

ESTATE PLANNING COUNCIL OF GREATER MIAMI

LEGISLATIVE UPDATE

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ESTATE PLANNING COUNCIL OF GREATER MIAMI
LEGISLATIVE UPDATE 2011

I. **Background Caveat:** This legislative update contains numerous measures. However, the Governor has not taken final action on any of these measures. The full text of each enrolled bill, as well as applicable legislative staff reports, are available on the legislative web sites (www.flsenate.gov, www.myfloridahouse.com, and www.leg.state.fl.us). Only a summary of certain measures is included herein for your knowledge. Please be sure to check with the legislative websites to determine whether a given measure has become enacted law.

II. **“Olmstead Fix”:** CS/HB 253 modifies the decision in the *Olmstead* case as it relates to charging orders against a member’s transferable interest in an LLC.

A. *Olmstead v. Federal Trade Commission*, 44 So. 3d 76 (Fla. 2010)

1. The Florida Supreme Court held in *Olmstead* that a charging order is not the exclusive remedy available to a creditor holding a judgment against the sole member of a Florida single-member limited liability company.
2. There was concern that the *Olmstead* decision is not limited to a single-member LLC, and there was a desire to clarify law by providing that *Olmstead* does not extend to a member of a multimember LLC organized under Florida law.

B. CS/HB 253 amends Fla. Stat. § 608.433 to provide:

1. Except in the case of an LLC having only one member, a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's assignee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company.
2. When an LLC has only one member:
 - a. If a judgment creditor of a member or member's assignee establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment

within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the assignee of the sole member, and upon such showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale; and

- b.** If the court orders a foreclosure sale of the member's interest in the single member LLC then:
 - 1.** The purchaser at the sale obtains the member's entire LLC interest, and not merely the rights of an assignee;
 - 2.** The purchaser becomes the member of the LLC; and
 - 3.** The person whose interest is sold ceases to be a member.
- 3.** In the case of an LLC having more than one member, the remedy of foreclosure on the member's interest is not available to the judgment creditor.
- 4.** Nothing in the law limits:
 - a.** The rights of the secured creditor to pursue rights under their security interest;
 - b.** The principles of law and equity that affect fraudulent transfers;
 - c.** The availability of certain equitable principles such as alter ego, equitable lien, or constructive trusts; or
 - d.** The continuing jurisdiction of the court to enforce its charging order.
- 5.** This amendment to Fla. Stat. § 608.433 is intended to be clarifying and remedial in nature and therefore applies retroactively. The act takes effect upon becoming law.

III. Probate and Trust Bill – CS/HB 325

- A. Fiduciary Lawyer-Client Privilege** – Creates Fla. Stat. § 90.5021 to provide:

1. A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under Fla. Stat. § 90.502 to the same extent as if the client were not acting as a fiduciary. In applying Fla. Stat. § 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.
2. **Who is a fiduciary?** For the purpose of this section, a client acts as a fiduciary when serving as: a personal representative or a trustee as defined in Fla. Stat. §§ 731.201 and 736.0103; an administrator ad litem as described in Fla. Stat. § 733.308; a curator as described in Fla. Stat. § 733.501; a guardian or guardian ad litem as defined in Fla. Stat. § 744.102; a conservator as defined in Fla. Stat. § 710.102; or an attorney in fact as described in Fla. Stat. Chapter 709.
3. **Why the need for the legislation?** Uncertainty as a result of court decisions as to whether the fiduciary had an attorney-client privilege or whether beneficiaries could claim a right to disclosure of the communications fueled the need for legislation. Three cases decided by the Second District Court of Appeal created great uncertainty in estate and trust law about the applicability of the lawyer-client privilege to communications between a fiduciary acting as a client and a lawyer. *Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006); *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004); *Barnett Banks Trust Co., N.A. v. Compson*, 629 So. 2d 849 (Fla. 2d DCA 1993). The test used by these cases to determine whether the privilege applies to communications is whether it is the fiduciary or beneficiary “who will ultimately benefit from the legal work” the fiduciary has instructed the attorney to perform. This analysis has its origin from a case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976).
4. **Amendment to Fla. Stat. § 733.212(2)(b):** This provides that the notice of administration shall state the name and address of the personal representative and the name and address of the personal representative's attorney, **and that the fiduciary lawyer-client privilege in Fla. Stat. § 90.5021 applies with respect to the personal representative and any attorney employed by the personal representative.**

