

The Florida Bar Continuing Education
Real Property, Probate and Trust Law Section

Power of Attorney Drafting
Estate Planning Powers

July 25, 2012

Laird A. Lile¹

The Florida Power of Attorney Act has been in effect for almost ten months. This paper identifies certain considerations regarding the drafting of the authorities requiring separate signed enumeration. Those authorities are found in Florida Statutes § 709.2202 and are referred to in this paper as the Estate Planning Powers. Examples of different drafting approaches are also provided.²

1. What are the Estate Planning Powers?

The Estate Planning Powers include the power to:

- (a) 709.2202(1)(a) – **create an inter vivos trust;**
 - In Florida? In another state? In another country?

- (b) 709.2202(1)(b) – **amend, modify, revoke or terminate a trust created by or on behalf of the principal;**
 - If this authority is granted in the power of attorney, it may only be exercised if the trust instrument also provides for amendment, modification, revocation or termination by the settlor’s agent.
 - Does a trust created “on behalf of the principal” refer only to a trust created by the principal’s agent?

¹ The author acknowledges the assistance of Patrick F. Mize, Esq. in preparing these materials. Mr. Mize is the inaugural “Resident At Law” at Laird A. Lile, P.A. See, www.LairdALile.com/news.html.

² These materials, including the examples, are for informational purposes and serve as a springboard for knowledgeable, informed members of The Florida Bar to prepare documents for use by their clients. Slavishly following any portion of these materials should be avoided and may lead to less than optimal results for the client (and the attorney). The author, the author’s firm, the Real Property Probate and Trust Law Section, The Florida Bar, and anyone else providing assistance with this paper make no warranties or representations concerning the effectiveness of any concept in this paper.

- (c) 709.2202(1)(c) – **make a gift;**
 - A grant of authority to make gifts also includes the authority to consent to split gifts, as provided by Internal Revenue Code § 2513, made by principal’s spouse in amounts per donee that do not exceed the couple’s aggregate federal gift tax annual exclusion amount. Caution: just because you can, should you?
 - Gifts can be made by transferring the principal’s property, real or personal, or exercising a general power of appointment held by the principal.

- (d) 709.2202(1)(d) – **create or change rights of survivorship;**
 - This authority pertains to both real and personal property.
 - Florida Statutes § 709.2202(4) provides that a grant of authority authorizing an agent to make deposits or withdrawals from a joint or survivorship account does not constitute a power to create or change rights of survivorship; therefore, separate enumeration is not required for deposit or withdrawal.

- (e) 709.2202(1)(e) – **create or change a beneficiary designation;**
 - This includes beneficiaries of life insurance policies, retirement plans, pay on death accounts and in trust for accounts.

- (f) 709.2202(1)(f) – **waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; and**

- (g) 709.2202(1)(g) – **disclaim property and powers of appointment.**
 - Florida Statutes Chapter 739 governs disclaimers.
 - Florida Statutes Section 709.02 *et seq* governs powers of appointments.

2. Statutory Limitations on the Estate Planning Powers

- (a) The Estate Planning Powers must be separately enumerated, which means the principal must sign or initial next to the authority being granted in order for it to be valid.

- (b) Unless the power of attorney states otherwise, the amount of a gift made by an agent is, by default, limited by Florida Statutes § 709.2202(3). The per donee value of a gift made pursuant to this authority is limited to the amount of the federal gift tax annual exclusion under Internal Revenue Code § 2503(b). If the principal’s spouse agrees to gift splitting, pursuant to Internal Revenue Code § 2513, the maximum per donee value of a gift that may be made by the agent is twice the federal gift tax annual exclusion amount.

- (c) The Estate Planning Powers may only be exercised if: (1) validly executed; (2) the exercise of the authority complies with the agent’s duties under Florida Statutes

§ 709.2114; and (3) exercise of the authority is not prohibited by another agreement or instrument.

- (d) Except where a power of attorney provides otherwise, an agent may not use authority granted in a power of attorney to create interests in the principal's property for the agent's benefit, or the benefit of someone the agent is legally obligated to support, unless the agent is the principal's ancestor, spouse, or descendent.

