

Legal Access For All

COMMUNITY

LEGAL SERVICES

A blue line-art illustration of Lady Justice, blindfolded and holding scales of justice in her raised right hand and a sword in her left hand. The illustration is positioned to the right of the word 'COMMUNITY' and partially overlaps the 'Y'.

The Florida Power of Attorney Act: Validity of Documents

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Florida Power of Attorney Act

(Fla. Stat §§709.2101–2402)



Power of attorney law has changed

Major changes in Florida laws governing “durable powers of attorney” should prompt anyone with such legal documents to review them and talk to their lawyers. Documents drafted before Oct. 1, when the law went into effect, are still valid. But it’s not known whether banks or the courts will accept legal papers drafted under the previous rules unless they specify which “powers” are to be conferred. What you need to know:

New documents must be more specific: Six of the most significant “powers” — including the right to give gifts from your funds, cre-

ating trusts and tapping into your retirement accounts — must be specifically listed in your document.

Effective date: Originally, you could create a “springing” power of attorney activated only after you were incapacitated. But the new law eliminates springing powers.

Legal documentation: Photocopies or electronic copies of durable power papers, not just originals, now must be honored by banks if they were signed on or after Oct. 1. If you later revoke your representative’s power, destroy all copies as well as originals.

— Diane C. Lade

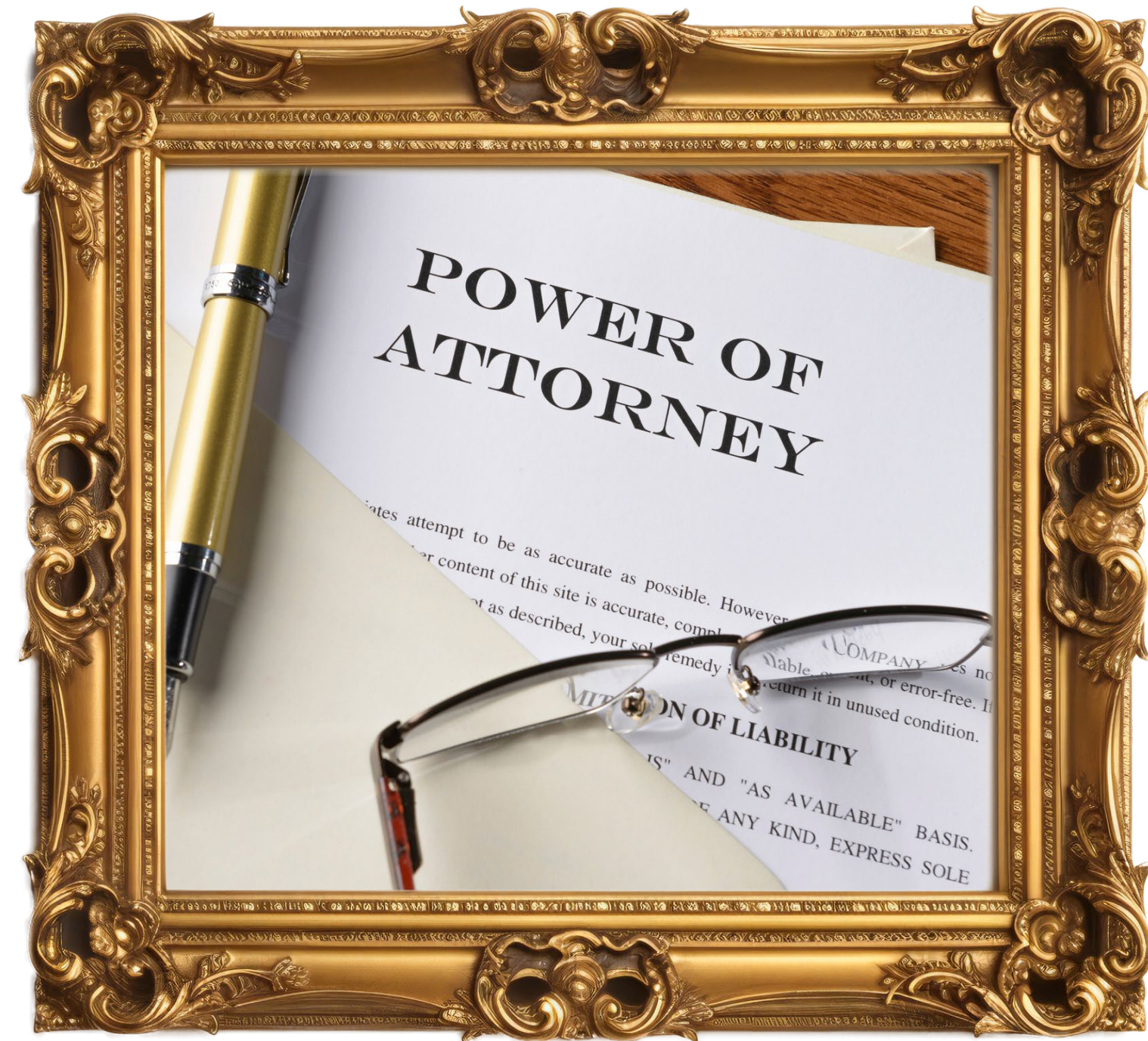


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POA Lingo: Power of Attorney

Fla. Stat. §709.2102(9)

A writing that grants authority to an agent to act in the place of the principal, regardless if the term is used.



POA Lingo: Agent

Fla. Stat. §709.2102(1)

A person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise.



POA Lingo: Durable

Fla. Stat. §709.2102(4) §709.2104

[...] Not terminated by the principal's incapacity.

“This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes,” or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity.”



DURABLE FINANCIAL POWER OF ATTORNEY

On the ____ day of _____, 20____ I, _____, the principal, of _____, State of _____, hereby designate _____, of _____, State of _____, my attorney-in-fact (hereinafter my “attorney-in-fact”), to act as initialed below, in my name, in my stead and for my benefit, hereby revoking any and all financial powers of attorney I may have executed in the past.

EFFECTIVE DATE

(Choose the applicable paragraph by placing your initials in the preceding space)

_____ - A. I grant my attorney-in-fact the powers set forth herein immediately upon the execution of this document. These powers shall not be affected by any subsequent disability or incapacity I may experience in the future.