5. Amendments to Fla. Stat. § 736.0813: Trustee’s Duty to Inform and Account

- a. Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, the full name and address of the trustee, **and that the fiduciary lawyer-client privilege in Fla. Stat. § 90.5021 applies with respect to the trustee and any attorney employed by the trustee.**
- b. Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings under this section, **and that the fiduciary lawyer-client privilege in Fla. Stat. § 90.5021 applies with respect to the trustee and any attorney employed by the trustee.**

6. Effective Date: Upon becoming law and applies to all proceedings pending before such date and all cases commenced on or after that date.

B. Fla. Stat. § 732.102: Amendments to Intestacy Statute Concerning Surviving Spouse’s Share

1. Surviving spouse takes the ENTIRE intestate estate IF the decedent is survived by one or more descendants, all of whom are descendants of the surviving spouse, and the surviving spouse has no other descendant;
2. Surviving spouse takes ONE-HALF of the intestate estate if there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse;
3. Surviving spouse takes ONE-HALF of the intestate estate if there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent;
4. **Effective Date:** October 1, 2011.

C. Will Reformation and Modification and Attorney's Fees and Costs

1. Reformation of Wills to Correct Mistakes:

a. Fla. Stat. § 732.615 is created to read: Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.

b. Effective Date: July 1, 2011.

2. Modification to achieve testator's tax objectives:

a. Fla. Stat. § 732.616 is created to read: Upon application of any interested person, to achieve the testator's tax objectives the court may modify the terms of a will in a manner that is not contrary to the testator's probable intent. The court may provide that the modification has retroactive effect.

b. Effective Date: July 1, 2011.

3. Attorney's Fees and Costs:

a. Fla. Stat. § 733.1061 is created to provide:

1. In a proceeding arising under Fla. Stat. §§ 732.615 or 732.616, the court shall award taxable costs as in chancery actions, including attorney's fees and guardian ad litem fees.

2. When awarding taxable costs, including attorney's fees and guardian ad litem fees, under this section, the court in its discretion may direct payment from a party's interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both.

b. Effective Date: July 1, 2011.

D. Actions to Challenge the Revocation of a Will or Trust

- 1. Fla. Stat. § 732.5165 is amended to provide:** If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.
- 2. Fla. Stat. § 732.518 is amended to state:** An action to contest the validity of **all or part of a will or the revocation of all or part of a will** may not be commenced before the death of the testator.
- 3. Fla. Stat. § 736.0207 is amended to read:** If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death.
- 4. Fla. Stat. § 736.0406 is amended to state:** If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.
- 5. Fla. Stat. § 744.441(11) is amended to read:** There shall be a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relates solely to a devise. This subsection does not preclude a challenge after the ward's death.
- 6. Why this legislation?** This legislation attempts to clarify the law in the area of wills and trusts to explicitly provide that the revocation of a will or trust, as well as the amendment of a will or trust, may be challenged on the grounds that the revocation, amendment, or codicil was procured by fraud, duress, mistake or undue influence. It also serves to overrule *MacIntyre v. Wedell*, 12 So. 3d 273 (Fla. 4th DCA 2009) to the extent there is any inconsistency.
- 7. Effective Date:** Upon becoming law and applies to all proceedings pending before such date and all cases commenced on or after that date.

E. Motions for Attorney's Fees and Costs in Trust Proceedings

- 1. Amends Fla. Stat. § 736.0201 to provide:**
 - a.** Florida Rules of Civil Procedure 1.525 shall apply to judicial proceedings concerning trusts, except that the following do not

constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

1. A trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust.
 2. A determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under Fla. Stat. § 736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.
- b. **Why this change?** This was needed to clarify that the payment of a trustee's attorneys' fees and costs from trust assets generally does not constitute taxation of costs and attorney's fees subject to Florida Rules of Civil Procedure 1.525.
- c. **Effective Date:** Upon becoming a law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date.

