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Expert Analysis

# Florida's New Power of Attorney Act: Significant Departure From Tradition

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Florida's new Power of Attorney Act became effective Oct. 1, 2011.[1] The act appears less complex and problematic on its face than it is in practice. At the threshold, in a significant departure from prior law, and with few exceptions, the act applies to both durable and non-durable powers of attorney created by an individual. The effect of this change, alone, cannot be underestimated.

### Grandfathering?

Initially one must address the enforceability of powers of attorney in place prior to Oct. 1, 2011. Three primary provisions of the act govern the extent to which a pre-act power of attorney will be grandfathered: §§709.2103, 709.2402(2), and 709.2402(3). To the extent a pre-act power of attorney is silent regarding any matter covered under the act, the applicable terms of the act will be deemed to apply. As discussed below, the results of this can have unpredictable and unwanted consequences. Using the act to amend pre-act powers of attorney is problematic at best. The best practice is to have clients execute new, act-compliant powers of attorney.

### Out-of-State Durable Powers

Post-act, many non-Florida powers of attorney may be "in," "out," or "partly out," in Florida. They may even be subject to constructive modification. Non-Florida durable (and non-durable) powers of attorney which are duly executed and effective under the laws of the respective jurisdictions in which they were executed, are "valid" in Florida. But they are generally only effective to authorize their fiduciaries [the "agent(s)"] to act to the extent of the powers which are enumerated in them and which are not prohibited under the act.

Post-act powers of attorney that contain only a traditional "blanket grant of authority" (e.g., "to do all acts that the principal could do") are "out." In Florida, these will not confer any power on their agents. Similarly, powers of attorney that contain incorporations by reference (e.g., so-called "check the box" and statutory "short form" powers of attorney), are generally "out." Whether such a pre-act power of attorney would now be effective is not absolutely clear. So arises the "validity" versus "effectiveness" issue.

### Validity and Effectiveness

Under the act, regardless of the date of execution, validity goes primarily to the issue of complying with due execution formalities. For example, a New York power of attorney, executed in compliance with New York law at the time of execution, is "valid" in Florida. Nevertheless, if a third party questions the validity of the out-of-state power in Florida, the agent may find it necessary to provide an "opinion of counsel" confirming the validity of the power of attorney. Typically done in the form of a letter from the drafting (or other) New York lawyer, the "opinion of counsel" must state that the power of attorney was duly executed and is valid and effective under New York law. It may also address any matter of law connected with the power of attorney.[2]

New York lawyers may streamline this process by providing these in advance, providing several (general) opinion letters with each power of attorney, ready for presentation as needed. Executing a new power of attorney under Florida law would probably be the more prudent course of action. Note: Under §709.2106(5) of the act, absent an express provision to the contrary in the power of attorney, a copy of the power is as effective as an original.

Effective operation of the power of attorney is another matter. Regardless of when executed, if a power of attorney is used in Florida or if its terms indicate that it is to be governed by Florida law, its effect and the meaning of its terms will be construed under Florida law—not under the law of the state of execution.[3] Reliance on a grandfathered durable power of attorney as being unaffected by the act may be misplaced. For example, a New York pre-act power of attorney in which the principal appoints co-agents and directs that they act jointly is no longer effective to require joint action. The act will override and modify the power of attorney so that either agent may delegate authority and act independently of the other with respect to banking transactions.[4]

There is also a limited exception to the act's prohibition on "blanket grants of authority." Sections 709.2208(1) and (2), Florida statutes, set out the act's rather lengthy so-called "blanket" banking and investment powers. For these "blanket" powers to be effective, they must be expressly conferred on the agent, using the required statutory language in the power of attorney.[5] However,

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there are many powers which are, unexpectedly, not included among these "blanket" powers.

For example, although the agent may sell a commodity futures contract or a put or call on a stock under the "blanket" investment powers, the agent cannot initiate, buy, or otherwise trade such put or call positions and cannot enter commodity futures contracts under those powers. Those powers must be set out separately, and be specifically enumerated. Due to such anomalies, specific enumeration of the client's intended banking and investment powers, coupled with specifically conferring the "blanket" banking and investment powers, may be the best alternative. "Less" is no longer "more" when drafting under the act.

