The New Florida Power of Attorney Act

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I. LEGISLATIVE HISTORY

The Florida Power of Attorney Act (the "Act") was filed in the 2011 Florida Legislature as Senate Bill 670 ("SB 670") and House Bill 815 ("HB 815"). As of the end of April, both bills had been approved by their respective Senate and House Committees, with amendments. The Committee Substitute for HB 815 contains significant changes that may or may not be reconciled in conference with SB 670. SB 670 was passed by the Senate on May 2, 2011 with a 39-0 vote and on May 5 by the House with a 115-0 vote. Governor Scott signed the Act into law on June 21, 2011.

This presentation explains the key provisions of the Florida Power of Attorney Act as enacted. References to sections in Chapter 709 without further qualification are to sections in the new Act and are identified by the section numbering in the "2000 series" of Chapter 709 (e.g., s. 709.2102). References to sections in existing Chapter 709 are identified by a precedent "former *FS*".

II. INTRODUCTORY CONCEPTS

A. Definition of Terms Used in the Act

Section 709.2102 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." 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.

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 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.

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

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.[1] 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 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.[2]

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 709.2102. Instead, it is covered comprehensively in section 709.2121. 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 709.2121, 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-

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1 See *FS* § 736.0104.

2 § 709.2102(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.

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.

III. THE POWER OF ATTORNEY DOCUMENT

A. Execution requirements §709.2106

FPOAA: Durable and nondurable powers executed after the effective date of the Act must be signed by the principal and by two subscribing witnesses, and be acknowledged by the principal before a notary public. § 709.2106(2). This should only change execution requirements for non-durable powers of attorney.

The Act continues recognizing a federal exception for 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).

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.

EXISTING: A power of attorney executed prior to the effective date of the Act will remain valid under the Act provided its execution complied with the law of Florida at the time of its execution. If the power of attorney is a durable (or springing) one, it will remain durable (or springing) under the new Act.

B. Revocation §709.2110

EXISTING: No specific provisions other than a general recognition that a power of attorney may be revoked by the principal.

FPOAA: The principal may revoke a power of attorney by either an express revocation in a new power of attorney, or in some other writing. The principal's signature is the only technical requirement for a stand-alone revocation. There is no requirement that a stand-alone revocation be witnessed or notarized.

C. Suspension and Termination §709.2109

EXISTING: There are a number of situations that affect the validity of powers of attorney under current law.

Both durable and non-durable powers of attorney terminate on the death of the principal.

Non-durable powers of attorney terminate on the incapacity of the principal.

Durable powers of attorney are suspended on the filing of a petition to determine capacity of the principal. No specific provision regarding nondurable powers of attorney.

FPOAA: 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. All powers of attorney will be suspended on filing a petition to determine capacity of the principal. A power of attorney terminates:

- When the purposes for the power are accomplished;
- Upon a date specified in the power of attorney;
- If the principal revokes it or dies;
- 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 Section III. below) and the power of attorney does not provide for an alternate agent.

D. Contingent Powers of Attorney §709.2108

EXISTING: A power of attorney may provide for a delayed effective date triggered by a determination of the principal's lack of capacity to manage property, as certified by a physician's affidavit.

FPOAA: Contingent, or "springing", powers of attorney will not be authorized after the effective date of the Act. Those in existence prior to the effective date will continue to be recognized.

E. Copies §709.2106(5)

FPOAA: Unless the power of attorney provides otherwise, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

EXISTING: No provision; originals required/requested to support presumption of validity.

III. THE AGENT

A. Co-agents and successor agents §709.2111

FPOAA: Subject to the qualification requirements (natural persons who are 18 years of age or older and financial institutions with trust powers), the principal may designate a single agent or, if desired, the 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. This is a significant change from current law.

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. 709.2111(6)

If an agent becomes unable to act as a result of the agent's death, incapacity, resignation, declination, or failure to qualify, the appointed successor agent (if any) may commence serving as agent. The filing of a petition for dissolution of marriage terminates the authority of an agent who is married to the principal unless the power of attorney provides otherwise.

EXISTING: No specific provisions in the current law applicable to nondurable powers of attorney. For durable powers of attorney, no recognition of successor agents. When multiple agents are named, unless specifically provided

otherwise in the document, a majority of the named agents must act (or both if there is only two).

