providing for the agent's acceptance of appointment; creating s. 709.2114, F.S.; providing for an agent's duties; limiting an agent's liability, absent a breach of duty; requiring that an agent make certain disclosures upon order of a court, upon the death of the principal, or under certain other circumstances; creating s. 709.2115, F.S.; providing for the exoneration of an agent; providing exceptions; creating s. 709.2116, F.S.; providing for judicial relief; authorizing the award of attorney's fees and costs; providing for a judicial challenge to an agent's exercise of power based on a conflict of interest; specifying the burden of proof required to overcome that challenge; creating s. 709.2117, F.S.; providing for an agent's liability; creating s. 709.2118, F.S.; providing for an agent's resignation; creating s. 709.2119, F.S.; providing for the acceptance of and reliance upon a power of attorney; authorizing a third party to require an affidavit; providing for the validity of acts taken on behalf of a principal who is reported as missing by a branch of the United States Armed Forces; providing a restriction on the conveyance of homestead property held by such a principal; creating s. 709.2120, F.S.; providing for liability if a third person refuses to accept a power of attorney under certain circumstances; providing for an award of damages and

attorney's fees and costs; creating s. 709.2121, F.S.; requiring that notice of certain events be provided to an agent or other third person; specifying the form of the notice and when it is effective; creating s. 709.2201, F.S.; providing for the authority of an agent; providing limitations; providing that an agent's authority extends to property later acquired by the principal; creating s. 709.2202, F.S.; specifying that certain authority requires separate signed enumeration; restricting the amount of certain gifts made by an agent; specifying certain acts that do not require specific authority if the agent is authorized to conduct banking transactions; limiting the application of such provision; creating s. 709.2208, F.S.; providing for authority to conduct banking and security transactions; creating s. 709.2301, F.S.; specifying the role of common law; creating s. 709.2302, F.S.; providing for the preemption of laws relating to financial institutions; creating s. 709.2303, F.S.; providing for the recognition of other remedies; creating s. 709.2401, F.S.; specifying the relationship of the act to federal law regulating electronic signatures; creating s. 709.2402, F.S.; providing for powers of attorney executed before the effective date of the act; amending s. 736.0602, F.S.; conforming a cross-reference; repealing s. 709.01, F.S., relating to the authority of an agent when the principal is dead; repealing s. 709.015, F.S., relating to the authority

of an agent when the principal is missing; repealing s. 709.08, F.S., relating to durable powers of attorney; repealing s. 709.11, F.S., relating to a deployment-contingent power of attorney; providing an effective date.

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

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

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

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

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

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

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

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

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

(3) "Electronic" means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or

similar capabilities.

(4) "Financial institution" has the same meaning as in s. 655.005.

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

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

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

(8) "Presently exercisable general power of appointment" means, with respect to property or a property interest subject to a power of appointment, power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

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

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

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

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

(a) Execute or adopt a tangible symbol; or

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

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

Section 5. Section 709.2103, Florida Statutes, is created

to read:

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

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

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

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

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

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

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

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

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

(1) The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers,

has a place of business in this state, and is authorized to conduct trust business in this state.

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

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

709.2106 Validity of power of attorney.—

(1) A power of attorney executed on or after October 1, 2011, is valid if its execution complies with s. 709.2105.

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

(3) A power of attorney executed in another state which does not comply with the execution requirements of this part is valid in this state if, when the power of attorney was executed, the power of attorney and its execution complied with the law of the state of execution. A third person who is requested to accept a power of attorney that is valid in this state solely because of this subsection may in good faith request, and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under this subsection must be provided at the principal's expense. A third person may accept a power of attorney that is valid in this state solely because of this subsection if the agent does not provide the requested opinion of counsel, and in such case, a third person has no

liability for refusing to accept the power of attorney. This subsection does not affect any other rights of a third person who is requested to accept the power of attorney under this part, or any other provisions of applicable law.

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

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

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

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

(1) Is used in this state; or

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

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

709.2108 When power of attorney is effective.—

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

(2) If a power of attorney executed before October 1, 2011, is conditioned on the principal's lack of capacity and the power of attorney has not become exercisable before that date, the power of attorney is exercisable upon the delivery of the

affidavit of a physician who has primary responsibility for the treatment and care of the principal and who is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459 as of the date of the affidavit. The affidavit executed by the physician must state that the physician is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the physician believes that the principal lacks the capacity to manage property.

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

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

709.2109 Termination or suspension of power of attorney or agent's authority.—

(1) A power of attorney terminates when:

(a) The principal dies;

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

(c) The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;

(d) The principal revokes the power of attorney;

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

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

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

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

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

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

(c) The power of attorney terminates.

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

(a) If an emergency arises after initiation of proceedings to determine incapacity and before adjudication regarding the principal's capacity, the agent may petition the court in which the proceeding is pending for authorization to exercise a power granted under the power of attorney. The petition must set forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent.

(b) Notwithstanding the provisions of this section, unless otherwise ordered by the court, a proceeding to determine incapacity does not affect the authority of the agent to make

health care decisions for the principal, including, but not limited to, those provided in chapter 765. If the principal has executed a health care advance directive designating a health care surrogate, the terms of the directive control if the directive and the power of attorney are in conflict unless the power of attorney is later executed and expressly states otherwise.

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

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

709.2110 Revocation of power of attorney.—

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

(2) Except as provided in subsection (1), the execution of a power of attorney does not revoke a power of attorney previously executed by the principal.

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

709.2111 Co-agents and successor agents.—

(1) A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each

co-agent may exercise its authority independently.

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

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

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

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

(4) An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, including a predecessor agent, must take any action reasonably appropriate in the circumstances to safeguard the principal's best interests. If the agent in good faith believes that the principal is not incapacitated, giving notice to the principal is a sufficient action. An agent who fails to take action as required by this subsection is liable to the principal for the principal's reasonably foreseeable damages that could have been avoided if the agent had taken such action.

(5) A successor agent does not have a duty to review the conduct or decisions of a predecessor agent. Except as provided in subsection (4), a successor agent does not have a duty to institute any proceeding against a predecessor agent, or to file

any claim against a predecessor agent's estate, for any of the predecessor agent's actions or omissions as agent.

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

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

709.2112 Reimbursement and compensation of agent.—

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

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

(3) Notwithstanding any provision in the power of attorney, an agent may not be paid compensation unless the agent is a qualified agent.

(4) For purposes of this section, the term "qualified agent" means an agent who is the spouse of the principal, an heir of the principal within the meaning of s. 732.103, a financial institution that has trust powers and a place of business in this state, an attorney or certified public accountant who is licensed in this state, or a natural person who is a resident of this state and who has never been an agent

for more than three principals at the same time.

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

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

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

709.2114 Agent's duties.—

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

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

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

2. Must act in good faith;

3. May not act in a manner that is contrary to the principal's best interest, except as provided in paragraph (2)(d) and s. 709.2202; and

4. Must attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

a. The value and nature of the principal's property;

b. The principal's foreseeable obligations and need for

maintenance;

c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

d. Eligibility for a benefit, a program, or assistance under a statute or rule; and

e. The principal's personal history of making or joining in making gifts;

(b) May not delegate authority to a third person except as provided in s. 518.112;

(c) Must keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and

(d) Must create and maintain an accurate inventory each time the agent accesses the principal's safe-deposit box, if the power of attorney authorizes the agent to access the box.

(2) Except as otherwise provided in the power of attorney, an agent who has accepted appointment shall:

(a) Act loyally for the sole benefit of the principal;

(b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

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

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

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

preserve the plan.

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

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

(6) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, transactions conducted on behalf of the principal, or safe-deposit box inventories, unless ordered by a court or requested by the principal, a court-appointed guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If requested, the agent must comply with the request within 60 days or provide a writing or other record substantiating why additional time is needed and comply with the request within an additional 60 days.

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

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

(1) Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless

indifference to the purposes of the power of attorney or the best interest of the principal; or

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

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

709.2116 Judicial relief; conflicts of interests.—

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

(2) The following persons may petition the court:

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

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

(c) A person authorized to make health care decisions for the principal if the health care of the principal is affected by the actions of the agent.

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

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

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

(3) In any proceeding commenced by filing a petition under this section, including, but not limited to, the unreasonable refusal of a third person to allow an agent to act pursuant to the power of attorney, and in challenges to the proper exercise

of authority by the agent, the court shall award reasonable attorney's fees and costs.

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

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

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

(5) For purposes of subsection (4):

(a) A provision authorizing an agent to engage in a transaction affected by a conflict of interest which is inserted into a power of attorney as the result of the abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate is invalid.

(b) Affiliates of an agent include:

1. The agent's spouse;

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

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

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

5. The agent acting in a fiduciary capacity for someone

other than the principal.

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

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

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

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

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

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

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

709.2119 Acceptance of and reliance upon power of attorney.—

(1)(a) A third person who in good faith accepts a power of attorney that appears to be executed in the manner required by law at the time of its execution may rely upon the power of attorney and the actions of the agent which are reasonably within the scope of the agent's authority and may enforce any

obligation created by the actions of the agent as if:

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

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

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

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

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

2. The purported agent's authority is void, invalid, suspended, or terminated.

(2) A third person may require:

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

(b) An officer of a financial institution acting as agent to execute a separate affidavit, or include in the form of the

affidavit, the officer's title and a statement that the officer has full authority to perform all acts and enter into all transactions authorized by the power of attorney for and on behalf of the financial institution in its capacity as agent. A written affidavit executed by the agent under this subsection may, but need not, be in the following form:

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

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

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

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

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

a. The Principal is not deceased;

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

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

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

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

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

.....