3. Drafting Considerations

(a) General Considerations

- (1) Should you include all of the Estate Planning Powers?
– Convenience vs. clarity vs. effectiveness
- (2) Does the authority within each subsection of Section 709.2202(1) require a separate enumeration or may the authority for more than one subsection be combined? For instance, may authority to create or change a beneficiary designation be combined with the authority to create or change rights of survivorship into one paragraph which the principal initials or signs?

Would this be valid?

Initials: _____ I expressly authorize my agent to create an inter vivos trust and amend, modify, revoke or terminate a trust created by me or on my behalf, make gifts, create or change rights of survivorship, create or change a beneficiary designation, waive my right to be a beneficiary under a joint and survivor annuity, including a survivor benefit under a retirement plan and disclaim property and powers of appointment.

Would this be valid?

Initials: _____ I expressly authorize my agent to create or change rights of survivorship and beneficiary designations.

(b) Trusts

- (1) Does the principal want the agent to have the authority to create and fund inter vivos trusts?
- (2) Does the principal want to limit the agent's authority to create inter vivos trusts to trusts created for certain beneficiaries?
- (3) Does the principal want the agent to have the authority to amend, modify, revoke or terminate trusts created by or for the benefit of the principal?

- (i) Does the principal want to grant only part of that authority? For example, allowing only amendment and modification, but not revocation or termination?
- (ii) Does the principal want to limit the extent of an amendment or modification, for instance to achieve certain tax results?

(c) Gifting

- (1) Does the principal intend for the agent to be permitted to make gifts to the agent?
- (2) Does the principal want to limit the amount that may be transferred by gift?
 - (i) To an amount less than the gift tax annual exclusion?
 - (ii) To an amount greater than the annual gift tax exclusion?
 - (iii) To the amount of the principal's remaining applicable exclusion amount?
- (3) Does the principal wish to limit the class of beneficiaries that may receive gifts?

(d) Rights of Survivorship

- (1) Does the principal want the agent to have the authority to create or change rights of survivorship in the principal's property?
 - (i) Does the principal want to limit the authority to create or change rights of survivorship to certain classes of property? For example, the agent may change the rights of survivorship on the principal's real property, but not bank accounts.
 - (ii) Does the principal want to limit the persons in whom survivorship rights may be created?
 - (iii) Does the principal want to limit the form of title the agent may designate when changing survivorship rights? For example, the agent may change property from tenants in common to joint tenants with right of survivorship, but not *vice versa*.

(e) Beneficiary Designations

- (1) Does the principal want the agent to have the authority to create or change beneficiary designations?
 - (i) Does the principal want to limit which beneficiary designations the agent may create or change? For example, the agent may change the beneficiary designation on a retirement account but not on a life insurance policy.
 - (ii) Does the principal want to limit the class of beneficiaries who the agent may designate as a beneficiary?

(g) Disclaimer of Property and Powers of Appointment

- (1) Does the principal want the agent to have the authority to disclaim property and powers of appointment?
 - (i) Does the principal want to limit the property or powers of appointment that can be disclaimed?
 - (iii) Does the principal want to limit the circumstances under which the agent may exercise the power to disclaim? For example, the agent may only disclaim an interest in property if the disclaimer would cause the property or interest to pass to one of the principal's lineal descendants.
 - (iv) Does the principal want to limit disclaimers only to general powers of appointment, rather than non-general powers of appointment?

4. General Approaches for incorporating the Estate Planning Powers

All Inclusive Approach

I expressly authorize my agent to:

Initials: _____ (A) create an inter vivos trust

Initials: _____ (B) amend, modify, revoke or terminate a trust created by me or on my behalf, provided the trust instrument permits amendment, modification, revocation or termination by my agent

Initials: _____ (C) make gifts

Initials: _____ (D) create or change rights of survivorship

Initials: _____ (E) create or change a beneficiary designation

Initials: _____ (F) waive my right to be a beneficiary under a joint and survivor annuity, including a survivor benefit under a retirement plan

Initials: _____ (G) disclaim property and powers of appointment

Note: What should a principal do with respect to powers not intended to be granted?