B. Resignation §709.2118

EXISTING: No specific provisions in the current law for an agent to resign his or her position as agent.

FPOAA: An agent who wishes to resign may do so by either complying with the requirements for resignation in the power of attorney, or if the document is silent, by giving notice to the principal, any court-appointed guardian, and any co-agent, or if none, to the next successor agent.

C. Compensation and Qualified Agents §709.2112(1)

EXISTING: No specific provisions.

FPOAA: Except as provided in the power of attorney, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal. Qualified agents are also entitled to compensation that is reasonable under the circumstances. Agents who are not qualified agents are not entitled to compensation.

Qualified agents include financial institutions with trust powers and a place of business in Florida, an attorney or certified public accountant licensed in Florida, the principal's spouse, and any heir of the principal within the meaning of *F.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. 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.

IV. THE DUTIES OF THE AGENT §709.2114

EXISTING: An agent is a fiduciary who must observe the standards of care applicable to a trustee as described in §736.0901.

FPOAA: Like the Trust Code, the Act creates both mandatory and default duties for the agent, and clearly delineates each. Mandatory duties apply notwithstanding a contrary provision in the power of attorney. Default duties apply in the absence of a contrary provision. Thus, the principal is free to expand, curtail, or eliminate a default duty but may not alter a mandatory duty.

Overriding Duty

- The duty to act only within the scope of authority granted.

Mandatory Duties

- The duty not to act in a manner that is contrary to the principal's actually known reasonable expectations.
- The duty not to act in a manner that is contrary to the principal's best interest.
- The duty to act in good faith.
- The duty to attempt to preserve the principal's estate plan.
- The duty to perform personally.
- The duty to keep adequate records.
- The duty to maintain a safe deposit box inventory.

Default (modifiable) duties

- The duty to act with care, competence, and diligence.
- The duties to act loyally and to avoid conflicts of interest.
- The duty to cooperate with health-care decision-makers.

V. THE AUTHORITY OF THE AGENT §709.2201

A. General Authority.

EXISTING: No specific provisions for nondurable powers of attorney. For durable powers of attorney, the agent has authority to perform, without prior court approval, every act authorized and specifically enumerated in the power of attorney.

FPOAA: Except as otherwise limited by section 709.201 of the Act or by 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. A general provision in a power of attorney (i.e., "my agent may do all acts in my place and stead as I could do personally") is insufficient, without more, to grant authority to the agent.

B. Exceptions. §709.2201(3)

FPOAA: 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.

EXISTING: Substantially identical.

One should pay particular attention to the restriction on the exercise of powers or authority held by the principal in a fiduciary capacity. It is very common for an agent holding a durable power of attorney to believe that he or she has authority to manage or transfer assets titled to the principal's revocable trust. Only the acting trustee of the trust has authority over trust assets, which often necessitates a change in trustee if the settlor/trustee has become unable to manage his financial affairs.

C. Banking and investment powers §709.2208

EXISTING: No special provisions.

FPOAA: Although the Act requires a degree of specificity in identifying the authority an agent may exercise, there are two recognized exceptions for banking powers and investment powers. These are the two most common uses of a power of attorney so it was deemed appropriate to make a power of attorney more "user friendly" for both the agents and the financial institutions asked to accept the powers of attorney for these actions.

A power of attorney that states the agent has "*authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes*" the agent has full authority to do the following, without any further expansion of the language:

- Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution.
- Contract for services available from a financial institution, including renting a safe deposit box or space in a vault.
- 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.

- Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them.
- Purchase cashiers checks, official checks, counter checks, bank drafts, money orders and similar instruments.
- Endorse and negotiate checks, cashiers 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.
- Apply for, receive, and use debit cards, electronic transaction authorizations, and traveler's checks from a financial institution.
- Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution.
- Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

A power of attorney that states the agent has "*authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes*" the agent has full authority to do the following, without any further expansion of the language:

- Buy, sell, and exchange investment instruments.
- Establish, continue, modify, or terminate an account with respect to investment instruments.
- Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal.
- Receive certificates and other evidences of ownership with respect to investment instruments.
- 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.
- Sell commodity futures contracts and call and put options on stocks and stock indexes.