...(Affiant)...

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

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

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

Personally Known OR Produced Identification

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

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

(a) A verified English translation of the power of attorney

if the power of attorney contains, in whole or in part, language other than English;

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

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

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

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

(6) The acts of an agent under a power of attorney are as valid and binding on the principal or the principal's estate as if the principal were alive and competent if, in connection with any activity pertaining to hostilities in which the United States is then engaged, the principal is officially listed or reported by a branch of the United States Armed Forces in a missing status as defined in 37 U.S.C. s. 551 or 5 U.S.C. s. 5561, regardless of whether the principal is dead, alive, or

incompetent. Homestead property held as tenants by the entireties may not be conveyed by a power of attorney regulated under this provision until 1 year after the first official report or listing of the principal as missing or missing in action. An affidavit of an officer of the Armed Forces having maintenance and control of the records pertaining to those missing or missing in action that the principal has been in that status for a given period is conclusive presumption of the fact.

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

709.2120 Refusal to accept power of attorney.—

(1) Except as provided in subsection (2):

(a) A third person must accept or reject a power of attorney within a reasonable time. A third person who rejects a power of attorney must state in writing the reason for the rejection.

(b) Four days, excluding Saturdays, Sundays, and legal holidays, are presumed to be a reasonable time for a financial institution to accept or reject a power of attorney with respect to:

1. A banking transaction, if the power of attorney expressly contains authority to conduct banking transactions pursuant to s. 709.2208(1); or

2. A security transaction, if the power of attorney expressly contains authority to conduct security transactions pursuant to s. 709.2208(2).

(c) A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(2) A third person is not required to accept a power of attorney if:

(a) The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(b) The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;

(c) A timely request by the third person for an affidavit, English translation, or opinion of counsel under s. 709.2119(4) is refused by the agent;

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

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

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

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

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

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

709.2121 Notice.—

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

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

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

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

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

709.2201 Authority of agent.—

(1) Except as provided in this section or other applicable law, an agent may only exercise authority specifically granted

to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of specific authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

709.2202 Authority that requires separate signed enumeration.—

(1) Notwithstanding s. 709.2201, an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise

of the authority is consistent with the agent's duties under s. 709.2114, and the exercise is not otherwise prohibited by another agreement or instrument:

(a) Create an inter vivos trust;

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

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

(d) Create or change rights of survivorship;

(e) Create or change a beneficiary designation;

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

(g) Disclaim property and powers of appointment.

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

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

(a) Make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment

held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under 26 U.S.C. s. 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to 26 U.S.C. s. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

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

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

exercise of the power of attorney.

(5) This section does not apply to a power of attorney executed before October 1, 2011.

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

709.2208 Banks and other financial institutions.—

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

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

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

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

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

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

(f) Endorse and negotiate checks, cashier's checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those

transactions, and accept a draft drawn by a person upon the principal and pay it when due.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

709.2302 Laws applicable to financial institutions and entities.—This part does not supersede any other law applicable

to financial institutions or other entities, and that law controls if inconsistent with this part.

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

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

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

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

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

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

(1) With respect to formalities of execution, this part applies to a power of attorney created on or after October 1, 2011.

(2) With respect to all matters other than formalities of execution, this part applies to a power of attorney regardless of the date of creation.

(3) With respect to a power of attorney existing on October 1, 2011, this part does not invalidate such power of attorney and it shall remain in effect. If a right was acquired under any other law before October 1, 2011, that law continues to apply to

the right even if it has been repealed or superseded.

(4) An act of an agent occurring before October 1, 2011, is not affected by this part.

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

736.0602 Revocation or amendment of revocable trust.—

(5) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only as authorized by s. 709.2202 ~~709.08~~.

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

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

Chapter 709 White Paper

I. SUMMARY

This legislation conforms Florida's power of attorney law to the Uniform Power of Attorney Act, with certain modifications, in order to achieve greater consistency among state laws. This bill does not have a fiscal impact on state funds.

II. BACKGROUND

The Power of Attorney Committee [the Committee] was created by the Real Property, Probate and Trust Law Section of the Bar. The Committee is comprised of attorneys with practices in several disciplines including estate planning, estate and trust litigation, elder law, and family law, as well as those who work for financial institutions, those who represent the Florida Bankers Association and those whose practice relates to real estate title insurance.

The Committee was charged with the task of evaluating the recently promulgated Uniform Power of Attorney Act[1] for possible enactment in Florida. As with other Uniform Acts in the estates and trusts area, the Committee found merit in many of the Uniform Act provisions but rejected numerous others for reasons that will be explained in this white paper. With its work largely completed, the Committee recommendations include significant revisions to Chapter 709 of the Florida Statutes. Part II of the revised Chapter 709 will carry forward without substantive change those provisions of current Chapter 709 that relate to powers of *appointment*.[2] Part I will contain a new Power of Attorney Act [the Act]. This white paper explains the key provisions of the final Committee draft. To avoid confusion, references to sections in Chapter 709 without further qualification (e.g., 709.102) are to sections in the proposed new Act. References to sections in existing Chapter 709 and to sections of the Uniform Act will be identified by a precedent *FS* and Uniform Act, respectively.

III. CURRENT SITUATION

Before turning to a detailed examination of the proposed Act, it is useful to explore some of the policy concerns that shaped it. The proposed legislation addresses both durable powers of attorney and non-durable powers of attorney. A power of attorney is a legal document used by individuals to designate an agent to act on their behalf. A durable power of attorney continues to be legally effective if the principal becomes incapacitated. A non-durable power of attorney is terminated upon the incapacity of the principal. Durable powers of attorney are frequently used in the estate planning context as a viable alternative to guardianship should the individual become incapacitated. The Legislature has recognized that it is desirable to make available to the citizens of Florida a system that provides incapacitated persons the least restrictive alternatives to ensure their physical health and safety, protect their rights and manage their financial resources.[3] Comprehensive legislation is necessary to ensure that durable powers of attorney continue to be an effective

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1 The Uniform Act was completed by the Uniform Law Commissioners in 2006. As of the end of 2009, the Uniform Act has been adopted in four states (Colorado, Idaho, Nevada, and New Mexico) and has been introduced in eight more (Illinois, Indiana, Maine, Maryland, Minnesota, Montana, Oregon, and Virginia).

2 Part II of revised Chapter 709 consists of sections 709.502 through .507 which are identical to current *FS* sections 709.02 through .07, respectively.

3 *FS* section 744.1012.

alternative to guardianship, while providing protection to the principal and clear guidance to the agent under any power of attorney as to their respective rights and responsibilities as well as a mechanism for detection and remedies of abuses.

Various interest groups represented on the Committee held specific opinions about the use and potential abuse of powers of attorney. These opinions can be summarized as follows:

1. Estate planning practitioners

Estate planning practitioners, particularly those with high net worth clients, view the power of attorney as an important tool for engaging in tax saving estate planning techniques such as the making of annual exclusion gifts and the creation of Grantor Retained Annuity and Qualified Personal Residence Trusts. Each of these techniques, and others as well, are dependent on the ability of an agent to make donative transfers of a principal's property. Some also involve the creation of trusts. And, when a family member serves as agent, these transactions can involve a conflict of interest as well. Hence, estate planning practitioners want the Act to permit an agent to be authorized to engage in all of these transactions.

2. Estate litigators and elder law practitioners

Estate litigators and some elder law practitioners share a different perspective. They focus on the abuses that powers of attorney enable when agents prove to be dishonest or duplicitous. From this perspective, the ability to authorize an agent to make donative transfers is particularly troublesome. Thus, some on the Committee favored prohibiting the use of powers to make gifts or to create trusts or to engage in transactions involving a conflict of interest between the agent and the principal.

3. Real estate practitioners

Committee members involved in the real estate practice voiced yet another concern. They worry that an insured real property transaction would be dismantled by a court where the power of attorney is invalid or the agent acted outside of the scope of the power. Even when a court ordered a return of the consideration, there could be liability for lost increases in value, which in some situations could be significant. Those who shared this concern favored a rule which would allow them to enforce a sale or mortgage transaction against the principal's real property, even if the power of attorney was not valid for some reason and even if the agent was acting outside of the scope of its authority, so long as they relied on the power of attorney in good faith and without actual knowledge.

4. Financial institutions

Then there are the myriad concerns voiced by Committee members involved with banks and other financial institutions. The concerns may be divided into three categories: protection of existing business, efficiency in the handling of powers, and concern for liability (and its attendant costs and potential for loss of goodwill). The first category – protection of existing business – manifested itself in a preference for a rule prohibiting compensation for agents because financial institutions see powers being used as a poor substitute for a living trust. The efficiency concern led to a preference for a central registration or recording of powers. Bankers also favored statutory approaches which promote the uniformity of language in powers such as check-the-box statutory form powers, a detailed set of default powers, and the ability to incorporate others by reference to a statutory list, each of which is an approach embraced by the Uniform Act. Lastly, the Bankers' concern about liability manifested itself in support for the view that donative transfers by agents should not be allowed, a hostility to contingent powers as well as springing powers, a bias against allowing the designation of successor agents, a strong desire for definitive rules for honoring or not honoring a power of attorney, and an insistence on immunity for acting on a presumptively valid power.