If a pre-act or post-act power of attorney is silent on a matter that is covered under the act, the provisions of the act are deemed to apply. The result may be a constructive modification of the power of attorney. For example, assume a New York principal appoints A and B as co-agents, without expressly providing that they must act jointly. Assume New York law requires in the absence of an express directive otherwise that co-agents must act jointly. The Florida act provides to the contrary.[6]

Thus, if the same New York power of attorney were used in Florida (or is governed by Florida law), the co-agents would be able to act jointly or severally because the New York power does not expressly require joint action. As noted, above, even if the New York power expressly requires joint action, the act will override such requirement with respect to banking transactions.

Under the act, powers of attorney may not be amended. The resulting implications cannot be overstated. In the case of a pre-act power of attorney, a duly executed amendment predating the act should be effective; however, a post-act amendment to a pre-act power of attorney will likely not be effective, notwithstanding the grandfather provisions. Moreover, an amendment to a post-act power of attorney will not be effective. Whether a New York-authorized amendment to a power of attorney executed after Sept. 30, 2011, would be effective in Florida is not yet clear. The appointment of a successor agent under a pre- or post-act power of attorney will now require the successor agent to provide a requesting third party an affidavit setting out the specifics (listed in the act) validating the effective succession of office. Likewise, any third party may require an affidavit from the initially named or currently serving agent, reciting a litany of circumstances and conditions which reflect that the power of attorney is still in effect and the agent is qualified to act under it.[7] Absent full compliance with such a request, the power of attorney may be "valid"; but it will not be "effective" with respect to the matters related to the requesting third party(ies).

### Super Powers!

The most impactful provisions under the act involve the so-called "super powers" under §709.2202. This section speaks to the principal's estate plan, and includes powers to create, amend, or terminate trusts. Under the act, the term "estate plan" has a much broader scope than lawyers or clients typically contemplate. For example, gifting is considered part of estate planning and includes any power that may directly or indirectly create or affect a gift. These new "super powers" essentially authorize the agent to modify the principal's estate plan, within certain statutory parameters. Modification to the gifting super powers is possible, but will be effective only to the extent it is (a) permitted under the act and (b) drafted and executed in a precise format.

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The act requires that each of these powers be set apart in a separate paragraph and that each such power that the principal intends to grant be either initialed or signed by the principal. If the principal's initials or signature do not appear in a location that is clearly and directly related to a "super power" listed in a power of attorney, that "super power" shall be deemed not granted. Inadvertent omission of such a power from the power of attorney also denies that power. Precise, detailed drafting and close attention to execution is critical. Thus, use of most "statutory short form" or "check the box" powers of attorney will not authorize the exercise of any such powers in Florida.

### Compensation

Absent an express provision to the contrary in the power of attorney, all "qualified" agents are entitled to compensation that is "reasonable under the circumstances."[8] Most pre-act powers of attorney and many New York post-act powers of attorney will not contain any reference to compensation especially if family members are appointed. Yet, most family members, among others, will likely be "qualified" agents. If any such instrument is used in Florida or is governed by Florida law, the "qualified" agent serving would automatically be entitled to reasonable compensation, as well as reimbursement of reasonable costs.

### The Spring Has Sprung

With a narrow exception for certain military personnel, the spring provisions in so-called "springing" durable powers of attorney executed on or after Oct. 1, 2011, will not be effective. However, "springing" durable powers of attorney, duly executed before Oct. 1, 2011, remain valid…if they otherwise meet the standards of the act and remain unchanged after Oct. 1, 2011.[9]

### So Now What?

Florida's new Power of Attorney Act is not for the faint of heart. Those attorneys representing clients who are domiciled in Florida or own property in Florida should carefully consider the effectiveness of their clients' powers of attorney.

1. §709.2101-709.2402, Fla. Stat.
2. §709.2106(3), Fla. Stat.
3. §709.2107, Fla. Stat.
4. §709.2111(6), Fla. Stat.
5. §709.2208(1), (2), Fla. Stat.
6. §709.2111(1), Fla. Stat.
7. §709.2119(2), Fla. Stat.
8. §709.2112, Fla. Stat.
9. §709.2108(2), Fla. Stat.