IV. Florida Uniform Prudent Management of Institutional Funds Act – CS/CS/CS/HB 599

- A. The Uniform Prudent Management of Institutional Funds Act (UPMIFA) combines the approaches taken by the Uniform Prudent Investor Act and by the Revised Model Nonprofit Corporation Act. UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity.
- B. UPMIFA provides new requirements for the management of funds held by an institution exclusively for charitable purposes. It provides standards of conduct in managing and investing institutional funds, and it authorizes the management and investment funds to be delegated by the institution.
- C. **CS/CS/CS/HB 599 creates Fla. Stat. § 617.2104** (the Florida UPMIFA), which contains the following provisions:
1. **Fla. Stat. § 617.2104(3):** provides for the standard of conduct in managing and investing institutional funds.

2. **Fla. Stat. § 617.2104(4):** addresses the appropriation for expenditure or accumulation of endowment funds.
3. **Fla. Stat. § 617.2104(5):** addresses the delegation of management and investment functions.
4. **Fla. Stat. § 617.2104(6):** addresses the release or modification of restrictions on charitable funds to permit more efficient management of these funds.

D. This Act applies to charities organized as charitable trusts, as nonprofit corporations, or in some other manner, but the rules do not apply to funds managed by trustees that are not charities. Thus, the Act does not apply to trusts managed by corporate or individual trustees, but the Act does apply to trusts managed by charities.

E. Effective Date: July 1, 2012.

V. Guardianship Public Records Exception – HB 7085

A. This **amends Fla. Stat. § 744.1076** to reenact the public records exemptions for any court order appointing a monitor in a guardianship proceeding under Fla. Stat. § 744.107 and for any court order for an emergency court monitor under Fla. Stat. § 744.1075.

B. This provides that orders appointing non-emergency court monitors are exempt rather than confidential and exempt.

C. This provides that only court orders finding no probable cause are confidential and exempt.

D. Effective Date: October 1, 2011.

VI. Judgment Interest – CS/HB 567

A. This directs the Chief Financial Officer to adjust the statutory rate of interest payable on judgments, quarterly, based upon the discount rate of the Federal Reserve.

B. This also **amends Fla. Stat. § 55.03** to require annual adjustments to the rate of interest payable on certain judgments.

C. This also **amends Fla. Stat. § 717.1341** to conform to the changes made by the CS/HB 567.

D. **Effective Date:** July 1, 2011.

VII. Estate Tax Returns – CS/HB 641

A. Provides that the provisions of Fla. Stat. § 198.13(4) do not apply to the estates of decedents dying after December 31, 2012.

B. This **retroactively amends Fla. Stat. § 198.13** as of January 1, 2011 to extend the period of exemption under certain circumstances from the filing of returns with respect to taxes on the estates of decedents or to taxes on generation-skipping transfers.

C. **Effective Date:** Upon becoming law.

VIII. Inherited IRAs – HB 469

A. This **amends Fla. Stat. § 222.21** to clarify that inherited individual retirement accounts (IRAs) are exempt from claims of creditors of the owner, beneficiary or participant of inherited IRAs.

B. This is remedial in nature and has retroactive application to all inherited IRAs without regard to the date the account was created.

C. **Effective Date:** Upon becoming law.

IX. Florida Power of Attorney Act – SB 670

A. This **updates the provisions of Fla. Stat. Chapter 709** relating to powers of appointment and powers of attorney by creating new Parts I and II in the chapter.

1. Part I **creates Fla. Stat. §§ 709.02-709.07** entitled “Powers of Appointment.”

2. Part II **creates Fla. Stat. §§ 709.2101-709.2402** entitled “Powers of Attorney.”

B. **Scope of the New Power of Attorney Act:** Fla. Stat. § 709.2103

1. The Act will apply only to powers of attorney created by an individual.

- a. With respect to such powers, Fla. Stat. § 709.2107 provides that the meaning and effectiveness of the power will be determined by the Act to the extent the power of attorney is used in Florida or the power states that it is to be governed by the laws of Florida. This includes powers of attorney executed in other jurisdictions.
- b. It also includes instruments executed before the Act becomes effective. That is, except as otherwise provided in a particular section, the Act applies retroactively.

