

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

| | | |
|-----------------------|-------|-------|
| ADOPTED | _____ | (Y/N) |
| ADOPTED AS AMENDED | _____ | (Y/N) |
| ADOPTED W/O OBJECTION | _____ | (Y/N) |
| FAILED TO ADOPT | _____ | (Y/N) |
| WITHDRAWN | _____ | (Y/N) |
| OTHER | | |

1 Committee/Subcommittee hearing bill: Judiciary Committee
2 Representative Powell offered the following:

Amendment (with title amendment)

5 Remove everything after the enacting clause and insert:

6 Section 1. Present subsections (2) through (12) of section
7 709.2102, Florida Statutes, are redesignated as subsections (3)
8 through (13), respectively, present subsection (13) of that
9 section is redesignated as subsection (15), a new subsection (2)
10 and a new subsection (14) are added to that section, and present
11 subsection (12) of that section is amended to read:

12 709.2102 Definitions.—As used in this part, the term:

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

17 (13)-(12) "Sign" means having present intent to
18 authenticate or adopt a record to:

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19 (a) Execute by signature or mark ~~adopt a tangible symbol~~;
20 or

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

23 (14) "Another state" means a state of the United States,
24 the District of Columbia, Puerto Rico, the United States Virgin
25 Islands, or any territory or insular possession subject to the
26 jurisdiction of the United States.

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

29 709.2103 Applicability.—This part applies to all powers of
30 attorney except:

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

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

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

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

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

44 (6) A power authorizing a financial institution or broker-
45 dealer, or an employee of the financial institution or broker-
46 dealer, to act as agent for the account owner in executing

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47 trades or transfers of cash, securities, commodities, or other
48 financial assets in the regular course of business; and

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

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

53 709.2105 Qualifications of agent; execution of power of
54 attorney.—

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

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

62 709.2106 Validity of power of attorney.—

63 (3) A power of attorney executed in another state which
64 does not comply with the execution requirements of this part is
65 valid in this state if, when the power of attorney was executed,
66 the power of attorney and its execution complied with the law of
67 the state of execution. A third person who is requested to
68 accept a power of attorney that is valid in this state solely
69 because of this subsection may in good faith request, and rely
70 upon, without further investigation, an opinion of counsel as to
71 any matter of law concerning the power of attorney, including
72 the due execution and validity of the power of attorney. An
73 opinion of counsel requested under this subsection must be
74 provided at the principal's expense. A third person may reject

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75 ~~accept~~ a power of attorney that is valid in this state solely
76 because of this subsection if the agent does not provide the
77 requested opinion of counsel, and in such case, a third person
78 has no liability for rejecting ~~refusing to accept~~ the power of
79 attorney. This subsection does not affect any other rights of a
80 third person who is requested to accept the power of attorney
81 under this part, or any other provisions of applicable law.

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

85 Notwithstanding the provisions of this subsection, an original
86 power of attorney that is relied upon to affect the title to
87 real property may be required for recording in the official
88 records.

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

93 Section 5. Subsection (1) of section 709.2114, Florida
94 Statutes, is amended to read:

95 709.2114 Agent's duties.—

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

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

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

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103 2. Must act in good faith;

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

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

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

112 b. The principal's foreseeable obligations and need for
113 maintenance;

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

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

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

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

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

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

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

132 709.2116 Judicial relief; conflicts of interests.—

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

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

141 709.2119 Acceptance of and reliance upon power of
142 attorney.—

143 (2) A third person may require:

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

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

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158 affidavit, the officer's title and a statement that the officer
159 has full authority to perform all acts and enter into all
160 transactions authorized by the power of attorney for and on
161 behalf of the financial institution in its capacity as agent.

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

164
165 STATE OF.....

166 COUNTY OF.....

167
168 Before me, the undersigned authority, personally appeared
169 ... (agent) (attorney in fact) ... ("Affiant"), who swore or
170 affirmed that:

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

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

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

179 a. The Principal is not deceased;

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

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

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

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

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

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

200
201
202 ...(Affiant)...

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

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

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

212 Personally Known OR Produced Identification
213 ...(Type of Identification Produced)...

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(3) A third person who is asked to accept a power of attorney that appears to be executed in accordance with s. 709.2105 ~~s. 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 a Refusal to accept power of attorney.-

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

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

~~(b) Four days, excluding Saturdays, Sundays, and legal holidays, are presumed to be a reasonable time for a financial institution 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

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

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

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

251 (4)(2) A third person is not required to accept a power of
252 attorney if:

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

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

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

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

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

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270 ~~(5)-(3)~~ A third person who, in violation of this section,
271 rejects ~~refuses to accept~~ a power of attorney is subject to:

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

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

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

280 709.2121 Notice.—

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

286 Section 10. Present subsections (2) through (5) of section
287 709.2202, Florida Statutes, are redesignated as subsections (3)
288 through (6), respectively, a new subsection (2) is added to that
289 section, and present subsections (1), (3), and (4) of that
290 section are amended to read:

291 709.2202 Authority that requires separate signed
292 enumeration.—

293 (1) Notwithstanding s. 709.2201, an agent may exercise the
294 following authority only if the principal signed or initialed
295 next to each specific enumeration of the authority, the exercise
296 of the authority is consistent with the agent's duties under s.