or

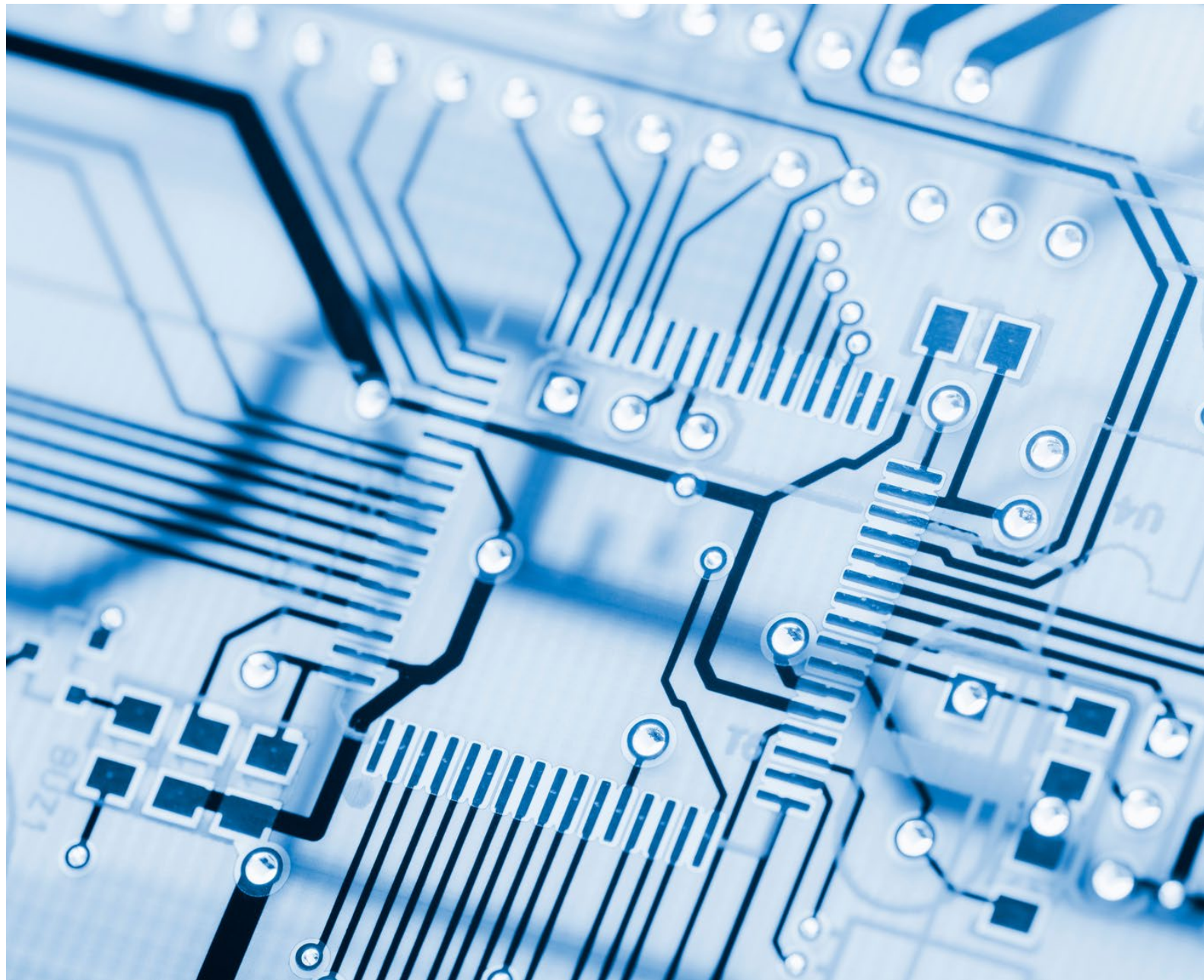
_____ - B. I grant my attorney-in-fact the powers set forth herein only when it has been determined in writing, by my attending physician, that I am unable to properly handle my financial affairs.

POWERS OF ATTORNEY-IN-FACT

My attorney-in-fact shall exercise powers in my best interests and for my welfare, as a fiduciary. My attorney-in-fact shall have the following powers:

POA Lingo: Electronic

Fla. Stat. §709.2102(5)