5. The Committee's response

A good part of the work of the Committee was to assess and reconcile these various views and concerns. Briefly tracking back through the list, the Act does not prohibit donative transfers by agents but it does include provisions intended to insure that a principal's decision to authorize them is a knowing and informed one. The Act also clarifies an agent's duty to maintain a principal's estate plan and the liability an agent incurs for not doing so.

Some of the concerns of real estate practitioners were addressed with a provision providing additional protections for third persons who rely on powers of attorney.[4] And financial institutions achieved much of what they were looking for as well. Although the Act does not create a central registry for powers, it does offer financial institutions a means to the uniformity of language they desire and more specific and comprehensive protection against liability for relying on powers without notice of any defects that might exist. In addition, the Act prohibits springing and other conditional powers but not successor agents or compensation for qualified agents.

IV. DEFINITIONS

Section 709.102 of the Act includes definitions of terms found in more than a single section of the Act. Consideration of most of these can wait until the terms become relevant. A few terms, however, require clarification at the outset.

Power of attorney: The Act defines a power of attorney to be "a writing that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used."[5] An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.[6]

Legacy power of attorney: Actually, this term does not appear in the Act. But it is used in this white paper. As used, it refers to a power of attorney that is executed before the effective date of the Act.

Principal and agent: From the definition of power of attorney it may be seen that the Act uses the term "principal" to refer to an individual who creates a power of attorney[7] and the term "agent" to refer to a person who is granted authority to act for a principal under a power of attorney. Agent is synonymous with attorney-in-fact and includes co-agents and successor agents.[8]

Third person: This term is used in the Act to refer to any person who is neither the principal nor the agent.[9]

Knowledge: Many of the Act's provisions depend on whether an agent or a third person has knowledge of a fact. The Act's definition of the term "knowledge" is based on and is substantively identical to the definition of the term in the Florida Trust Code.[10] In summary, knowledge means that a person has actual knowledge of the fact, has received a notice or notification of the fact, or has reason to know the fact from all other facts and circumstances known to the person at the time in

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4 See § 709.119.

5 § 709.102(6). Except as otherwise provided in the power of attorney, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original. § 709.106(4).

6 § 709.201(5).

7 §709.102(8).

8 § 709.102(1).

9 § 709.102(12). An agent is excluded from the term "third person" only when the agent acts in its capacity as agent.

10 See *FS* § 736.0104.

question. With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a power of attorney only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the power of attorney or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.[11]

Notice: Notice also plays an important role in the Act. Giving an agent or third person notice is critical in some contexts and advisable in numerous others. This includes when a power of attorney is revoked or terminated or suspended. Notice is not a defined term in section 709.102. Instead, it is covered comprehensively in section 709.121. Although this section appears in the middle of the Act, an appreciation of the requirements for an effective notice is useful at the outset as notice and its requirements are referred to extensively throughout the Act. One should also note that *notice* is different from *knowledge* (a defined term) which also appears throughout the Act.

Under section 709.102, a notice is legally effective only if it is in writing and is served on the agent or affected third person, as the case may be. In general, notice must be accomplished in a manner that is reasonably suitable under the circumstances and is likely to result in receipt of the document. Permissible methods include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.

Notice to a financial institution is subject to additional requirements. The notice must contain the name, address, and the last four digits of the taxpayer identification number of the principal and it must be directed to an officer or a manager of the financial institution in Florida. As it is not always obvious where notice should be directed, the following web site may be helpful. The site — either directly or by link to other sites — provides the official address for every national bank (not state banks), including the online banks like "Bank of Internet" based in San Diego. The web site is:

http://www.ffiec.gov/nicpubweb/nicweb/searchform.aspx

In general, notice is effective when given. Notice on a financial institution, brokerage company, or title insurance company, however, is not effective until five business days after it is received.

V. THE ACT IN DETAIL

For convenience, the various sections of the Act may be divided to eight categories. In the order they are discussed in this white paper, the categories include sections relating to:

- The scope of the Act;
- The instrument itself (including execution, amendment, revocation, suspension and termination);
- The office of agent (including designation, acceptance, compensation, and resignation);
- The duties of an agent;
- The authority of an agent;
- The liabilities of agents

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[11] § 709.102(5). An organization exercises reasonable diligence if the organization maintains reasonable routines for communicating significant information to the employee having responsibility to act on matters involving the power of attorney and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the power of attorney would be materially affected by the information. Id.

- Acceptance, rejection, liability and reliance of third persons; and
- Judicial proceedings

A. Scope of the new Act

The Act will apply only to powers of attorney created by an individual.[12] With respect to such powers, section 709.107 provides that the meaning and effectiveness of the power will be determined by the Act to the extent the power of attorney is used in Florida or the power states that it is to be governed by the laws of Florida. This includes powers of attorney executed in other jurisdictions.[13] It also includes instruments executed before the Act becomes effective.[14] That is, except as otherwise provided in a particular section, the Act applies retroactively.

1. Relationship of the Act to other law

Although it is much more comprehensive than current section 709.08, there will be issues that the Act does not address. As to these, except to the extent modified by the Act or another Florida law, the Act is supplemented by the common law of agency and principles of equity.[15] Likewise, the remedies under the Act are not exclusive and do not abrogate any right or remedy under Florida law.[16] Moreover, in the event of a conflict between the Act and any other law applicable to financial institutions, the other law controls.[17]

2. Powers to which the Act does not apply

In addition to powers created by persons other than an individual, section 709.103 provides that the Act does not apply to any of the following:

- A proxy or other delegation to exercise voting or management rights;
- A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; or
- Powers coupled with an interest (such as powers given to a creditor to perfect or protect title in or to sell, pledged collateral).

3. Effect on existing powers of attorney

Except as might otherwise be provided in an individual section, the Act applies to all powers of attorney, regardless of the date the powers were created. The Act also applies to judicial proceedings concerning a power of attorney commenced on, after, or before the effective date of the Act unless, in the last case, the court finds that application of a provision of the Act would substantially interfere with the effective conduct of the judicial proceeding or that it would prejudice

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12 This follows indirectly from the definition of principal as being an individual in section 709.102(8) and directly from section 709.103(4) which states that the Act does not apply to a power created by a person other than an individual. This limitation means that the Act does not apply to powers created by corporations or other non-natural persons.

13 A power executed in another state in a manner that complies with § 709.106 (see "*Execution requirements*", infra p. 6) will be construed as provided in the Act when used in Florida. So, for example, if the power contains an impermissible delegation (see § 709.114(1)(b)) or incorporation by reference (see "*General rule: No incorporation by reference*", infra p. 18), the delegation provision or the impermissible incorporation will not be given effect.

14 See § 709.402(1).

15 § 709.301.

16 § 709.303.

17 § 709.302.

the rights of a party to the judicial proceeding. The Act has no effect on any act done before the effective date of the Act.

B. The power of attorney instrument

1. Execution requirements

A legacy power of attorney will remain valid under the Act provided its execution complied with the law of Florida at the time of its execution.[18] If the legacy power is a durable (or springing) one, it will remain durable (or springing) under the new Act.

Durable and nondurable powers executed after the effective date of the Act must be signed by the principal[19] and by two subscribing witnesses, and be acknowledged by the principal before a notary public.[20] An exception applies to military powers. A military power is valid if it is executed in accordance with the requirements for a military power pursuant to 10 U.S.C. sec. 1004(b).[21] An exception also applies to powers of attorney created and executed under the laws of a state other than Florida, provided the execution complied with the law of the state of execution. [22] This is a significant change from existing law and embraces the concept of making powers of attorney "portable" between states, as encouraged by the Uniform Act.

a) Durable powers

The Act embraces both durable and nondurable powers. A durable power of attorney is one which is not terminated by the principal's incapacity.[23] Unlike the Uniform Act, however, the Act does not make powers durable by default. Consistent with current law,[24] a power of attorney is durable only if it contains appropriate language to that effect. The language mentioned in the Act[25] — "[t]his durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes" — is not exclusive. A power may be made durable by any language expressing the principal's intent that the agent's authority is to be exercisable notwithstanding the principal's subsequent incapacity, except as provided in chapter 709.

> **Example 1**: P executes a power of attorney one of the provisions of which states: "This durable power of attorney is not affected by

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18 § 709.106(2). The Act does not change the execution requirements for a durable power. See *FS* § 709.08. So the significance of section 709.106(2) occurs with respect to legacy nondurable powers.

19 The Act defines the term "sign" to mean the execution or adoption of a tangible symbol or the attachment or logical association of an electronic sound, symbol, or process, in each case with a present intent to authenticate or adopt the record. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. See § 709.102(10) and (11).

20 See §§ 709.105 and 709.106(1). Florida law does not currently address the acceptance of power of attorney documents executed in accordance with the laws of other jurisdictions. The Uniform Act contains provisions providing for the portability of such documents. See Uniform Act § 106(c). The portability concept was rejected by the Committee.

21 § 709.1065(1). Military powers must be notarized but need not otherwise have witnesses. See 10 U.S.C § 1044(b).

22 § 709.106(3). Non-Florida powers of attorney must meet the requirements of the state of execution. As third persons in Florida cannot be expected to know the execution requirements of the 49 other states, third persons may request an opinion of counsel as to validity before they accept the agent's authority.

23 § 706.102(3). Section 709.102(4) defines incapacity to be the "inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, tangible property, business property, benefits, and income." This is similar to the definition found in the Florida Guardianship Law. See *FS* § 744.102(12)(a).