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297 709.2114, and the exercise is not otherwise prohibited by
298 another agreement or instrument:

299 (a) Create an inter vivos trust;

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

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

305 (d) Create or change rights of survivorship;

306 (e) Create or change a beneficiary designation;

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

310 (g) Disclaim property and powers of appointment.

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

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

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

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325 (c) The notary writes the statement "Signature or initials
326 affixed by notary, pursuant to s. 709.2202(2), Florida Statutes"
327 below each signature or initial that the notary writes on behalf
328 of the principal. Only one notarial certificate, in
329 substantially the same form as provided in s. 117.05(14), which
330 states the circumstances of all signatures and initials written
331 by the notary public, is required to be completed by the notary
332 public.

333 ~~(4)~~(3) Unless the power of attorney otherwise provides, a
334 provision in a power of attorney granting general authority with
335 respect to gifts authorizes the agent to only:

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

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

351 ~~(5)~~(4) Notwithstanding subsection (1), if a power of
352 attorney is otherwise sufficient to grant an agent authority to

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353 | conduct banking transactions, as provided in s. 709.2208(1),
354 | conduct investment transactions as provided in s. 709.2208(2),
355 | or otherwise make additions to or withdrawals from an account of
356 | the principal, making a deposit to or withdrawal from an
357 | insurance policy, retirement account, individual retirement
358 | account, benefit plan, bank account, or any other account held
359 | jointly or otherwise held in survivorship or payable on death,
360 | is not considered to be a change to the survivorship feature or
361 | beneficiary designation, and no further specific authority is
362 | required for the agent to exercise such authority. A ~~bank or~~
363 | ~~other~~ financial institution or broker-dealer does not have a
364 | duty to inquire as to the appropriateness of the agent's
365 | exercise of that authority and is not liable to the principal or
366 | any other person for actions taken in good faith reliance on the
367 | appropriateness of the agent's actions. This subsection does not
368 | eliminate the agent's fiduciary duties to the principal with
369 | respect to any exercise of the power of attorney.

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

372 | 709.2208 Banks and other financial institutions.—

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

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

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

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

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

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

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

393

394 For purposes of this subsection, the term "investment
395 instruments" means stocks, bonds, mutual funds, and all other
396 types of securities and financial instruments, whether held
397 directly, indirectly, or in any other manner, including shares
398 or interests in a private investment fund, including, but not
399 limited to, a private investment fund organized as a limited
400 partnership, a limited liability company, a statutory or common
401 law business trust, a statutory trust, or a real estate
402 investment trust, joint venture, or any other general or limited
403 partnership; derivatives or other interests of any nature in
404 securities such as options, options on futures, and variable
405 forward contracts; mutual funds; common trust funds; money
406 market funds; hedge funds; private equity or venture capital
407 funds; insurance contracts; and other entities or vehicles
408 investing in securities or interests in securities whether

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409 registered or otherwise, except commodity futures contracts and
410 call and put options on stocks and stock indexes.

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

413

414

T I T L E A M E N D M E N T

415
416 Remove everything before the enacting clause and insert:

417 A bill to be entitled

418 An act relating to powers of attorney; amending s.

419 709.2102, F.S.; adding definitions; revising the

420 definition of "sign"; amending s. 709.2103, F.S.;

421 adding certain powers of attorney to which this part

422 does not apply; amending s. 709.2105, F.S.;

423 authorizing a notary public to sign the principal's

424 name to the power of attorney under certain

425 circumstances; amending s. 709.2106, F.S.; clarifying

426 and revising language; providing that an original

427 power of attorney, rather than a photocopy or

428 electronic copy, may be required under certain

429 circumstances; providing that an original power of

430 attorney may be presented for recording in the

431 official records for a fee; amending s. 709.2114,

432 F.S.; adding exceptions to a provision that prohibits

433 an agent who has accepted appointment from delegating

434 authority to a third person; amending s. 709.2116,

435 F.S.; providing for attorney fees and costs as in

436 chancery actions; amending s. 709.2119, F.S.;

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437 authorizing a third person to require an agent to
438 execute an affidavit stating that the agent's
439 authority was not terminated because of certain
440 circumstances; revising a sample form of an affidavit;
441 revising a cross-reference; amending s. 709.2120,
442 F.S.; revising language; providing a presumption of
443 reasonable time to accept or reject a power of
444 attorney for a broker-dealer; requiring a third person
445 who rejects a power of attorney to state the reason in
446 writing unless a certain circumstance applies;
447 amending s. 709.2121, F.S.; providing for notice to a
448 broker-dealer; amending s. 709.2202, F.S.; conforming
449 a cross-reference; authorizing a notary public to sign
450 the principal's name to documents, other than the
451 power of attorney, under certain circumstances;
452 clarifying that certain gift amounts are based on the
453 calendar year; specifying that a broker-dealer does
454 not have a duty to inquire into certain actions by an
455 agent and is not liable for relying in good faith on
456 an agent's actions; amending s. 709.2208, F.S.;
457 providing that an agent acquires general authority
458 regarding securities held by a broker-dealer under
459 certain circumstances; providing an effective date.