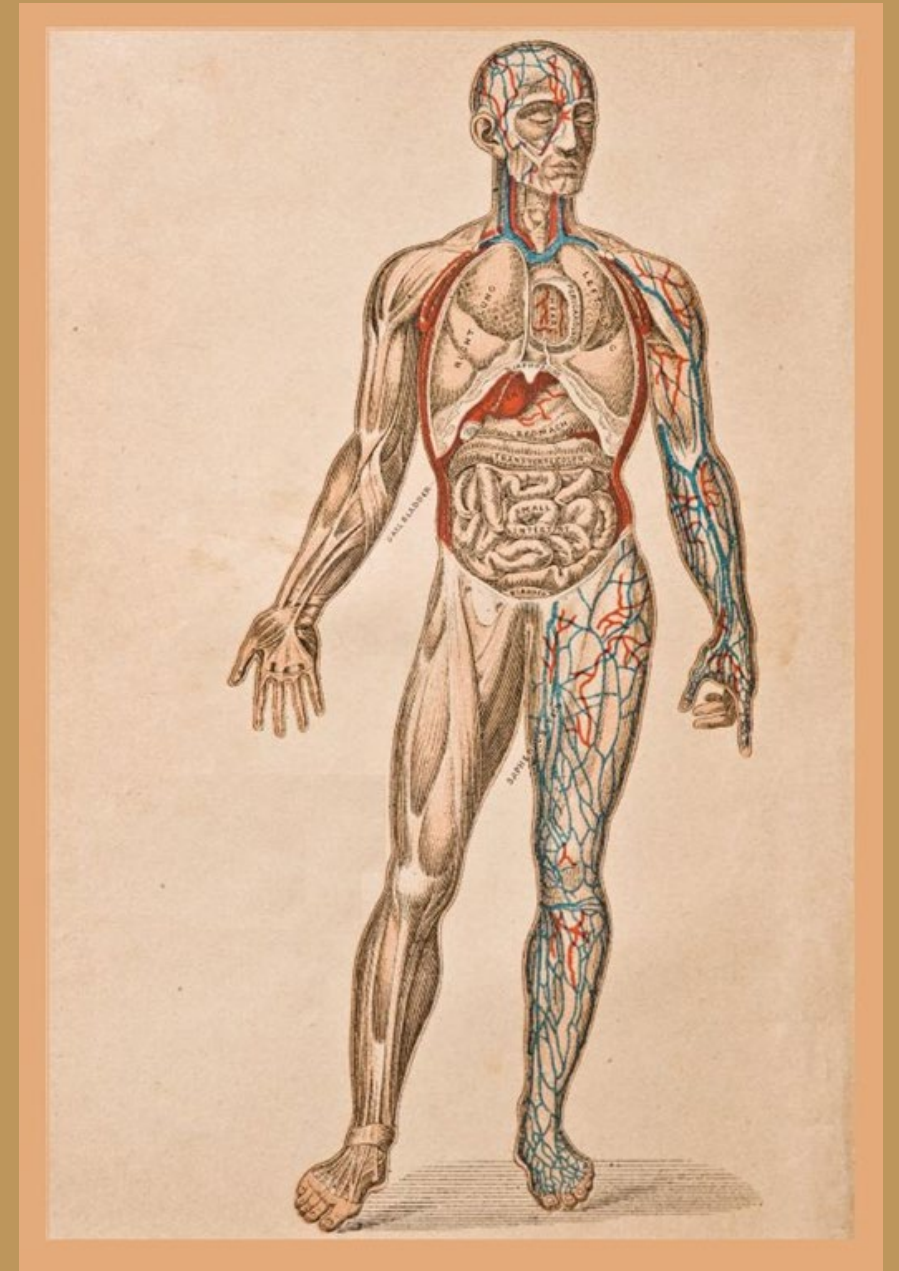


Technology having digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

POA Lingo: Incapacity

Fla. Stat. §709.2102(7)

*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.*



POA Lingo: Principal

Fla. Stat. §709.2102(11)



An individual who grants authority to an agent in a power of attorney.

POA Lingo: Property

Fla. Stat. §709.2102(12)

Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest or right therein.



POA Lingo: Third Person

Fla. Stat. §709.2102(15)



Any person other than the Principal, or the agent in the agent's capacity as agent.

Evaluation of POA Validity & The Principal's Capacity



The Importance of Legal Authority



Healthcare Welfare
Safety Residential
Financial Educational
Travel Employment
Visitation Benefits
Property Family
Insurance Identification

Types of Capacity

Incapacity

Legal

Medical

Testamentary

Diminished

Fluctuating(Lucid Intervals)

Presumption of Capacity



Understanding POAs



Fundamentals

Fla. Stat., Chapter 709



- The Principal **must** have capacity
- A **powerful** document
- Delegates authority
- Based on trust
- Little oversight
- Must **clearly** state conveyed powers
- **NO** Springing POA (**i.e. based on future incapacity**)
- **Specific Durable** language is required
- Enumerated (**superpowers**) must be initialed
- A Court may suspend/terminate
- POA Revocation must be executed
- POA Revocation must be given to POA agent

Common POA's in Florida

Limited:

- Conveys **specific** powers
- Restricted in *time* or *scope*

General:

- Conveys **broad** powers
- Ends at incapacity

Military:

- Must be executed in accordance with 10 U.S.C. s. 1044b; & *Fla. Stat* §§709.2106

Durable:

- Conveys **broad, continuing** powers;
- Continues during an incapacity
- Must comply with *Fla. Stat* §709.2104



Validity of a Power of Attorney



The Date of Execution

Fla. Stat. §709.2106 (12)

As of 10/1/2011, POAs must
comply with Fla. Stat., §709.

Prior to 10/1/2011, POAs must
comply with the law on the
date of execution.