24 As to which, see *FS* § 709.08(1).

25 See § 709.104.

subsequent incapacity of the principal except as provided in s. 709.104, Florida Statutes." The words used by P are similar to those included in section 709.104 and are sufficient to indicate an intent to create a durable power.

b) No springing or other contingent powers

The Uniform Act permits the creation of contingent powers.[26] A contingent power is one which does not become effective until the happening of a condition stated in the power of attorney. The springing power is a common example. A springing power takes effect only when the principal loses capacity.

Springing powers (but probably not other types of contingent powers) are valid under current Florida law.[27] And legacy springing powers remain valid (and springing) under the Act.[28] But to be effective in Florida, powers created on or after the effective date of the Act, must be exercisable as of the time they are executed.[29] Accordingly, post-Act contingent powers, including springing powers, are not effective under the Act.[30] Here again, an exception is made for military powers. Under section 709.1065(2), a deployment-contingent power of attorney is to be afforded full force and effect by Florida courts.[31]

2. Amendment and revocation of powers

a) Amendment

A principal who wishes to amend a power of attorney may do so by revoking the old power and by executing a new one in amended form. As explained below, this can be accomplished in a single document. But direct amendments — codicils for lack of a better term — are not permitted. This restriction helps insulate agents and third persons from concerns that an instrument they are asked to rely on has been amended without their knowledge. Of course, the protection is not perfect. A power of attorney can be revoked without an agent or a third person knowing it (see below). And forgeries are also a possibility. Here, however, other provisions of the Act protect the unknowing agent and third persons who rely on a revoked or forged power without notice of the defect.[32]

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26 See Uniform Act § 109.

27 See *FS.* § 709.08(1).

28 A legacy springing power becomes exercisable upon delivery of an affidavit by the principal's licensed primary physician stating (among other things) that the physician believes that the principal lacks the capacity to manage property as defined in s. 744.102(12)(a). See § 709.108(2).

29 See § 709.108(1).

30 See § 709.108(3). The Committee rationale for this change rests with its collective experience that springing powers are fine in theory, but bad in practice. In theory, they address the reluctance principals have to an instrument that authorizes an agent to act on the principal's behalf while the principal still has capacity to act for his or her own self. In practice, uncertainty about whether and when principals lose capacity has made springing powers problematic both for agents who seek to exercise them and for financial institutions and other third persons who are asked to honor them. On balance, the Committee believes that the reluctance of principals described above is better addressed by other means. An approach used by many practitioners is to escrow the power of attorney with some trusted third person for release to the agent only upon satisfactory proof that the principal has lost capacity. A similar approach can be used to obviate the need for successor agents.

31 Section 709.1065(2) is identical to current *FS* § 709.11.

32 See §§ 709.109(4) and 709.119.

b) Revocation

With respect to revocation, neither the mere lapse of time nor the mere execution of a subsequent power of attorney is sufficient to revoke a prior power. Instead, to revoke a power of attorney the principal must express the revocation in either a new power of attorney or in some other writing signed by the principal.[33] In this latter case, there is no requirement that the other writing be witnessed or notarized. Hence, the formalities required to revoke a power are less stringent than those required to execute one. This reflects the Committee view that revocations present a smaller potential for fraud than do executions. That said, best practice would suggest that a written revocation be notarized so that it can be recorded in any county where the principal owns real estate. In addition, best practice would suggest that a notice of revocation be sent to the agent. Indeed, as a hint, section 709.110(1) states that the principal "may, but is not required to," give the agent notice of the revocation. Although not mentioned in the section, notice of the revocation should likewise be given to all financial institutions where the principal has accounts. Otherwise, the financial institutions are not responsible if they honor a revoked power of attorney.[34]

3. Suspension and termination of powers

Section 709.109 of the Act specifies the events which result in a suspension or termination of a power of attorney or of an agent's authority. In all cases, the termination or suspension is not effective as to an agent who acts in good faith and without knowledge of the termination or suspension. Moreover, acts performed by the unknowing agent, unless invalid or unenforceable for other reasons, bind the principal and the principal's successors in interest.[35]

a) Suspension of a power

As with current law,[36] section 709.109(4) provides for the suspension of an agent's authorities upon initiation of a proceeding to determine the principal's capacity.[37] The suspension takes effect when the agent has knowledge of the filing of the petition and lasts until the petition is dismissed or withdrawn. In the event of an emergency, an agent may petition the court for continued authority.[38]

b) Termination of a power

If a power specifies when it is to terminate, it will terminate at the specified time.[39] In addition, a power terminates:

- When the purposes for the power are accomplished;
- If the principal revokes it or dies;

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33 See § 709.110(1).

34 See § 709.119(1).

35 § 709.109(4).

36 See *FS* § 709.08(3)(c).

37 Unless otherwise ordered by the court, a proceeding to determine the capacity of the principal does not affect any authority of the agent to make health care decisions for the principal, including those defined in chapter 765. If the principal has designated a health care advance directive designating a health care surrogate pursuant to chapter 765, the terms of the directive control any conflicting provisions in the power of attorney, unless the power of attorney is executed after the advance directive and the power expressly states that it is to control in the event of any conflict. § 709.109(3)(b). Accord, *FS* § 709.08(3)(a)3.

38 § 709.109(3)(a).

39 The provisions of the Act covering terminations of a power of attorney appear in section 709.109(1).

- If a power is not durable, when the principal loses capacity;
- If a power is durable, upon an adjudication of incapacity (unless the court determines otherwise); or
- When the agent's authority terminates (see below) and the power of attorney does not provide for an alternate agent.

c) Termination of an agent's authority

Section 709.109(2) addresses when an agent's authority terminates. That happens:

- When the agent dies, becomes incapacitated, or is removed by a court of competent jurisdiction;
- Upon the filing of an action for the dissolution, legal separation, or annulment of the marriage of the agent to the principal;
- When the power itself terminates; or
- Except as provided by the court, if the principal is adjudicated totally or partially incapacitated and a guardian of the property is appointed for the principal.

4. The office of agent

a) Qualifications

The qualification requirements to serve as an agent appear in the definition of "agent" in section 709.102(1). Under that definition, only natural persons (i.e., individuals) who are 18 years of age or older and certain financial institutions may be named as an agent. To qualify, a financial institution must have a place of business in Florida and be authorized to conduct trust business in this state.

b) Designation

Subject to the above qualification requirements, a principal may designate a single agent or, if desired, a principal may designate two or more persons to act as co-agents. Unless the power of attorney provides otherwise, each co-agent may exercise its authority independently.[40] This is a change in Florida law.[41] Even where the power of attorney requires two or more agents to act jointly, there is a special exception for banking transactions to allow any one of the agents to sign checks and otherwise handle banking matters with a single signature.[42]

Also, in what may be another change in current law,[43] a principal may designate one or more successor agents to act if the primary agent's authority terminates or the agent declines to

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40 § 709.111(1). The liabilities of co-agents are discussed in "*Liability for actions of co-agents and successor agents*", infra p. 22.

41 Compare § 709.08(9) which requires a majority of named agents (or both if there are only two) to concur unless otherwise provided in the document.

42 § 709.111(6). This recognizes modern banking practices and the inability of a financial institution to enforce dual-signature requirements in many transactions.

43 It is unclear whether current law permits designation of successor agents as it is not specifically authorized in *FS* § 709.08.

serve, dies, or resigns.[44] Unless the power of attorney provides otherwise, a successor agent has the same authority as that given to the primary agent.[45] The successor agent may not act until the predecessor agent or agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to do so.[46]

c) Acceptance

It goes without saying that a person may not be made the agent of another against his or her will. Thus, agents must accept the power. According to section 709.113, if a power specifies a method for acceptance, an agent accepts the power by complying with that method. Otherwise, an agent accepts a power by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. This is not an all or nothing thing. The scope of acceptance is limited to those aspects of the power for which the agent's assertions or conduct reasonably manifest acceptance.[47] This can be a point of considerable significance. As is explained later, an agent can incur liability for a failure to act.[48] But the duty an agent may have to act is circumscribed by the scope of the agent's acceptance of the power.

d) Compensation

Among the factors to be considered in determining whether to accept a designation as an agent are the duties and liabilities the Act imposes on agents. These matters are discussed at length later.[49] Another relevant factor is whether the agent is entitled to compensation. For the most part, this is a question that can be addressed in the terms of the power itself. Except as provided in the power of attorney, section 709.112(1) states that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal. Qualified agents (but not others) are also entitled to compensation that is reasonable under the circumstances.[50] Qualified agents include financial institutions,[51] an attorney or certified public accountant licensed in Florida, the principal's spouse, and relatives of either the principal or the principal's spouse.[52] The term also includes any other natural person provided the person is a resident of Florida and (in effect) the person is not in the business of serving as an agent. More precisely, the person must never have served as an agent for more than three principals at the same time.

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44 The authority to designate co-agents and successor agents is limited to the principal. This authority may not be delegated by the principal to others. Thus, the Act does not allow a principal to authorize an agent to designate his or her own successor or co-agent. Nor may these authorities reside with a committee or protector. Compare Uniform Act § 111(b).

45 § 709.111(2)(a). The liabilities of successor agents are discussed in "*Liability for actions of co-agents and successor agents*", infra p. 22.

46 § 709.111(2)(b). Recall that financial institutions dislike powers with designated successor agents because of the uncertainties involved in ascertaining when the successor is authorized to act. Although other provisions of the Act provide protections for agents and third persons, careful consideration should be given to using other approaches such as the escrow approach mentioned previously. See note 30 in "*No springing or other contingent powers*", supra p. 7.

47 § 709.113.

