

CHAPTER 2013-90

Committee Substitute for House Bill No. 841

An act relating to powers of attorney; amending s. 709.2102, F.S.; revising and providing definitions; amending s. 709.2103, F.S.; providing additional exceptions to the applicability of specified power of attorney provisions; amending s. 709.2105, F.S.; authorizing a notary public to sign a principal's name on a power of attorney under certain circumstances; amending s. 709.2106, F.S.; clarifying and revising language; providing that an original power of attorney may be required under certain circumstances; providing that an original power of attorney may be recorded in the official records for a fee; amending s. 709.2114, F.S.; adding exceptions to a provision that prohibits an agent who has accepted appointment from delegating authority to a third person; amending s. 709.2116, F.S.; providing for the award of attorney fees and costs as in chancery actions; amending s. 709.2119, F.S.; authorizing a third person to require an agent to execute an affidavit stating that the agent's authority was not terminated because of certain circumstances; revising a form for affidavits; revising a cross-reference; revising terminology; amending s. 709.2120, F.S.; conforming provisions to changes made by the act; requiring a third person who rejects a power of attorney for certain reasons to state the reason for the rejection in writing; amending s. 709.2121, F.S.; providing for notice to a broker-dealer; amending s. 709.2202, F.S.; authorizing a notary to sign the principal's name to documents, other than the power of attorney, under certain circumstances; clarifying that certain gift amounts are based on the calendar year; specifying that a broker-dealer does not have a duty to inquire into certain actions by an agent and is not liable for actions taken in good faith reliance on an agent's actions; amending s. 709.2208, F.S.; providing that an agent acquires general authority regarding securities held by broker-dealers under certain circumstances; providing an effective date.

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

Section 1. Subsections (2) through (12) of section 709.2102, Florida Statutes, are renumbered as subsections (3) through (13), respectively, subsection (13) of that section is renumbered as subsection (15), new subsections (2) and (14) are added to that section, and present subsection (12) of that section is amended, to read:

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

(2) “Broker-dealer” means a broker-dealer registered with the United States Securities and Exchange Commission or the Commodity Futures Trading Commission if the broker-dealer is acting in that capacity.

~~(13)~~(12) “Sign” means having present intent to authenticate or adopt a record to:

- (a) ~~Execute by signature or mark or adopt a tangible symbol;~~ or
- (b) Attach to, or logically associate with the record an electronic sound, symbol, or process.

(14) “Another state” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Section 2. Section 709.2103, Florida Statutes, is amended to read:

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

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

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

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

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

(5) A power given to a transfer agent to facilitate a specific transfer or disposition of one or more identified stocks, bonds, or other financial instruments;

(6) A power authorizing a financial institution or broker-dealer, or an employee of the financial institution or broker-dealer, to act as agent for the account owner in executing trades or transfers of cash, securities, commodities, or other financial assets in the regular course of business; and

(7) A delegation of powers by a trustee in accordance with s. 736.0807.

Section 3. Subsection (3) is added to section 709.2105, Florida Statutes, to read:

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

(3) If the principal is physically unable to sign the power of attorney, the notary public before whom the principal’s oath or acknowledgment is made may sign the principal’s name on the power of attorney pursuant to s. 117.05(14).

Section 4. Subsections (3) and (5) of section 709.2106, Florida Statutes, are amended, and subsection (6) is added to that section, to read:

709.2106 Validity of power of attorney.—

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

(5) Except as otherwise provided in the power of attorney, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original. Notwithstanding this subsection, an original power of attorney that is relied upon to affect the title to real property may be required for recording in the official records.

(6) An original of a properly executed power of attorney may be presented to the clerk of the circuit court for recording in the official records as provided under s. 28.222 upon payment of the service charge as provided under s. 28.24.

Section 5. Paragraph (b) of subsection (1) of section 709.2114, Florida Statutes, is amended to read:

709.2114 Agent’s duties.—

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

(b) May not delegate authority to a third person except as authorized under provided in s. 518.112 or this part or by executing a power of attorney on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose;

Section 6. Subsection (3) of section 709.2116, Florida Statutes, is amended to read:

709.2116 Judicial relief; conflicts of interests.—

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

Section 7. Subsections (2) and (3) of section 709.2119, Florida Statutes, are amended to read:

709.2119 Acceptance of and reliance upon power of attorney.—

(2) A third person may require:

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

(b) An officer of a financial institution acting as agent to execute a separate affidavit, or include in the form of the affidavit, the officer's title and a statement that the officer has full authority to perform all acts and enter into all transactions authorized by the power of attorney for and on behalf of the financial institution in its capacity as agent.

(c) A written affidavit executed by the agent under this subsection may, but need not, be in the following form:

STATE OF.....

COUNTY OF.....