Agent Qualifications

Fla. Stat. §709.2105(1)

Authorized agents:

1. Must be 18+ years old or
2. A financial institution that
 - Has trust powers;
 - A place of business in Florida; and
 - Authorized to conduct trust business in Florida



Document Signing

Fla. Stat. §709.2105(23)

The Principal Signs during the Execution:

- Principal
- Two subscribing witnesses
- Notary
- **NOTE:** The Notary Signs if the Principal is physically unable to sign the POA per *Fla. Stat. §17.05(14)*

All parties must be present, at the same time.



Validity of Foreign POAs

Fla. Stat. §709.2106(3)

POAs executed in another state,
which does not comply with Florida
Law is valid ***IF*** the executed POA
complied with the foreign state laws.



Opinion of Counsel

Fla. Stat. §709.2106(3)

- A receiver of a POA (aka third person) may request an Opinion of Counsel as to its validity.
- This request is at the Principal's expense.
- If the Principal or POA agent does not provide the requested Opinion, then the receiver can reject the POA with no liability.



Validity of Military POAs

Fla. Stat. §709.2106(4)

Military POAs are valid if they comply with 10 U.S.C. s. 1044b.

Deployment contingent POA:

- May be signed in advance;
- Effective upon the Principal's deployment; *and*
- Afforded full force and effect by Florida courts



Validity of Power of Attorney

Fla. Stat. § 709.2106 (6)

An original of a properly executed POA may be presented & recorded in official records for a nominal fee.

See Fla. Stat. § 28.222 and § 28.24.



POA: Validity of Electronic Copies

Fla. Stat. §709.2106 (5)

Electronic Copies: Unless the POA states otherwise, digital copies are acceptable.

Deeds/Titles: An original POA that is relied upon to affect the *title to real property* may be required for recording in the official records.



Termination of POAs

(Fla. Stat. §709.2109)

- Principal dies
- Principal declared incapacitated
- Principal Revocation
- By court order
- Expiration Date
- Purpose is accomplished
- Principal & Agent divorce
(unless the POA states otherwise)
- Agent Dies
- Agent resigns
- Agent's authority terminates and
there is **NO** alternate agent



Revocation of POA Checklist

Fla. Stat. §709.2110

- Principal **has** capacity
- Revocation methods:
 - Execute a **Revocation of POA** **or**
 - Execute a **new** POA with a revocation clause
 - **TIP: Screen for capacity issues**
- Properly execute the document(s)
- Send a copy of the **Revocation** to the POA agent **and** third parties like banks or medical providers
 - **TIP: via certified mail and 1st Class Mail**
- Record where property is registered or recorded



Best Practice: Revoke or update advanced directives, disclosure authorizations, legal releases and HIPPA forms.

Legal Notice Requirement

Fla. Stat. §709.2121(1)

All written notices must be provided to the agent **and** third parties relying on a POA, including:

- Principal's death
- Revocation of POA
- Suspension or termination of POA
- Petition for Determination of Incapacity
- Petition for Appointment of a Guardian
- Partial or complete termination by adjudication of incapacity
- Partial or complete termination by the occurrence of an event in the POA



CoAgents & Successors

Fla. Stat. §709.2111

1. Coagents may act independently *unless* the POA states otherwise
2. Successor Agents are allowed
3. CoAgents *may* not be liable for the actions or omissions of other agent(s).
 - Reasonable knowledge of a breach
 - Good Faith efforts to resolve
 - *NO* Actual knowledge
4. Successor agents *may not* have a duty to review the conduct of predecessor agents



Tip #1: Appoint a POA protector *(a third party who decides for specific issues)*

Tip #2: Add a POA clause stating that *agents must have joint consent for transactions exceeding \$500.*

Agent's Acceptance

Fla. Stat. §709.2113

A person accepts appointment as an agent by

- Exercising authority
- Performing duties
- Any assertion or conduct indicating acceptance.



The scope of an agent's acceptance is limited to those aspects of the POA for which the agent's assertions or conduct reasonably manifests acceptance.

Agent's Duties

Fla. Stat. §709.2114

Any POA agent is **fiduciary!**
Must **act within the scope** of the POA
Must act in **good faith**
May **not delegate authority**
Must **create and maintain an inventory**
Plus many more duties

Tip: Add a clause allowing immediate family, trustees, or a POA protector to request an annual accounting of assets, actions of the agent, financial records, etc.