48 See "*Liability of agents*", beginning infra p. 21.

49 As to an agent's duties, see "*Duties of agents*", infra p. 11. Agent liability is discussed in "*Liability of agents*", infra p. 21.

50 § 709.112(2) and (3).

51 The financial institution must have trust powers and a place of business in Florida.

52 Section 709.112(3) speaks of the principal's spouse or "an heir of the principal within the meaning of s. 732.103." Since relatives of the last deceased spouse of the principal can qualify as an heir of the principal under *FS* § 732.103(5), qualified agents include relatives of both the agent and the agent's spouse.

Before leaving the topic of compensation, it is informative to consider why the Act distinguishes between qualified and nonqualified agents. The distinction addresses the concern previously mentioned that financial institutions have with a blanket provision permitting the compensation of agents. The concern is that such a provision would encourage and facilitate an industry in which unlicensed and unregulated individuals would serve as agents for profit. By permitting compensation for qualified agents and prohibiting compensation for others, the Act seeks to strike a balance between that concern and the wishes some principals might have with respect to the compensation of their agents.

e) Resignation

An agent may resign as provided in the power of attorney. In the absence of a provision covering resignation, an agent may resign by giving notice[53] to the principal, any court-appointed guardian, and any co-agent, or if none, to the next successor agent.[54]

5. Duties of agents

An important feature of the Act is the clarity it provides with respect to the duties of an agent. The relevant provision is section 709.114 which is based in some measure on the corresponding provision of the Uniform Act. Under section 709.114, the duties of an agent are divided into two categories: mandatory and default. Mandatory duties apply notwithstanding a contrary provision in the power. Default duties apply in the absence of a contrary provision. Thus, a principal is free to expand, curtail, or eliminate a default duty.

a) Mandatory duties

An agent's mandatory duties are enumerated in section 709.114(1). The list is an expanded and modified version of Uniform Act section 114(a). The mandatory duties include the duty to act within the scope of the authority granted in the power[55] and, to the extent actually known, in a manner that is not contrary to the principal's reasonable expectations;[56] to act in good faith[57] and (except as authorized by other statutory provisions), in a manner that is not contrary to the principal's best interest;[58] to attempt in good faith to preserve the principal's estate plan;[59] to perform personally,[60] to keep adequate records;[61] and, if the power of attorney effectively authorizes the agent to access the principal's safe deposit box, to create and maintain an accurate and current inventory of the box.[62] Some of these duties merit further discussion.

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53 On the requirements for an effective notice, see § 709.121.

54 § 709.118.

55 § 709.114(1)(a).

56 § 709.114(1)(a)1.

57 § 709.114(1)(a)2

58 § 709.114(1)(a)3.

59 § 709.114(1)(a)4.

60 § 709.114((1)(b).

61 § 709.114(1)(c).

62 § 709.114(1)(d). The Uniform Act does not include this duty. For the requirements for an effective authorization of an agent to enter a principal's safe deposit box, see *F.S.* § 655.933.

1) *The duty not to act in a manner that is contrary to the principal's actually known reasonable expectations*

Section 709.114(1)(a)1 provides that an agent has a mandatory duty not to act in a manner that is contrary to the principal's reasonable expectations actually known by the agent. A somewhat similar duty appears in the Uniform Act. But the Uniform Act differs from the Florida formulation. The Uniform Act states that an agent has a duty TO ACT in accordance with the principal's reasonable and actually known expectations. The Florida formulation is phrased as a duty NOT TO ACT in a manner CONTRARY to those expectations.

The Committee believes that the Florida formulation is preferable because it reduces the risk that section 709.114(1)(a)1 could be construed as authorizing an agent to do something. It is important to recognize that it does not. It simply means, that with respect to authorities the agent does have, the agent must not exercise those authorizes in a manner that is contrary to the principal's actually known expectations. "Known" in this context means known by the agent. Stated somewhat differently, section 709.114(1)(a)1 restrains an agent from acting. It does not authorize or require an agent to act.

2) *The duty not to act in a manner that is contrary to the principal's best interest*

The mandatory duty to refrain from acting in a manner that is contrary to the principal's best interest appears in section 709.114(1)(a)3. Here again, the formulation differs from the corresponding provision of the Uniform Act. The duty under the Uniform Act is phrased as an affirmative duty to act in the principal's best interest. More importantly, the duty under the Uniform Act is explicitly subservient to the agent's duty (discussed above) to act in accordance with the principal's known reasonable expectations.[63] No such hierarchy appears in the Florida Act. To the contrary, these dual duties are co-equal under the Florida Act. As mandatory duties, this co-equal status may not be modified in the power of attorney. However, the duty not to act in a manner that is contrary to the principal's best interest in section 709.114(1)(a)3 is subject to qualification by other provisions of the Act. That is, section 709.114(1)(a)3 states that the duty applies "except in those circumstances authorized by statute." This is an important qualification. As is discussed later, within limits, section 709.202 allows a principal to authorize an agent to make gifts of the principal's property. Without the qualification, it is arguable that no exercise of a gift making authority would be consistent with the agent's duty to act in the best interest of the principal. With the qualification, gifts are not impermissible, per se. Nor are they appropriate, per se. As is illustrated in the following examples, there is a balancing to be done here.

> **Example 2**: Assume a divorced principal (P) who has three children, C1, C2, and C3. P's will leaves all of his substantial estate per stirpes to his descendants. As part of his estate planning, P executes a power of attorney naming his sister S as agent. The power effectively authorizes S to make gifts of P's property to any descendant of P.[64] C1 and C2 each marry at a point when P still has capacity. At the time of C1's marriage, P makes a $20,000 cash gift to him to facilitate his purchase of a home. A similar gift to

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63 See Uniform Act § 114(a)(1). The comments to the Uniform Act provision explain this approach as follows:

> Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for 'substituted judgment' over 'best interest' as the surrogate decision making standard that better protects an incapacitated person's self-determination interests.

64 On what must be done to authorize an agent to make gifts of a principal's property, see the discussion of section 709.202 in "*Authorities that can impact a principal's existing estate plan*", beginning on p. 19, infra.

C2 is made at the time of her marriage. P and S discuss making a similar gift to C3 upon his marriage. Such a gift would not jeopardize P's own welfare. But P loses capacity shortly before C3 marries. On these facts, an exercise of S's authority to make a gift to C3 would not be contrary to P's known expectations and would not be precluded by S's duty to act in P's best interest. Accordingly, S may (but is not required to) exercise her authority to make a gift to C3.

Example 3: Same as the previous example except that prior to his loss of capacity P suffers a substantial financial setback. Although S reasonably believes that, were P competent, he would still make the gift to C3, P also believes that any gift at this time could potentially jeopardize P's own financial welfare. As an initial matter, even with these additional facts, it is not necessarily the case that a gift to C3 would not be in P's best interest. This is true because the "best interest" standard in the Act is not restricted to "financial interest." The standard permits consideration of other factors, including, for example, a principal's desire to treat children equally and to promote harmony in the family. In any case, even if a gift to C3 in this example is inconsistent with P's best interest, S may, in her discretion, make the gift because the gift is consistent with P's known expectations.

3) *The duty to preserve the principal's estate plan*

The mandatory duty to preserve the principal's estate plan is new to Florida law. It appears in section 709.114(1)(a)4[65] and is subject to a number of qualifications. First the duty applies only to the extent the principal's estate plan is actually known by the agent. Hence, an agent has no duty to ascertain the principal's plan. And, even if the plan is known to the agent, the agent incurs no liability for failing to preserve it as long as the agent acts in good faith.[66] Finally, the duty to preserve the principal's estate plan applies only when preservation of the plan is in the principal's best interest based on all relevant factors, including:

- The value and nature of the principal's property;
- The principal's foreseeable obligations and need for maintenance;
- Minimization of taxes;[67]
- Eligibility for a statutory or regulatory benefit, program, or assistance;
- The principal's personal history of making or joining in the making of gifts.

The following examples have been considered and approved by the Committee.

Example 4: As the designated agent of P, A wants to exercise an otherwise effective authority under P's power of attorney to create and fund a revocable living trust. The objective is to facilitate investment of P's assets and to reduce administration costs at P's death. The distribution terms of the trust at P's death will mirror those in P's current will. On these facts, the creation of the trust by

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65 Section 114(b)(6) of the Uniform Act is similar although the duty detailed there is a default duty, not a mandatory one.

66 See § 709.114(3).

67 Including income, estate, inheritance, generation-skipping transfer, and gift taxes.

A would be consistent with A's duty to preserve the principal's actually known estate plan.

Example 5: Same as the preceding example except P has no will. The terms of the revocable trust will mirror Florida's intestacy statute with the exception of a share that is to pass to P's oldest child. Because the child is disabled, his share will be held in a continuing trust after P's death. The answer is the same.

Example 6: Same as Example 5 except that in addition to the authority to create a trust, A also has authority to conduct banking transactions on P's behalf. To pay an attorney to draft the trust, A withdraws money from a bank account held jointly by P and one of his children. Because the creation of the trust is in P's best interest, the withdrawal from P's joint account is consistent with A's duty to preserve P's actually known estate plan.

Example 7: After consulting his attorney, P executes a will and a durable power of attorney. The will leaves all of P's stock holdings at Smith Barney to P's adult son, S and the residue of P's estate to his second wife, W. P's brother, B is named agent. The originals of both the will and the power of attorney are left with P's attorney for safe keeping. A year later, P loses capacity and pursuant to an escrow agreement P made with his attorney, the original of the power of attorney is sent via registered mail to B. No mention is made of P's will and B makes no inquiry about whether P had a will. In the exercise of B's authority to conduct banking transactions. B retitles P's brokerage account to "P TOD to S and W." B's intent is to minimize probate at P's death. However, because of B's actions, at P's subsequent death, S does not take all of the securities in the Smith Barney account as P's will directs. Although B's actions in retititling the brokerage account fundamentally alter P's estate plan, B's actions are proper because the terms of P's will were not actually known to B and B has no duty under the Act to ascertain whether P had a will.