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

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

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

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

a. The Principal is not deceased;

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

c. Affiant’s authority has not been terminated by the filing of an action for dissolution or annulment of Affiant’s marriage to the principal, or their legal separation; and

d.e. There has been no revocation, or partial or complete termination, of the power of attorney or of Affiant’s authority.

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

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

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

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

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

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

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

Personally Known OR Produced Identification

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

(3) A third person who is asked to accept a power of attorney that appears to be executed in accordance with s. 709.2105 ~~709.2103~~ may in good faith request, and rely upon, without further investigation:

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

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

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

Section 8. Section 709.2120, Florida Statutes, is amended to read:

709.2120 ~~Rejecting Refusal to accept~~ power of attorney.—

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

~~(1)(a) A third person must accept or reject a power of attorney within a reasonable time. A third person who rejects a power of attorney must state in writing the reason for the rejection.~~

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

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

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

~~(2)(c) A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.~~

~~(3) A third person who rejects a power of attorney for any reason other than as provided in paragraph (4)(a) must state in writing the reason for the rejection.~~

~~(4)(2) A third person is not required to accept a power of attorney if:~~

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

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

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

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

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

~~(5)(3) A third person who, in violation of this section, rejects refuses to accept a power of attorney is subject to:~~

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

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

Section 9. Subsection (3) of section 709.2121, Florida Statutes, is amended to read:

709.2121 Notice.—

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

Section 10. Section 709.2202, Florida Statutes, is amended to read:

709.2202 Authority that requires separate signed enumeration.—

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

(a) Create an inter vivos trust;

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

(c) Make a gift, subject to subsection (4) (3);

(d) Create or change rights of survivorship;

(e) Create or change a beneficiary designation;

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

(g) Disclaim property and powers of appointment.

(2) In addition to signing the power of attorney on behalf of the principal pursuant to s. 709.2105(3), if the principal is physically unable to sign or initial next to any enumerated authority for which subsection (1) requires the principal to sign or initial, the notary public before whom the principal’s oath or acknowledgment is made may sign the principal’s name or initials if:

(a) The principal directs the notary to sign the principal's name or initials on the power of attorney next to any enumerated authority for which subsection (1) requires the principal to sign or initial;

(b) The signing or initialling by the notary is done in the presence of the principal and witnessed by two disinterested subscribing witnesses; and

(c) The notary writes the statement "Signature or initials affixed by the notary pursuant to s. 709.2202(2), Florida Statutes," below each signature or initial that the notary writes on behalf of the principal.

Only one notarial certificate in substantially the same form as those described in s. 117.05(14), which states the circumstances of all signatures and initials written by the notary public, is required to be completed by the notary public.

~~(3)(2)~~ Notwithstanding a grant of authority to do an act described in subsection (1), unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

~~(4)(3)~~ Unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gifts authorizes the agent to only:

(a) Make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee per calendar year not to exceed the annual dollar limits of the federal gift tax exclusion under 26 U.S.C. s. 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to 26 U.S.C. s. 2513, as amended, in an amount per donee per calendar year not to exceed twice the annual federal gift tax exclusion limit; and

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

~~(5)(4)~~ Notwithstanding subsection (1), if a power of attorney is otherwise sufficient to grant an agent authority to conduct banking transactions, as provided in s. 709.2208(1), conduct investment transactions as provided in s. 709.2208(2), or otherwise make additions to or withdrawals from an account of the principal, making a deposit to or withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account, or any other account held jointly or otherwise held in survivorship or payable on death, is not considered to be a change to the survivorship feature or beneficiary designation, and no further specific authority is

required for the agent to exercise such authority. A ~~bank or other~~ financial institution or broker-dealer does not have a duty to inquire as to the appropriateness of the agent's exercise of that authority and is not liable to the principal or any other person for actions taken in good faith reliance on the appropriateness of the agent's actions. This subsection does not eliminate the agent's fiduciary duties to the principal with respect to any exercise of the power of attorney.

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

Section 11. Subsection (2) of section 709.2208, Florida Statutes, is amended to read:

709.2208 Banks and other financial institutions.—

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

- (a) Buy, sell, and exchange investment instruments.
- (b) Establish, continue, modify, or terminate an account with respect to investment instruments.
- (c) Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal.
- (d) Receive certificates and other evidences of ownership with respect to investment instruments.
- (e) Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.
- (f) Sell commodity futures contracts and call and put options on stocks and stock indexes.

For purposes of this subsection, the term “investment instruments” means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, including shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds;

private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered or otherwise, except commodity futures contracts and call and put options on stocks and stock indexes.

Section 12. This act shall take effect upon becoming a law.

Approved by the Governor May 30, 2013.

Filed in Office Secretary of State May 30, 2013.