"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, 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.**

D. The "Superpowers" §709.2202

EXISTING: The durable power of attorney statutes state that "an attorney in fact may not…5. Create, amend, modify or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney." Much debate has taken place over whether "unless expressly authorized by the power of attorney" modifies only the restriction on transferring assets to an existing trust (thereby only allowing such transfers) or the entire section (thereby authorizing any of the otherwise prohibited functions).

FPOAA: The Act clearly allows a principal to grant authority to the agent to take significant actions that can impact the principal's estate plan or gifting program, but one must be careful in the drafting and implementation of these powers as there are additional execution formalities and restrictions on the authorization. Special note should be made of the application of these rules to powers of attorney executed on or after October 1, 2011. These rules do not affect existing powers of attorney prior to that date.

Minimum Requirements. The following mandatory minimum requirements must be met:

1. The authority must be specific. For example, "My agent may create and fund a revocable trust on my behalf."

2. The principal must sign or initial next to each specific enumeration of the authority.

3. The agent may only exercise the authority consistent with the duty to preserve the principal's estate plan.

4. The exercise must not be prohibited by any governing document affected. For example, "My agent may amend or revoke my revocable trust." But the trust agreement says the right of amendment or revocation is personal to the grantor and may not be exercised by anyone else.

The Superpowers. The powers that may be granted to the agent under this provision include:

- Create an inter vivos trust.
- With respect to a trust created by or on behalf of the principal, amend, modify, revoke or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation or termination by the settlor's agent.
- Make a gift (subject to restrictions).
- 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.
- Disclaim property and powers of appointment.

Duty to Attempt to Preserve the Estate Plan. The mandatory duty to preserve the principal's estate plan is new to Florida law. It appears in section 709.2114(1)(a)4 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. 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;
- Eligibility for a statutory or regulatory benefit, program, or assistance;
- The principal's personal history of making or joining in the making of gifts.

Modifiable Restrictions. If the agent is not related to the principal, the agent may not use these powers to benefit himself or anyone to whom the agent has a support obligation.

Gifts are limited to the federal gift tax exclusion amount under Internal Revenue Code section 2503(b), 26 U.S.C. §2503(b), as amended, without regard to whether the

federal gift tax exclusion applies to the gift. The amount may be doubled if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, 26 U.S.C. 2513.

Spousal split gift consent on behalf of the principal is limited to the annual exclusion amount.

VI. ACCEPTANCE BY THIRD PERSONS §709.2119 and §709.2120

EXISTING: Third parties asked to accept a power of attorney may presume the document and the agent's authority are both valid until they have notice of suspension, revocation, or some other defect. A statutory affidavit form provides the third party additional assurance that the agent has made diligent inquiry and that there are no circumstances that affect the validity of the document or the agent's authority.

FPOAA: Realizing that improvements could be made, the Act provides further guidance on the types of information the third party may request, requires the third party to act within a specific period of time and to explain why a power of attorney is rejected (if it is), and also protects the third party who has accepted a power of attorney in good faith that appears to be properly executed.

Guidelines for acceptance

1. Time limits - A third person must 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 authorized pursuant to §709.2208.

2. Reasonable requests for additional information – A third person may make a good faith request for an English translation or an opinion of counsel as to any matter of law.

3. Notice of rejection - A third person that rejects a power of attorney must state the reasons for the rejection in writing.

4. Grounds for rejection - 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;

- 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.

Liability and reliance of third persons

1. The affidavit - 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

2. Statutory protections - The Act creates protections for third persons who rely on a power of attorney in good faith. These include:

- Section 709.2119(1)(a) for a power of attorney that appears to be properly executed.
- Section 709.2202(4) applies to financial institutions that honor an agent's authorized authority to conduct banking or investment transactions.
- Section 709.119(5) applies to third persons who rely in good faith on an English translation, opinion of counsel, or affidavit of an agent.

3. Liability for improper rejection – If a third person improperly rejects a power of attorney, the agent may seek a court order mandating acceptance and liability for damages, including reasonable attorney's fees and costs.

VII. JUDICIAL RELIEF

Section 709.2116 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. Standing

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 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.

B. Damages for Agent Breach § 709.2117

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.

C. Fees and Costs §709.2116

In addition, in all actions for judicial relief under the Act, the court may award taxable costs (including reasonable attorney's fees) to the prevailing party.