Example 8: Same as Example 7 except when P's attorney sent the original of the durable power of attorney to B, the attorney also included a copy of P's will. The copy was contained in a sealed envelope on which was written" "Copy of the Will of P." The transmittal letter indicated that the will was being sent to B in accordance with P's instructions. Although B read the transmittal letter, he did not open the envelope and read P's will. On these facts, B acted improperly when he retitled the brokerage account. Although B has no duty to ascertain whether P had a will, when the existence of the will is known to B and B has unrestricted access to the terms of the will, B's duty to act in good faith and in a manner that is not inconsistent with P's actually known reasonable expectations requires him to read the will. Thus, in this example, B will be treated as having actual knowledge of the terms of P's will.

4) *The duty to perform personally*

Current *FS* section 709.08(3)(a) states as a general principle that a power of attorney is nondelegable. Section 709.114(1)(b) of the Act expresses a similar rule. An exception applies to delegations permitted under Florida's Prudent Investor Rule. [68]

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[68] See § 709.114(1)(b). See also *FS* § 518.112.

5) *The duty to keep adequate records*

Under the Uniform Act, an agent's duty to keep adequate records is a default duty. It is elevated to a mandatory one in the Florida Act. As expressed in section 709.114(1)(c), the duty requires an agent to keep a record of all receipts, disbursements, and transactions made on behalf of the principal.

The duty imposed by section 709.114(1)(c) should be considered in conjunction with subsection (6) of the same section. Subsection (6) restricts the persons to whom an agent has an obligation to disclose receipts, disbursements, safe deposit box inventories, and transactions. Except as provided in the power of attorney or by order of the court, disclosure is required only at the request of the principal, a court-appointed guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the principal's death, by the personal representative or successor in interest of the principal's estate. Upon receiving a valid request, the agent has 60 days to comply with the request. Provision is made for an additional 60 day extension if the agent substantiates the need for one in a writing or other record within the initial 60 day period.[69]

b) Default duties

Default duties apply unless the power of attorney provides to the contrary. These duties appear in section 709.114(2) and include, in the order discussed below, the duty of competency, the duties of impartiality and loyalty, and the duty to cooperate with health-care decision makers.

1) *The duty to act with care, competence, and diligence*

An agent owes fiduciary duties to its principal. Among these duties is the default duty to act with care, competence, and diligence.[70] The precise requirements of this standard will vary with the circumstances. For an agent who has accepted authority to make investment decisions for the principal,[71] the standard requires compliance with Florida's Prudent Investor Rule.[72] As provided there, and more generally in section 709.114(4), if an agent is selected because the agent possesses special skills or expertise, or in reliance on the agent's representations that it has special skills or expertise, the special skills or expertise must be considered in determining compliance with this standard.

2) *The duties to act loyally and to avoid conflicts*

Section 709.114(2)(a) provides that an agent has a default duty to act loyally for the *sole* benefit of the principal. Closely related section 709.114(2)(b) imposes on agents a default duty to act so as to avoid conflicts of interest that impair the agent's ability to act impartially in the principal's best interest. Both of these duties are in accord with the traditional common law duty of

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69 Section 709.114(6) is substantially identical to a section 114(h) of the Uniform Act. The only difference is that the Uniform Act gives an agent 30 days to comply. In its consideration and ultimate adoption of the provision, the Committee unanimously adopted the following resolution as guide to their intent: "We approve in principle subsection (7) with the understanding that we interpret it to not require the appointment of a guardian or conservator, solely for the purpose of receiving or demanding an accounting. The Power of Attorney can expand this list of people who can request disclosure."

70 § 709.114(2)(c).

71 As to which, see the discussion of § 709.208 in "*Special rules for banks and other financial institutions,*" beginning at p. 18, infra.

72 See *FS* § 518.11. See also the definition of "fiduciary" in *FS* § 518.10.

loyalty[73] and with the similar duty of trustees under the Florida Trust Code.[74] Under these standards, even if an agent acts competently and in the best interest of the principal, the agent can incur liability for actions that also benefit the agent or that otherwise involve a conflict of interest.

Because an agent's duties of loyalty and impartiality, as expressed above, are default duties, a principal is free to modify or eliminate them in the terms of the power of attorney. Caution is advised here. Under section 709.1145(2), a provision that authorizes an agent to engage in a conflicted transaction is invalid if it was inserted into the power of attorney as a result of an abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate.[75] For this purpose, affiliates of an agent include:

- The agent's spouse, descendants, siblings, parents and the spouses of any of them;
- A corporation or other entity in which the agent or a person that owns a significant interest in the agent, has an interest that might affect the agent's best judgment;
- A person or entity that owns a significant interest in the agent; and
- The agent when acting in a fiduciary capacity for someone other than the principal.[76]

Even assuming that a provision granting an agent the authority to engage in a conflicted transaction passes muster under section 709.1145(2), an exercise of the authority may prompt a judicial challenge by or on behalf of the principal. If so, upon presentation of evidence that the agent or an affiliate had a personal interest in the exercise of the power, the agent or affiliate will have the burden of proving by clear and convincing evidence either:

- That the agent acted *solely* in the interest of the principal; or
- That the agent acted in good faith in the principal's best interest and that the conflict was expressly authorized in the power of attorney.[77]

3) *The duty to cooperate with health-care providers*

Under Section 709.114(2)(d), an agent has a default duty to cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations if actually known by the agent. If the expectations are not actually known, the agent must act consistently with the principal's best interest.

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73 See Restatement (Second) of Agency § 387 (1958).

74 See *FS* § 732.0802(1). The formulation of an agent's duty of loyalty in the Florida Act should be contrasted with the corresponding provision of the Uniform Act. Section 114(b)(1) of the Uniform Act states that an agent has a duty to act for the principal's benefit, rather than the principal's *sole* benefit. Under this standard and as explicitly stated in Uniform Act § 114(d), "an agent that acts with care, competence, and diligence for the principal's best interest incurs no liability solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal."

75 The Committee emphasizes that section 709.1145(2)(a) relates to judicial actions against the agent by or on behalf of the principal. The section is therefore subject to third person reliance provisions found elsewhere in the Act. See § 709.119.

76 § 709.1145(2)(b)1 - 5.

77 § 709.1145(1).

6. Authorities of agents

Except as otherwise limited by section 709.201 of the Act or by other applicable law, an agent "has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the power of attorney." These authorities extend to property[78] acquired both before and after the execution of the power and whether or not the property is located or the power is executed in Florida.[79]

a) Prohibited personal authorities

The statement of an agent's authority in section 709.201 – in effect, that agents may perform those acts specifically enumerated in the power of attorney – is subject to a number of qualifications and exceptions. The initial exception is found in section 709.201(2) which includes a list of personal authorities that the Act does not permit a principal to delegate to an agent. These should be familiar territory to many practitioners because similar prohibitions exist under current law.[80] Whether or not authorized in a power of attorney instrument, an agent may not:

- Perform duties under a contract that requires personal services of the principal;
- Make an affidavit as to the principal's personal knowledge;
- Vote on behalf of the principal in a public election;
- Execute or revoke the principal's will or codicil; or
- Exercise powers or authority held by the principal in a fiduciary capacity.

b) No blanket or default powers

The general statement in section 709.201 has other more subtle implications. One is that a blanket grant of authority (*i.e.*, "to do all acts that the principal could do"), is not sufficient to grant *any* authority to the agent.[81] Another is that agents have no default authorities under the Act. That is, agents may perform those acts *and only those acts* specifically enumerated in the power of attorney.[82]

In early drafts of the Act, section 709.201 included a laundry list of powers that principals and their advisers could consider in crafting a power of attorney. The list was a somewhat expanded version of section 203 of the Uniform Act and those wanting to see the list should refer to that section.[83] But most of the list was removed in the final product for reasons explained more fully in the discussion of incorporation by reference (below). There are three exceptions. Section 709.201(1) includes without substantive change three provisions found in current *FS* section 709.08. These are not default authorities. They merely continue current law which authorizes their inclusion

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78 Property means any right or interest in anything that may be the subject of ownership, whether real or personal, legal or equitable. § 709.102(9).

79 § 709.201(4).

80 See *FS* § 709.08(7)(b).

81 Contrast Uniform Act § 201(c) which provides that this type of blanket provision gives an agent a broad array of authority as provided in sections 204 through 216 of the Uniform Act.

