

Estate Planning News Alert¹

Florida's New Power Of Attorney Act

The Florida Power of Attorney Act² became effective on October 1, 2011. The highlights of particular importance to our clients and fellow estate planners include:

- The Act applies to durable and non-durable powers of attorney created by an individual "Principal" in favor of an "Agent." The focus of the new law is on Durable Powers of Attorney ("DPOA's"), the kind of powers prepared in connection with a Will, a Revocable Trust and other core estate planning documents.
- A DPOA is durable if it contains the following words or similar words that show the Principal's intent that the authority conferred is exercisable notwithstanding the Principal's subsequent incapacity: **This durable power is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes.**
- "Incapacity" means the inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.
- "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest or right therein.
- An existing DPOA, one validly created before October 1, 2011 is not rendered invalid by the Act, but actions of the Agent and interpretations of any DPOA going forward will be governed by the Act. Existing DPOA's may become harder to administer under the Act when needed.
- Under the Act photocopies or electronically transmitted copies of an original DPOA now have the same effect as the original. Document security concerns for any existing or new DPOA are critical and must be considered in every situation.
- A newly created DPOA with a springing feature (conditioned upon the Principal's lack of capacity) is invalid under the Act, except for a military deployment contingent power of attorney. The new general rule is that a DPOA is exercisable when executed.
- An existing DPOA with a springing feature that becomes operative upon the Principal's incapacity is still valid. All existing DPOA's with a springing feature should be evaluated and replaced with a new DPOA that is secured using an escrow arrangement.
- A DPOA cannot be amended, but can be changed by revoking the existing DPOA and executing a new DPOA. A DPOA can be revoked by a separate writing for that purpose. The Principal may, but is not required to give the Agent notice of the revocation.
- The Agent is a fiduciary with specific mandatory (non-waivable) duties and some duties that can be waived, curtailed or expanded. A designated Agent must accept or reject the appointment within a reasonable time. An Agent's acceptance can be required with formality or may occur simply by an Agent exercising authority. If Co-Agents are named, each may exercise powers independently unless the DPOA provides otherwise.
- Every power must be authorized and be specifically enumerated in the DPOA. Blanket general descriptions of powers will no longer be effective. Therefore, newly created DPOA's will

¹ This News Alert was prepared in November of 2011 by Bruce H. Gordon, Chair of Tampa Office Trusts and Estates Department.

² Chapter 709 of the Florida Statutes, Part II entitled "Powers of Attorney" as F.S. 709.2101 to 709.2402. This News Alert is not a comprehensive treatment of this topic. The reader is advised to consult the Act for specific provisions.

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become longer documents than existing DPOA’s and the language granting powers must be very specific and might include some indication of the Principal’s intention in special cases.

- No Agent may perform duties (1) under a personal services contract; (2) make an affidavit as to the Principal’s personal knowledge; (3) vote for the Principal in a public election; (4) execute or revoke the Principal’s Last Will and Testament or a Codicil; (5) exercise powers held by the Principal in a fiduciary capacity.
- Broad powers may be granted to the Agent in connection with estate planning if the Principal signs or initials next to each specified grant of power or authority in the DPOA. To the extent actually known, the Agent has a duty to preserve the Principal’s estate plan if consistent with the Principal’s best interests based on relevant factors set out in the Act. This procedure ensures that the Principal makes a knowing grant of these optional powers: (1) create an inter-vivous trust; (2) amend, modify, revoke or terminate a trust, but only if the trust instrument explicitly provides for such actions by the Agent; (3) make a gift (limited to annual exclusion gifts and consenting to gift-splitting without additional specific language); (4) create or change rights of survivorship; (5) waive the right to be beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or (6) disclaim property and powers of appointment.
- If a Principal is adjudicated totally or partially incapacitated by a court, the DPOA will terminate unless the court determines that certain authority granted to the Agent by the DPOA should be continued outside of a formal guardianship.
- An action for dissolution or annulment of marriage or legal separation terminates the DPOA unless the DPOA otherwise provides.
- Any Agent is entitled to reimbursement of expenses, but only a “Qualified Agent” as defined is permitted to charge fees for DPOA services.
- An Agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in Florida, and is authorized to conduct trust business in this state.
- DPOA’s must be executed with certain formalities. The Principal must sign before two witnesses and be acknowledged before a notary public.

When asked whether clients should sign a new DPOA our best advice is yes. Existing DPOA’s become stale with the passage of time. A properly drafted DPOA can avoid the publicity, frustration and expense of a formal guardianship. It is also prudent to comply with a new uniform law that is being adopted by many other states.

We hope every client never needs an Agent to act under his or her DPOA, but if necessary due to age or illness, the provisions of the DPOA could become important, perhaps critical. The Agent under the DPOA and the Trustee of the Revocable Trust, working together, should provide proper care for the Principal and the custody, control and management of the Principal’s assets.

Please contact your Shumaker estate planning attorney with questions or for assistance.³

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