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2013 Legislature

1
2 An act relating to powers of attorney; amending s.
3 709.2102, F.S.; revising and providing definitions;
4 amending s. 709.2103, F.S.; providing additional
5 exceptions to the applicability of specified power of
6 attorney provisions; amending s. 709.2105, F.S.;
7 authorizing a notary public to sign a principal's name
8 on a power of attorney under certain circumstances;
9 amending s. 709.2106, F.S.; clarifying and revising
10 language; providing that an original power of attorney
11 may be required under certain circumstances; providing
12 that an original power of attorney may recorded in the
13 official records for a fee; amending s. 709.2114,
14 F.S.; adding exceptions to a provision that prohibits
15 an agent who has accepted appointment from delegating
16 authority to a third person; amending s. 709.2116,
17 F.S.; providing for the award of attorney fees and
18 costs as in chancery actions; amending s. 709.2119,
19 F.S.; authorizing a third person to require an agent
20 to execute an affidavit stating that the agent's
21 authority was not terminated because of certain
22 circumstances; revising a form for affidavits;
23 revising a cross-reference; revising terminology;
24 amending s. 709.2120, F.S.; conforming provisions to
25 changes made by the act; requiring a third person who
26 rejects a power of attorney for certain reasons to
27 state the reason for the rejection in writing;
28 amending s. 709.2121, F.S.; providing for notice to a

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29 broker-dealer; amending s. 709.2202, F.S.; authorizing
30 a notary to sign the principal's name to documents,
31 other than the power of attorney, under certain
32 circumstances; clarifying that certain gift amounts
33 are based on the calendar year; specifying that a
34 broker-dealer does not have a duty to inquire into
35 certain actions by an agent and is not liable for
36 actions taken in good faith reliance on an agent's
37 actions; amending s. 709.2208, F.S.; providing that an
38 agent acquires general authority regarding securities
39 held by broker-dealers under certain circumstances;
40 providing an effective date.

41

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

43

44 Section 1. Subsections (2) through (12) of section
45 709.2102, Florida Statutes, are renumbered as subsections (3)
46 through (13), respectively, subsection (13) of that section is
47 renumbered as subsection (15), new subsections (2) and (14) are
48 added to that section, and present subsection (12) of that
49 section is amended, to read:

50 709.2102 Definitions.—As used in this part, the term:

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

55 (13)-(12) "Sign" means having present intent to
56 authenticate or adopt a record to:

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57 (a) Execute by signature or mark ~~or adopt a tangible~~
58 ~~symbol~~; or

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

61 (14) "Another state" means a state of the United States,
62 the District of Columbia, Puerto Rico, the United States Virgin
63 Islands, or any territory or insular possession subject to the
64 jurisdiction of the United States.

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

67 709.2103 Applicability.—This part applies to all powers of
68 attorney except:

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

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

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

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

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

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

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

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

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

91 709.2105 Qualifications of agent; execution of power of
92 attorney.—

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

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

100 709.2106 Validity of power of attorney.—

101 (3) A power of attorney executed in another state which
102 does not comply with the execution requirements of this part is
103 valid in this state if, when the power of attorney was executed,
104 the power of attorney and its execution complied with the law of
105 the state of execution. A third person who is requested to
106 accept a power of attorney that is valid in this state solely
107 because of this subsection may in good faith request, and rely
108 upon, without further investigation, an opinion of counsel as to
109 any matter of law concerning the power of attorney, including
110 the due execution and validity of the power of attorney. An
111 opinion of counsel requested under this subsection must be
112 provided at the principal's expense. A third person may reject

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113 | ~~accept~~ a power of attorney that is valid in this state solely
 114 | because of this subsection if the agent does not provide the
 115 | requested opinion of counsel, and in such case, a third person
 116 | has no liability for rejecting ~~refusing to accept~~ the power of
 117 | attorney. This subsection does not affect any other rights of a
 118 | third person who is requested to accept the power of attorney
 119 | under this part, or any other provisions of applicable law.

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

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

130 | Section 5. Paragraph (b) of subsection (1) of section
 131 | 709.2114, Florida Statutes, is amended to read:

132 | 709.2114 Agent's duties.—

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

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

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

143 709.2116 Judicial relief; conflicts of interests.—

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

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

152 709.2119 Acceptance of and reliance upon power of
153 attorney.—

154 (2) A third person may require:

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

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

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

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

175
176 STATE OF.....
177 COUNTY OF.....
178

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

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

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

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

- 190 a. The Principal is not deceased;
- 191 b. Affiant's authority has not been suspended by
192 initiation of proceedings to determine incapacity or to appoint
193 a guardian or a guardian advocate;

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

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

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

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

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

211 |
212 | ...(Affiant)...

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

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

217 |
218 | ...(Print, Type, or Stamp Commissioned Name of Notary Public)...

219 |
220 | Personally Known OR Produced Identification
221 | ...(Type of Identification Produced)...

222 |
223 | (3) A third person who is asked to accept a power of
224 | attorney that appears to be executed in accordance with s.