82 If two or more enumerated authorities overlap, the broadest authority controls. § 709.201(3).

83 See also the more targeted powers found in Uniform Act sections 204 (real property), 205 (tangible personal property), 209 (operation of an entity or business), 210 (insurance and annuities), 211 (estates, trusts, and other beneficial interests), 212 (claims and litigation), 213 (personal and family maintenance), 214 (benefits from governmental programs or civil or military service), 215 (retirement plans), and 216 (taxes).

in a power of attorney. The Committee's objective was to avoid any negative implication that might have arisen had they been omitted. The provisions referred to here are:

- Section 709.201(1)(a) relating to the execution of stock powers or similar documents and the delegation of authority to register securities into or out of nominee form. This provision is identical to current section 709.08(7)(a)1;
- Section 709.201(1)(b) relating the authority to convey or mortgage homestead property. This provision is identical to current section 709.08(7)(a)2; and
- Section 709.201(1)(c) which permits a principal to empower an agent under a durable power of attorney to make health care decisions on the part of the principal. This provision is substantively identical to current section 709.08(7)(c).

c) General rule: No incorporation by reference

As mentioned above, the final version of section 709.201 omits the laundry list of powers that appeared in earlier drafts. The list was removed because of the Committee's concern that its presence would invite attorneys and others to try to incorporate the list by reference. The general statement of an agent's authority in the introductory sentence of section 709.201 refers only to acts "authorized and specifically enumerated in the power of attorney." Thus, with two exceptions discussed below, the Act does not permit incorporation of an agent's powers by reference. Here is why.

Although never strictly necessary, an ability to incorporate by reference the terms authorizing an agent to act can be a useful convenience. The Committee's reason for prohibiting it rests with the competing concern that incorporation creates an undesirable risk that principals will execute instruments containing less than obvious terms which they either do not intend or that they do not fully appreciate and understand. The Act cannot guarantee that all principals will carefully consider the terms of the instruments they execute. It can, however, facilitate awareness and understanding for those who do.

d) Special rules for banks and other financial institutions

Too much of a good thing can be bad. And in this context, a universal prohibition against incorporation could impede a desirable uniformity of language in powers. Uniformity is desirable because it reduces ambiguity and increases efficiency, particularly when third persons are asked to honor an agent's authority. These concerns are greatest when agents deal with financial institutions. For that reason, section 709.208 allows incorporation in two areas, both of which apply to financial institutions.

1) *Banking transactions*

Without the need for individual enumeration in the power, an agent may be authorized to conduct an array of actions with respect to accounts at banks and other financial institutions by stating that the agent has "*authority to conduct banking transactions as provided in section 709.208(1), Florida Statutes.*" (emphasis added)

Among others, the authorized actions include the authority to establish, continue, modify, terminate, or make withdrawals from a principal's account; to contract for financial services, including renting a safe deposit box; to receive statements, vouchers, notices, and similar documents from a financial institution; to apply for and use debit cards, electronic transaction authorizations, and travelers checks; to draw upon any line or credit, credit card, or other credit established by the principal; and to purchase or to endorse and negotiate personal, cashiers, counter, etc. checks.

2) *Investment transactions*

Without the need for individual enumeration in the power, an agent may be granted general authority to engage in an array of actions with respect to investment instruments[84] held by financial institutions by stating that the agent has "*authority to conduct investment transactions as provided in section 709.208(2), Florida Statutes.*" (emphasis added)

Among others, the authorized actions include the authority to buy, sell or exchange investment instruments; to establish, continue, modify or terminate an investment account; to exercise voting rights and to pledge investment instruments as security to borrow, pay, renew, or extend the time for payment of a principal's debt; to receive certificates and other evidences of investment instrument ownership; and to exercise voting rights with respect to investment instruments.

e) Authorities that can impact a principal's existing estate plan

Because of the potential for abuse, section 709.202 singles out certain authorities for special treatment. A common thread to these authorities is that their exercise can impact a principal's existing estate plan. Section 709.202 applies to an authority to:

- Create an inter vivos trust;
- Amend, modify, revoke or terminate a trust created by or on behalf of the principal;
- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- Disclaim property and powers of appointment.

As to these authorities, section 709.202 provides both additional formalities and limitations on their authorization and exercise. We begin with the additional formalities.

1) *Additional formalities*

As an initial matter, section 709.202(1) specifies additional formalities that a principal must comply with in order to authorize an agent to do any of the actions listed above. Notwithstanding section 709.201, an agent may not exercise any of the above authorities on behalf of the principal or with the principal's property unless the principal places his or her signature or initials next to the paragraph containing the enumeration of the agent's authority in the power of attorney. Note that it is not enough for the principal to sign or initial the page on which these powers appear.

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84 The term "investment instruments" is broadly defined to mean:

> [S]tocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, including, but not limited to, shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, a joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds; private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered or otherwise, except commodity futures contracts and call and put options on stocks and stock indexes.

§ 709.208(2).

The Act requires a separate signing or initialing of each individual authority. To facilitate this and to insure compliance with section 709.202(1), each individual authority should appear in a separate paragraph and a place should be provided for the principal to sign or initial next to each paragraph. Authority specified in a paragraph the principal signs or initials will be authorized; authority specified in a paragraph that the principal declines to sign or initial will not.

2) *Other restrictions and limitations*

In addition to increased formalities, section 702.202 places new restrictions and limitations on these authorities. Three of these apply across the board. As a somewhat redundant but useful reminder to agents, all of these authorities are explicitly made subject to the agent's duties under section 709.114, including the duty to preserve the principal's actually known estate plan.[85] All are also subject to the proviso that the authorities must not be otherwise prohibited by another agreement or instrument to which the authority or property is subject.[86] Less obviously, the authorities listed in section 709.202(1) apply only with respect to an agent's exercise of authority on or after the effective date of the Act. This follows directly from section 709.402(4) which states that an act done before the effective date of the Act is not affected by the Act.[87] Additional restrictions and limitations are discussed below.

(a) Authority to amend, modify, revoke, or terminate the principal's trust

Even assuming full compliance with the additional formalities imposed in section 709.202, an agent may amend, modify, revoke, or terminate a trust for which the principal is the settlor only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent.[88]

(b) Special limitation on general authority to make gifts

Assuming compliance with the formalities required by section 709.202, an agent may be authorized to make gifts of the principal's property by transfer or exercise of a principal's presently exercisable general power of appointment.[89] The authority may relate to gifts of specific property or it may be phrased as a general authority to make gifts. In this latter case,

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85 See § 709.202(1).

86 See id.

87 Note that the relevant issue here relates to when an agent exercises authority not to when the instrument itself was executed. Indeed, the Act applies to a power of attorney whether the power was executed before or after the effective date of the Act. See § 709.402(1). However, since the Act has no effect on actions taken prior to the effective date of the Act, the Act has nothing to say with respect to pre-Act actions of agents of legacy powers. To further clarify, the Committee is aware of a difference of opinion on the effectiveness under current law of an authorization in a power of attorney for the agent to create a trust of the principal's property. Because the Act applies only to exercises on or after its effective date, the Act avoids taking a position on the issue as it relates to pre-Act exercises of the agent's purported authority. However, even if Florida courts conclude that an authority to create a trust is not permissible under current law, if the authority is included in a legacy power of attorney, it will become effective for exercises on or after the effective date of the Act.

For additional discussion of how section 709.202 relates to legacy powers of appointment, see "*Inapplicability of section 709.202 to legacy powers*", infra p. 21.

88 § 709.202(1)(b).

89 A presently exercisable general power of appointment is a power of appointment exercisable at the time in question in favor of the principal, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term does not include a power exercisable in a fiduciary capacity or only by will. It includes a power that in not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the contingency associated with the power has occurred. § 709.102(7).

however, unless the authorization provides otherwise, gifts by the agent may not exceed the annual exclusion amount specified in IRC s. 2503 (or twice that amount in the case of a split gift).[90] An agent's authority to consent to gift splitting for gifts made by the principal's spouse is similarly limited.[91]

> **Example 9:** P's power of attorney effectively authorizes her agent to create revocable and irrevocable trusts on P's behalf. The power does not, however, specifically authorize the agent to make gifts in excess of the gift tax annual exclusion. Although the agent may create an irrevocable trust, the initial funding of the trust and all subsequent transfers of property to the trust are subject to the restrictions imposed by section 709.202(3)(a). The restrictions do not apply to a revocable trust.

(c) Special restriction for actions that benefit unrelated agents

Notwithstanding an expressed general enumeration of authority to do an act, unless a power expressly provides otherwise, an agent who is not an ancestor, spouse, or descendant of the principal, may not exercise authority to create in the agent or in someone the agent is legally obligated to support, any interest in the principal's property whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.[92]

3) *Inapplicability of section 709.202(1) to certain banking and investment transactions*

Section 709.202(4) addresses a concern that financial institutions have when an agent makes a deposit to or a withdrawal from accounts held in survivorship or beneficiary form. Without more, the authority to take these actions could be seen as an authority to create or modify rights of survivorship or beneficiary designations to which the more stringent formality provisions of section 709.202(1) apply. Section 709.202(4) provides to the contrary. The section provides that, if a power of attorney is otherwise sufficient to grant an agent authorization to conduct banking or investment transactions, either using the incorporation methodology allowed by section 709.208(1) and (2), or otherwise, then making a deposit to or a withdrawal from an insurance policy, retirement account, IRA, benefit plan, bank account, or any other joint or payable on death account is not a power to create or modify rights of survivorship or beneficiary designations and no further specific authority is required for the agent to exercise such authorization.[93]

4) *Inapplicability of section 709.202 to legacy powers*

Legacy powers of attorney present a special problem with respect to the additional formalities imposed by section 709.202(1). Because the sign-or-initial requirement is new under the Act, it is unlikely that any legacy power will comply with it. Section 709.202(5) addresses this concern. Under it, notwithstanding anything to the contrary in section 709.202, if a legacy power is otherwise sufficient to authorize an agent to exercise any of the authorities described in section 709.202(1), then the power of attorney is sufficient to the same extent under the Act. As a

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90 See § 709.202(3)(a).

91 See § 709.202(3)(b).

92 § 709.202(2).