Agent Authority

Fla. Stat. §709.2201

- Exercises *specific authority* conveyed
- Vague provisions conveying authority “to do all acts,” are legally unenforceable clauses
- By statute the agent can:
 - a. Convey or mortgage homestead property.
 - b. IF** in a DPOA: make all health care decisions



Agent May NOT

Fla. Stat. §709.2201(3)

An agent may not:

- Perform selfdealings: execute contract to themselves unless enumerated in the POA
- Make any affidavit as to the personal knowledge of the Principal
- Vote in any public elections on behalf of the Principal
- Execute or revoke any Last Will or Codicil for the Principal
- Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.



Agent Binds the Principal

Fla. Stat. §709.2201(6)

As if the Principal had performed the act, any acts performed by a POA agent:

- Has the same effect
- Inures to the benefit of the Principal
- Binds the Principal
- Binds the Principal's successors in interest



Agent Exoneration

Fla. Stat. §709.2115

A POA document may not:

1. Relieve the agent of liability for breach of a duty committed dishonestly, with improper motive, with reckless indifference, or acts not in the best interest of the Principal; or
2. Remove liability due to abuse of confidential or fiduciary powers.



Judicial Relief

Fla. Stat. §709.2116(1)

A Judge **may**:

- Determine the validity of a POA
- Enforce a POA
- Review the agent's conduct
- Terminate the agent's authority
- Remove the agent
- Suspend or Terminate the POA
- Grant any appropriate relief



Who may Petition for Judicial Relief

Legal Access For All



Fla. Stat. §709.2116(2)

- Principal
- POA agents
- A guardian, conservator, trustee, or any fiduciary acting for the Principal
- A guardian, conservator, trustee, or any fiduciary acting for the principal's estate.
- Principal's health care decisionmaker *(Possibly)*
- An interested party *(Possibly)*
- A governmental agency *(Possibly)*
- A person asked to honor the POA



Agent Resignation

Fla. Stat. §709.2118



An agent may resign by giving notice to

- *The principal*
- *The court-appointed guardian*
- *Any coagent*
- *The next successor agent*
- *Third parties in reliance of the POA*

Enumerated (Super) Powers

Fla. Stat. §709.2202

Must be initialed by the Principal to be effective:

- Personal Service / Self-Dealing Contracts
- Create an inter vivos trust;
- Amend, modify, revoke, or terminate a trust
- maybe*
- Make a gift, subject to ...
- Create or change rights of survivorship
- Create or change a beneficiary designation
- Waive the principal's right to be a beneficiary of a joint or survivor annuity,
- Waive the principal's pension benefits
- Disclaim property and powers of appointment.

BUT there may other clauses to add



Other Statutes to Review

709.2208 Banks and other financial institutions.

709.2209 Supported decision making agreements.

709.2303 Remedies under other law.

709.2401 Relation to electronic signatures in federal law.



Beware of Ethical Issues:



Undue Influence & Third Parties



The Presumption of Undue Influence may apply.

≠ There is ~~No~~ Confidentiality If a Third Party is Present

≠ There is ~~No~~ Attorney-Client Privilege If a Third Party is Present

≠ The documents prepared for the client may be invalidated!

Review *Fla. Stat* §709.2106, §709.2116, §733.107; *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971) & subsequent case law.

Sample Conversation Starters



- Do you have an existing Power of Attorney?
- Do you have any health care conditions?
- Who is your current Power of Attorney Agent?
- Do you have an existing Trust, Advanced directive or Pre Guardian?
- Do you understand what a Power of Attorney does?
- What are the goals for a Power of Attorney? Why do you need it?
- What happens if there is no Power of Attorney?
- Who can use the Power of Attorney?
- What powers can be included in a Power of Attorney?
- Who should be appointed as a POA agent?
- What powers to add if there are agents?
- Do you need a successor agent?
- When does a Power of Attorney become effective?
- What are the alternatives to a Power of Attorney?
- Other legal documents to assist the client achieve their goal

THE END