2. Powers to Which the Act Does Not Apply: Fla. Stat. § 709.2103

- a. Powers created by persons other than individuals;
- b. A proxy or other delegation to exercise voting or management rights;
- c. A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; or
- d. Powers coupled with an interest (such as powers given to a creditor to perfect or protect title in or to sell pledged collateral).

3. Effect on Existing Powers of Attorney: Fla. Stat. § 709.2402

- a. Except as might otherwise be provided in an individual section, the Act applies to all powers of attorney, regardless of the date the powers were created.
- b. The Act has no effect on any act done by and agent before the effective date of the Act. (Fla. Stat. § 709.2402(4)).

C. The Power of Attorney Instrument

1. Execution Requirements: Fla. Stat. § 709.2015(2)

- a. Durable and nondurable powers executed after the effective date of the Act must be signed by the principal and by two subscribing witnesses, and be acknowledged by the principal before a notary public. (Fla. Stat. § 709.2105(2)).

- b. An exception applies to military powers. A military power is valid if it is executed in accordance with the requirements for a military power pursuant to 10 U.S.C. § 1044(b).
- c. An exception also applies to powers of attorney created and executed under the laws of a state other than Florida, provided the execution complied with the law of the state of execution.

2. Durable Powers: Fla. Stat. § 709.2104

- a. Consistent with current law, a power of attorney is durable only if it contains appropriate language to that effect. The language mentioned in the Act — “[t]his durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes” — is not exclusive. (Fla. Stat. § 709.2104).

3. No Springing or Other Contingent Powers: Fla. Stat. § 709.2108(3)

- a. Springing powers are valid under current Florida law.
- b. Legacy springing powers (those executed prior to the effective date of the Act) remain valid under the Act.
- c. Powers created on or after the effective date of the Act, must be exercisable as of the time they are executed. Accordingly, post-Act contingent powers, including springing powers, are not effective under the Act except for military powers.

4. Amendment and Revocation of Powers: Fla. Stat. § 709.2110

- a. Amendment: A principal who wishes to amend a power of attorney may do so by revoking the old power and by executing a new one in amended form.
- b. Revocation: With respect to revocation, neither the mere lapse of time nor the mere execution of a subsequent power of attorney is sufficient to revoke a prior power. Instead, to revoke a power of attorney the principal must express the revocation in either a new power of attorney or in some other writing signed by the principal.

5. Suspension and Termination of Powers: Fla. Stat. § 709.2109

- a. Suspension of a power.
- b. Termination of a power.
- c. Termination of an agent's authority.

6. The Office of Agent:

a. Qualifications: Fla. Stat. § 709.2105:

- 1. Only natural persons (i.e., individuals) who are 18 years of age or older and certain financial institutions may be named as an agent.
- 2. To qualify, a financial institution must have a place of business in Florida and be authorized to conduct trust business in this state.

b. Designation: Fla. Stat. § 709.2111

- 1. Subject to the above qualification requirements, a principal may designate a single agent or, if desired, a principal may designate two or more persons to act as co-agents. Unless the power of attorney provides otherwise, each co-agent may exercise its authority independently.
- 2. Even where the power of attorney requires two or more agents to act jointly, there is a special exception for banking transactions to allow any one of the agents to sign checks and otherwise handle banking matters with a single signature.
- 3. A principal may designate one or more successor agents to act if the primary agent's authority terminates or the agent declines to serve, dies, or resigns.

c. Acceptance: Fla. Stat. § 709.2113

- 1. Agents must accept the power.
- 2. If a power specifies a method for acceptance, an agent accepts the power by complying with that method. Otherwise, an agent accepts a power by exercising authority or performing duties as

an agent or by any other assertion or conduct indicating acceptance.

d. Resignation: Fla. Stat. § 709.2118

1. An agent may resign as provided in the power of attorney. In the absence of a provision covering resignation, an agent may resign by giving notice to the principal, any court-appointed guardian, and any co-agent, or if none, to the next successor agent.

