Chapter 709 White Paper

I. SUMMARY

The proposal seeks to conform 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.

Significant revisions to Chapter 709 of the Florida Statutes are recommended, beginning with a *de facto* repeal of the chapter. Part II of the proposed Chapter 709 will reinstate without substantive change those provisions of current Chapter 709 that relate to powers of *appointment*.[1] Part I will contain a new Power of Attorney Act [the Act].

Proposed Part I addresses both durable powers of attorney and non-durable powers of attorney. A power of attorney is a legal document used by individuals and entities 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.

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., s. 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.

II. CURRENT SITUATION

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.[2] Comprehensive legislation is necessary to ensure that durable powers of attorney continue to be an effective 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.

The Power of Attorney Committee [the "Committee"] was charged with the task of evaluating the recently promulgated Uniform Power of Attorney Act[3] for possible enactment in Florida. 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.

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1 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.

2 *FS* section 744.1012.

3 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).

Various interest groups represented on the Committee held specific opinions about the use and potential abuse of powers of attorney, including conflicts of interest. These opinions, which the proposal balances, 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. When a family member serves as agent, these transactions can involve a conflict of interest. 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.

III. EFFECT OF PROPOSED CHANGES

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] Financial institutions achieved much of what they were looking, 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. SECTION BY SECTION ANALYSIS

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:

- Definition of terms used in the Act;
- 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
- Acceptance, rejection, liability and reliance of third persons; and
- Judicial proceedings

A. Definition of Terms used in the Act

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]

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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).

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 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 709.121, 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:

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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.

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.

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.

B. 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

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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.

substantially interfere with the effective conduct of the judicial proceeding or that it would prejudice 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.

C. 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 adopted with modifications 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;
- If a power is not durable, when the principal loses capacity;

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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 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 section 709.1085, qualifications of agent. Under that section, 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 serve, dies, or resigns.[44] Unless the power of attorney provides otherwise, a successor agent has the

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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. 23.

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.

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

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.

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

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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. 23.

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. 22.

49 As to an agent's duties, see "*Duties of agents*", infra p. 11. Agent liability is discussed in "*Liability of agents*", infra p. 23.

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.

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.

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

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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.

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 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.

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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.

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 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

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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.

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]

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

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

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 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

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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.

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."

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.

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

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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).

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).

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 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).

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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).

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]

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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.

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. 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

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§ 709.208(2).

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, 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

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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).

90 See § 709.202(3)(a).

91 See § 709.202(3)(b).

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 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.

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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.

94 See § 709.114(1), initial sentence.

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.

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]

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:

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95 See § 709.111(4) discussed in "*Liability for actions of co-agents and successor agents*", infra p. 23.

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).

101 § 709.111(4).

- 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]

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

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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.

108 § 709.117.

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;
- 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]

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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).

114 § 709.120(3).

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 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 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, and providing Florida citizens with an economical method

[115] § 709.116.

to plan for the management of their person and finances, particularly in the event of incapacity.

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
AARP