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Florida's New Power of Attorney Law—Ten Things you Need to Know

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Earlier this year, Florida's legislature passed an overhaul of Florida's power of attorney law. The new law, which has an effective date of October 1, 2011, imposes many new requirements on this important estate planning tool. As an introduction, a power of attorney is a document in which a person (the "principal") designates another person to act on the principal's behalf (the "agent"). Florida law gives the option to create a "durable" power of attorney, which remains effective even if the principal becomes incapacitated—reducing the potential need for a court-appointed guardian.

This newsletter highlights some of the most critical features of the new law.

1. Your existing power of attorney is still valid. Although Florida's legislature completely re-wrote the power of attorney statute, the new law does not affect powers of attorney validly executed before October 1, 2011. Further, "springing" powers of attorney (discussed further in paragraph 6) signed before October 1, 2011, may still be deployed if the principal becomes incapacitated after October 1, 2011.

2. Valid, out-of-state powers of attorney are acceptable in Florida. If an out-of-state power of attorney and its execution were valid in another state, it is also valid in Florida. A third party who is called upon to accept an out-of-state power of attorney may request an opinion of counsel concerning the power's validity, at the principal's expense. Military powers of attorney also remain valid in Florida if executed in accordance with relevant federal law. Note: if a power of attorney is used to convey real property, it must be executed in the same manner as a deed—i.e. two witnesses and a notarized acknowledgement—even if not required in the state of execution.

3. Third parties who refuse to honor a power of attorney must give a written explanation. Third parties must accept or reject a power of attorney within a reasonable time. For financial institutions, four business days is presumed to be a reasonable time. For other third parties, reasonableness will depend on the circumstances and the terms of the power of attorney. Third parties may require an agent to sign an affidavit reciting that to the best of the agent's knowledge, the principal is not deceased and the power of attorney remains in full force and effect; however, third parties may not require an additional—i.e. in-house form—for acts authorized under the power of attorney presented. Third parties who violate this new law will be subject to a court order mandating acceptance and liability for damages (including attorney's fees and costs) incurred in compelling acceptance of a valid power of attorney.

4. Powers granted under the document must be specific. Under the new law, broad grants of authority, allowing an agent "to do everything the grantor could do," are invalid. The new law allows an agent to perform only those acts expressly granted in the document. If a document grants the agent authority to conduct "banking" or "investment" transactions, the new law lists certain banking or investment functions that an agent may perform without specific enumeration in the document.

5. "Qualified" agents may be compensated. The new law continues to allow all agents to be reimbursed for expenses reasonably incurred on behalf of the principal. However, the new law limits who may receive compensation for their services. Compensation may be paid to the principal's spouse and

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"heirs"; financial institutions with Florida trust powers; Florida attorneys and certified public accountants; and natural persons who are Florida residents and have never been an agent for more than three principals at the same time.

6. All new powers of attorney will be immediately effective. Under the prior law, powers of attorney came in two varieties: one that took immediate effect, and one that did not become effective until the principal became incapacitated. Under the new law, the latter, so-called "springing" power of attorney is no longer available. However, as noted above, "springing" powers of attorney signed before October 1, 2011 remain valid and can be deployed after October 1, 2011 if the principal becomes incapacitated.

7. All new powers of attorney will require two witnesses and a notary. Under the prior law, only durable powers of attorney had to be signed before two witnesses and a notary. Non-durable powers—i.e. those that terminate upon a person's incapacity—did not require such formalities unless being used to convey real property. Under the new law, durable and non-durable powers of attorney must be signed by the principal in the presence of two witnesses and acknowledged before a notary.

8. Photocopies are acceptable. The new law provides that photocopies and electronically transmitted copies of an original power of attorney have the same effect as an original. However, the new law does not eliminate the necessity of recording original powers of attorney in a county's official records in order to use the power of attorney to convey real property.

9. What your agent needs to know. An agent is a fiduciary of the principal, who must act in good faith, preserve the principal's estate plan, and may not delegate authority to a third party. Under the new law, multiple agents are presumed to be capable of acting independently. Of course, new powers of attorney can be tailored to require unanimity or majority consent to act. This is a departure from the prior law, which presumed that two agents had to act unanimously and three or more agents to act by majority consent unless otherwise stated in the power of attorney.

10. Your agent must keep records. Under the new law, agents must keep records of all receipts, disbursements, and transactions made on behalf of the principal. Additionally, if the power of attorney authorizes the agent to access a safe-deposit box, the agent must render an inventory of the contents each time the agent accesses the box.

Powers of attorney remain one of the most important components of a well-drafted estate plan. It is important to consult a qualified attorney when establishing a power of attorney to ensure that it satisfies Florida's new power of attorney law.

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