93 Section 709.202(4) also provides that banks and other financial institutions have no duty to inquire as to the appropriateness of the agent's actions and no liability to the principal or to other persons for actions taken in good faith reliance on the appropriateness of the agent's actions. The section does not eliminate the agent's duties and liability to the principal.

consequence of this provision, legacy powers are not subject to the sign-or-initial requirement of section 709.202(1). Nor are they subject to the limitations imposed by sections 709.202(2) and (3).

7. Liability of agents

a) In general

An agent is a fiduciary[94] and as such is liable for improper acts or omissions. However, the extent of liability is affected by several other Act sections. For one, an agent's liability assumes that the agent has accepted the power. Since acceptance may be limited, so too may be the agent's liability.

> **Example 10:** Prior to losing capacity, P executed a power of attorney designating A as agent and authorizing A to conduct banking and investment transactions in conformity with the requirements of section 709.208. The power of attorney had no provision dealing with acceptance of the power. After P lost capacity, A deposited checks in P's savings account and drew checks on P"'s checking account to pay for P's support and other needs. A received and saved the statements from P's brokerage account, but did not take any other actions with respect to that account. On these facts, A's actions manifest acceptance of the authority to conduct banking transactions but not the authority to conduct investment transactions.
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> **Example 11**: Same as Example 10, except A communicated regularly with P's securities broker. He followed the broker's recommendations on some securities purchases and he directed the broker to sell some stock when A needed cash for P's support. On these facts, A's actions manifest acceptance of the authority to conduct investment transactions. Accordingly, A can be held liable if his acts or omissions do not meet his duties under Florida's Prudent Investor Rule.

In addition, many of the duties imposed on an agent apply only when the agent has actual knowledge of some fact or circumstance. This includes the duties to:

- Take action to safeguard the principal's interests when the agent knows of a breach or imminent breach by another agent;[95]
- Act in an a manner not contrary to the principal's expectations;[96]
- Preserve the principal's estate plan;[97] and
- Cooperate with the principal's health care decision-maker.[98]

Obviously, there can be no liability with respect to these duties in the absence of the required actual knowledge. Moreover, an agent that acts in good faith is not liable for any failure to preserve the principal's estate plan even when that plan is actually known by the agent.[99] Likewise, good faith will insolate an agent from responsibility for actions taken without knowledge that the agent's authority has terminated or been suspended;[100]

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94 See § 709.114(1), initial sentence.

95 See § 709.111(4) discussed in "*Liability for actions of co-agents and successor agents*", infra p. 22.

96 See § 709.114(1)(a)1 discussed in "*The duty not to act in a manner that is contrary to the principal's actually known reasonable expectations*", supra p. 12.

97 See § 709.114(1)(a)4 discussed in "*The duty to preserve the principal's estate plan*", supra p. 13.

98 See § 709.114(2)(d) discussed in "*The duty to cooperate with health-care providers*", supra p. 16.

99 See § 709.114(3).

100 See §§ 709.109(4).

b) Liability for actions of co-agents and successor agents

An agent that has actual knowledge of a breach or imminent breach by another agent has a duty to take reasonably appropriate actions to safeguard the principal's best interests. If the agent has a good faith belief that the principal is not incapacitated, this duty is satisfied if the agent gives notice of the breach or pending breach to the principal.[101]

Otherwise:

- Except as provided in the power of attorney, a co-agent or successor agent who neither participates in nor conceals another agent's breach is not liable for the other agent's actions or omissions;[102]
- A successor agent has no duty to review the conduct or decisions of a predecessor agent;[103] and
- A successor agent has no duty to institute any proceeding against a predecessor agent or to file any claim against any predecessor agent's estate, for any of the predecessor agent's actions or omissions as agent.[104]

c) Liability for actions of others

In very limited situations, the Act permits an agent to delegate authority to other persons.[105] In the case of a proper delegation pursuant to the Florida Prudent Investor Rule, the delegating agent is not liable for an act, error of judgment, or default of the delegee, provided the agent exercises reasonable care, judgment, and caution in selecting the delegee, establishing the scope and terms of the delegation, and in periodically reviewing the delegee's actions.[106]

d) Exoneration

A power of attorney may include a provision exonerating the agent for liability for acts, omissions, or decisions made in good faith. The provision is effective except to the extent it:

- Relieves the agent for liability for breaches committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the principal's best interest; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.[107]

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101 § 709.111(4).

102 § 709.111(3).

103 § 709.111(5).

104 Id.

105 On the situations where the Act permits an agent to delegate authority, see § 709.114(1)(b) relating to delegation under the Florida Prudent Investor Rule and § 709.201(1)(a) relating to the delegation of authority to register securities into or out of nominee form.

106 See § 518.112(1) and (4).

107 § 709.115.

e) Damages and costs

An agent that violates its duties under the Act is liable to the principal or the principal's successors for the amount required to restore the principal's property to what it would have been had the violation not occurred and for reimbursement for fees and costs paid from the principals funds on the agent's behalf in defense of the agent's actions.[108]

8. Acceptance, rejection, liability, and reliance of third persons

a) Acceptance of a power of attorney

Subject to the exceptions discussed here, section 709.120(1)(a) requires a third person to accept or reject a power of attorney within a reasonable time. For financial institutions, four business days is presumed to be a reasonable time to accept or reject an agent's authority to conduct banking or investment transactions pursuant to section 709.208.[109] What constitutes a reasonable time for acceptance or rejection in other situations will depend on the circumstances and the terms of the power of attorney instrument. With respect to that instrument, a third person may not require an additional or different form of the power of attorney; the instrument must be accepted or rejected, as is.[110] A third person may, however, require the agent to execute an affidavit stating where the principal is domiciled, that the principal is not deceased, and that there has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, or suspension by initiation of proceedings to determine the principal's incapacity or to appoint a guardian of the principal.[111] In addition, if the power appears to be properly executed, a third person may make a good faith request for:

- An English translation, if the power is not wholly in English; or
- An opinion of counsel as to any matter of law, if the third person provides the reason for the request in a writing or other record. [112]

b) Rejection of a power of attorney

A third person that rejects a power of attorney must state the reasons for the rejection in writing.[113] In this regard, section 709.120(2) states that a third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- The third person has knowledge of the termination of the agent's authority or of the power of attorney;
- A timely request by the third person for an affidavit, English translation, or opinion of counsel is refused by the agent;

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108 § 709.117.

109 § 709.120(1)(b). Section 709.208 is discussed in "*Special rules for banks and other financial institutions*", supra p. 18.

110 See § 709.120(1)(c).

111 See §§ 709.119(2) and (3)(c). The Act includes a suggested form for the affidavit. See § 709.119(2)

112 See § 709.119(3)(a) and (b). The English translation or opinion of counsel must be provided at the principal's expense unless the request is made after the time allowed for acceptance or rejection of the power of attorney. § 709.119(4).

113 § 709.120(1)(a).

- The person in good faith believes that the power is invalid or that the agent lacks the authority to perform the act requested; or
- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or by a person acting for or with the agent.

c) Liability for an improper failure to accept a power of attorney

A third person that improperly refuses to accept a power of attorney is subject to a court order mandating acceptance and to liability for damages, including reasonable attorney's fees and costs, incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of it.[114]

d) Protection of third persons that act in reliance on a power of attorney

The Act includes several provisions that afford protection from liability to third persons. These include:

- Section 709.202(4), which applies to financial institutions that honor an agent's authorized authority to conduct banking or investment transactions. The section relieves financial institutions from any duty to inquire as to the appropriateness of an agent's exercise of the authority and protects the institutions from liability to the principal or to any other person for actions the institution takes in good faith reliance on the appropriateness of the agent's actions. The section does not eliminate the agent's duties or potential liability to the principal;
- Section 709.119(5), which applies to third persons who rely in good faith on an English translation; opinion of counsel, or affidavit of an agent; and
- Section 709.119(1)(a), which provides that third persons that accept in good faith a power of attorney that appears to be properly executed may rely upon the power and may enforce an authorized transaction against the principal's property as if the power of attorney and the agent's authority under it were genuine, valid, and still in effect. For purposes of this provision (and without limitation) the requisite good faith does not exist if the third person has notice that the power of attorney or the agent's authority is void, invalid, suspended or terminated.

9. Judicial relief

Section 709.116 deals with judicial relief. Under the section, a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant appropriate relief. A petition for judicial relief may be made by the principal or his agent (including any nominated successor agent); a guardian, conservator, trustee or other fiduciary acting for the principal or the principal's estate; a health care decision-maker (with respect to relevant agent authority or conduct); a governmental agency having regulatory authority to protect the principal's welfare; a person who is asked to honor the power of attorney; or any other interested

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[114] § 709.120(3).

person (such as the principal's spouse, parent or descendant) who demonstrates that they are interested in the principal's welfare and have a good faith belief that intervention by the court is necessary. In all actions for judicial relief under the Act, the court shall award taxable costs (including reasonable attorney's fees) as in chancery actions. [115]

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

VII. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal provides Florida citizens with an economical method to plan for the management of their person and finances, particularly in the event of incapacity. The proposal will provide economic benefit to the private sector by enhancing the usefulness of powers of attorney, while at the same time protecting the principal, the agent, and those who deal with the agent.

VIII. CONSTITUTIONAL ISSUES

There are no Constitutional issues.

V. OTHER INTERESTED PARTIES

Elder Law Section of The Florida Bar – supports
Florida Bankers Association – supports
Business Law Section of The Florida Bar – review pending

[115] § 709.116.