7. Duties of Agents:

a. Mandatory Duties: Fla. Stat. § 709.2114(1)

1. An agent's mandatory duties are enumerated in Fla. Stat. § 709.2114(1). The mandatory duties include: the duty to act within the scope of the authority granted in the power and, to the extent actually known, in a manner that is not contrary to the principal's reasonable expectations; to act in good faith and (except as authorized by other statutory provisions), in a manner that is not contrary to the principal's best interest; to attempt in good faith to preserve the principal's estate plan; to perform personally; to keep adequate records; and if the power of attorney effectively authorizes the agent to access the principal's safe deposit box, to create and maintain an accurate and current inventory of the box.

A. The Duty to Preserve the Principal's Estate Plan:

- 1) This mandatory duty appears in Fla. Stat. § 709.2114(1)(a)4 and is subject to a number of qualifications. The duty applies only to the extent the principal's estate plan is actually known by the agent. An agent has no duty to ascertain the principal's plan. Even if the plan is known to the agent, the agent incurs no liability for failing to preserve it as long as the agent acts in good faith. The duty to preserve the principal's estate plan applies only when preservation of the plan is in the principal's best interest based on all relevant factors, including:

- a) The value and nature of the principal's property;

- b) The principal's foreseeable obligations and need for maintenance;
- c) Minimization of taxes;
- d) Eligibility for a statutory or regulatory benefit, program, or assistance; and
- e) The principal's personal history of making or joining in the making of gifts.

b. Default Duties: Fla. Stat. § 709.2114(2)

- 1. Default duties apply unless the power of attorney provides to the contrary. These duties appear in Fla. Stat. § 709.2114(2) and include, in the order discussed below, the duty of competency, the duties of impartiality and loyalty, and the duty to cooperate with health-care decision makers.

8. Authorities of Agents: Fla. Stat. § 709.2201

- a. Except as otherwise limited by Fla. Stat. § 709.2201 of the Act or by other applicable law, an agent "has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the power of attorney."

1. Prohibited Personal Authorities: Fla. Stat. § 709.2201(3)

Whether or not authorized in a power of attorney instrument, an agent may not:

- A. Perform duties under a contract that requires personal services of the principal;
- B. Make an affidavit as to the principal's personal knowledge;
- C. Vote on behalf of the principal in a public election;
- D. Execute or revoke the principal's will or codicil; or
- E. Exercise powers or authority held by the principal in a fiduciary capacity.

2. No Blanket or Default Powers: Fla. Stat. § 709.2201(1)

- A. A blanket grant of authority (*i.e.*, “to do all acts that the principal could do”), is not sufficient to grant *any* authority to the agent.
- B. Agents have no default authorities under the Act. That is, agents may perform those acts *and only those acts* specifically enumerated in the power of attorney.

3. General Rule is No Incorporation by Reference: With two exceptions discussed below related to special rules for banks and other financial institutions, the Act does not permit incorporation of an agent’s powers by reference.

4. Special Rules for Banks and Other Financial Institutions: Fla. Stat. § 709.2208 allows incorporation in two areas, both of which apply to financial institutions.

A. Banking Transactions: Fla. Stat. § 709.2208(1)

- 1) Without the need for individual enumeration in the power, an agent may be authorized to conduct an array of actions with respect to accounts at banks and other financial institutions by stating that the agent has “*authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes.*” (emphasis added)
- 2) Among others, the authorized actions include the authority to establish, continue, modify, terminate, or make withdrawals from a principal’s account; to contract for financial services, including renting a safe deposit box; to receive statements, vouchers, notices, and similar documents from a financial institution; to apply for and use debit cards, electronic transaction authorizations, and travelers checks; to draw upon any line or credit, credit card, or other credit established by the principal; and to purchase or to endorse and negotiate personal, cashiers, counter, etc. checks.

B. Investment Transactions: Fla. Stat. § 709.2208(2)

- 1) Without the need for individual enumeration in the power, an agent may be granted general authority to engage in an array of actions with respect to investment instruments held by financial institutions by stating that the agent has “*authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes.*” (emphasis added)
- 2) Among others, the authorized actions include the authority to buy, sell or exchange investment instruments; to establish, continue, modify or terminate an investment account; to exercise voting rights and to pledge investment instruments as security to borrow, pay, renew, or extend the time for payment of a principal’s debt; to receive certificates and other evidences of investment instrument ownership; and to exercise voting rights with respect to investment instruments.