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225 | 709.2105 ~~709.2103~~ may in good faith request, and rely upon,
226 | without further investigation:

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

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

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

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

237 | 709.2120 Rejecting ~~Refusal to accept~~ power of attorney.—

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

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

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

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

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

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

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

259 | ~~(4)(2)~~ A third person is not required to accept a power of
260 | attorney if:

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

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

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

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

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

278 | ~~(5)(3)~~ A third person who, in violation of this section,
279 | rejects ~~refuses to accept~~ a power of attorney is subject to:

280 | (a) A court order mandating acceptance of the power of

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281 attorney; and

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

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

289 709.2121 Notice.—

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

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

297 709.2202 Authority that requires separate signed
298 enumeration.—

299 (1) Notwithstanding s. 709.2201, an agent may exercise the
300 following authority only if the principal signed or initialed
301 next to each specific enumeration of the authority, the exercise
302 of the authority is consistent with the agent's duties under s.
303 709.2114, and the exercise is not otherwise prohibited by
304 another agreement or instrument:

305 (a) Create an inter vivos trust;

306 (b) With respect to a trust created by or on behalf of the
307 principal, amend, modify, revoke, or terminate the trust, but
308 only if the trust instrument explicitly provides for amendment,

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309 modification, revocation, or termination by the settlor's agent;

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

311 (d) Create or change rights of survivorship;

312 (e) Create or change a beneficiary designation;

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

316 (g) Disclaim property and powers of appointment.

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

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

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

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

335
336 Only one notarial certificate in substantially the same form as

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337 | those described in s. 117.05(14), which states the circumstances
 338 | of all signatures and initials written by the notary public, is
 339 | required to be completed by the notary public.

340 | ~~(3)~~~~(2)~~ Notwithstanding a grant of authority to do an act
 341 | described in subsection (1), unless the power of attorney
 342 | otherwise provides, an agent who is not an ancestor, spouse, or
 343 | descendant of the principal may not exercise authority to create
 344 | in the agent, or in an individual to whom the agent owes a legal
 345 | obligation of support, an interest in the principal's property,
 346 | whether by gift, right of survivorship, beneficiary designation,
 347 | disclaimer, or otherwise.

348 | ~~(4)~~~~(3)~~ Unless the power of attorney otherwise provides, a
 349 | provision in a power of attorney granting general authority with
 350 | respect to gifts authorizes the agent to only:

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

362 | (b) Consent, pursuant to 26 U.S.C. s. 2513, as amended, to
 363 | the splitting of a gift made by the principal's spouse in an
 364 | amount per donee per calendar year not to exceed the aggregate

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365 annual gift tax exclusions for both spouses.

366 ~~(5)~~⁽⁴⁾ Notwithstanding subsection (1), if a power of
367 attorney is otherwise sufficient to grant an agent authority to
368 conduct banking transactions, as provided in s. 709.2208(1),
369 conduct investment transactions as provided in s. 709.2208(2),
370 or otherwise make additions to or withdrawals from an account of
371 the principal, making a deposit to or withdrawal from an
372 insurance policy, retirement account, individual retirement
373 account, benefit plan, bank account, or any other account held
374 jointly or otherwise held in survivorship or payable on death,
375 is not considered to be a change to the survivorship feature or
376 beneficiary designation, and no further specific authority is
377 required for the agent to exercise such authority. A ~~bank or~~
378 ~~other~~ financial institution or broker-dealer does not have a
379 duty to inquire as to the appropriateness of the agent's
380 exercise of that authority and is not liable to the principal or
381 any other person for actions taken in good faith reliance on the
382 appropriateness of the agent's actions. This subsection does not
383 eliminate the agent's fiduciary duties to the principal with
384 respect to any exercise of the power of attorney.

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

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

389 709.2208 Banks and other financial institutions.—

390 (2) A power of attorney that specifically includes the
391 statement that the agent has "authority to conduct investment
392 transactions as provided in section 709.2208(2), Florida

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393 Statutes" grants general authority to the agent with respect to
394 securities held by financial institutions or broker-dealers to
395 take the following actions without additional specific
396 enumeration in the power of attorney:

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

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

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

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

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

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

410

411 For purposes of this subsection, the term "investment
412 instruments" means stocks, bonds, mutual funds, and all other
413 types of securities and financial instruments, whether held
414 directly, indirectly, or in any other manner, including shares
415 or interests in a private investment fund, including, but not
416 limited to, a private investment fund organized as a limited
417 partnership, a limited liability company, a statutory or common
418 law business trust, a statutory trust, or a real estate
419 investment trust, joint venture, or any other general or limited
420 partnership; derivatives or other interests of any nature in

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421 securities such as options, options on futures, and variable
422 forward contracts; mutual funds; common trust funds; money
423 market funds; hedge funds; private equity or venture capital
424 funds; insurance contracts; and other entities or vehicles
425 investing in securities or interests in securities whether
426 registered or otherwise, except commodity futures contracts and
427 call and put options on stocks and stock indexes.

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