5. Authorities that can impact a principal’s existing estate plan

A. Because of the potential for abuse, Fla. Stat. § 709.2202 singles out certain authorities for special treatment. Their exercise can impact a principal’s existing estate plan. Fla. Stat. § 709.2202 applies to an authority to:

- 1) Create an inter vivos trust;
- 2) Amend, modify, revoke or terminate a trust created by or on behalf of the principal;
- 3) Make a gift;
- 4) Create or change rights of survivorship;
- 5) Create or change a beneficiary designation;
- 6) Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- 7) Disclaim property and powers of appointment.

As to these authorities, Fla. Stat. § 709.2202 provides both additional formalities and limitations on their authorization and exercise.

B. Additional Formalities: As an initial matter, Fla. Stat. § 709.2202(1) specifies additional formalities that a principal must comply with in order to authorize an agent to do any of the actions listed above. Notwithstanding Fla. Stat. § 709.2201, **an agent may not exercise any of the above authorities on behalf of the principal or with the principal's property unless the principal places his or her signature or initials next to the paragraph containing the enumeration of the agent's authority in the power of attorney.**

C. Other Restrictions and Limitations: In addition to increased formalities, Fla. Stat. § 709.2202 places new restrictions and limitations on these authorities.

1) Authority to Amend, Modify, Revoke, or Terminate the Principal's Trust: Even assuming full compliance with the additional formalities imposed in Fla. Stat. § 709.2202, an agent may amend, modify, revoke, or terminate a trust for which the principal is the settlor **only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent.**

2) Special Limitation on General Authority to Make Gifts: Assuming compliance with the formalities required by Fla. Stat. § 709.2202, an agent may be authorized to make gifts of the principal's property by transfer or exercise of a principal's presently exercisable general power of appointment. The authority may relate to gifts of specific property or it may be phrased as a general authority to make gifts. In the latter case, however, unless the authorization provides otherwise, gifts by the agent may not exceed the annual exclusion amount specified in IRC § 2503 (or twice that amount in the case of a split gift). An agent's authority to consent to gift splitting for gifts made by the principal's spouse is similarly limited.

3) Special Restriction for Actions that Benefit Unrelated Agents: Notwithstanding an expressed general enumeration of authority to do an act, unless a power expressly provides otherwise, an agent who is not an ancestor, spouse, or descendant of the principal, may not exercise authority to create in the agent or in someone the agent is legally obligated to support, any interest in the principal's property whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

9. Liability of Agents: Fla. Stat. § 709.2117

- a. **In General:** An agent is a fiduciary and as such is liable for improper acts or omissions.
- b. Liability for actions of co-agents and successor agent.
- c. Liability for actions of others.
- d. Exoneration.
- e. Damages and costs.

10. Acceptance, Rejection, Liability, and Reliance of Third Persons:
Fla. Stat. §§ 709.2119 and 709.2120

- a. **Acceptance of a Power of Attorney:** Subject to certain exceptions, Fla. Stat. § 709.2120(1)(a) requires a third person to accept or reject a power of attorney within a reasonable time. For financial institutions, four business days is presumed to be a reasonable time to accept or reject an agent's authority to conduct banking or investment transactions pursuant to Fla. Stat. § 709.2208.
- b. **Rejection of a Power of Attorney:** A third person that rejects a power of attorney must state the reasons for the rejection in writing pursuant to Fla. Stat. § 709.2120.
- c. **Liability for an Improper Failure to Accept a Power of Attorney:** A third person that improperly refuses to accept a power of attorney is subject to a court order mandating acceptance and to liability for damages, including reasonable attorney's fees and costs, incurred in any action or proceeding that confirms the validity of the

power of attorney or mandates acceptance of it pursuant to Fla. Stat. § 709.2120(3).

- d. Protection of Third Persons that Act in Reliance on a Power of Attorney:** The Act includes several provisions that afford protection from liability to third persons pursuant to Fla. Stat. §§ 709.2119 and 709.2120.

11. Judicial relief: Fla. Stat. § 709.2116