- Leave blank
- Affirmatively indicate not applicable
 - Cross through
 - Instead of initialing, insert "N/A"

Powers to be Enumerated Only Approach

I expressly authorize my agent to:

Initials: _____ (A) make gifts

Initials: _____ (B) create or change rights of survivorship

Initials: _____ (C) create or change a beneficiary designation

Initials: _____ (D) disclaim property and powers of appointment

Note: All of these would be expected to be initialed.

Included/Excluded Approach

Estate Planning Powers.

I expressly authorize my agent to:

- Initials: _____ (A) make gifts
- Initials: _____ (B) create or change rights of survivorship
- Initials: _____ (C) create or change a beneficiary designation
- Initials: _____ (D) disclaim property and powers of appointment

Excluded Powers.

My agent does not have the authority to create an inter vivos trust, to amend, modify, revoke or terminate a trust created by me or on my behalf, or waive my right to be a beneficiary of a joint and survivor annuity, which includes a death benefit under a retirement plan.

Note: All of the authorized powers would be expected to be initialed. Reduced doubt about which authority has not been granted.

[Balance of page intentionally left blank]

Additional Choices Approach

I expressly authorize my agent to:

Initials: _____ (A) create an inter vivos trust

Initials: _____ (B) amend, modify, revoke or terminate a trust created by me or on my behalf, provided the trust instrument permits amendment, modification, revocation or termination by my agent

(C) make gifts [*choose an option*]

Initials: _____ (1) in any amount

Initials: _____ (2) in an amount not to exceed the federal gift tax annual exclusion

Initials: _____ (3) in excess of the federal gift tax annual exclusion, provided that at no time may the agent make gifts that cause the total of my taxable gifts to exceed the amount of my applicable exclusion amount.

Initials: _____ (D) create or change rights of survivorship

Initials: _____ (E) create or change a beneficiary designation

Initials: _____ (F) waive my right to be a beneficiary under a joint and survivor annuity, including a survivor benefit under a retirement plan

Initials: _____ (G) disclaim property and powers of appointment

[Balance of page intentionally left blank]

5. Stylistic Variations and Sample Language

This section illustrates some variations of the Estate Planning Powers. The footnotes in this section will contain full provisions from sample documents generously provided to us by the following:

- Deborah L. Russell, Principal, Cummings & Lockwood LLC
- Richard “Rick” Stockton, Partner, Holland & Knight LLP/Lawgic
- Linda Suzanne Griffin, Linda Suzanne Griffin, P.A.
- A. Stephen Kotler, Kotler Law Firm, P.L.

I. Options for Drafting Authority to Create Inter Vivos Trusts

a. Statutory Language

I expressly authorize my agent to:

Initials:_____ (A) create inter vivos trusts

b. Statutory Language plus Funding

I expressly authorize my agent to:

Initials:_____ (A) create and fund inter vivos trusts

c. Mandate Principal must be a Beneficiary

I expressly authorize my agent to:

Initials:_____ (A) create and fund inter vivos trusts in which I am a beneficiary

d. Limited Beneficiaries

I expressly authorize my agent to:

Initials:_____ (A) create and fund inter vivos trusts in which all interests are held by *[Insert Beneficiaries]*.

II. Options for Drafting Authority to Amend, Modify, Revoke or Terminate a Trust³

a. Statutory Language

I expressly authorize my agent to:

Initials: _____ (B) amend, modify, revoke or terminate a trust created by me or on my behalf, but only if the trust instrument explicitly provides for amendment, modification, revocation or termination by my agent

b. Limited to Trusts Created by the Agent

I expressly authorize my agent to:

Initials: _____ (B) amend, modify, revoke or terminate a trust that is created by my agent on my behalf pursuant to the authority granted to my agent in this power of attorney, but only if that trust instrument explicitly provides for amendment, modification, revocation or termination by my agent

³ Trusts. I authorize my Agents to deal with trusts created by me, for me, on my behalf, or in connection with gifts from me to others as provided in the paragraph above authorizing gifts, as follows:

_____ To create an inter vivos trust, whether revocable or irrevocable, in which I am a beneficiary

_____ To the extent permitted in the trust agreement, to amend, revoke, or terminate a trust of which I am a beneficiary, or transfer the assets of such a trust into another trust under which I am a beneficiary

_____ To create, amend, or revoke trusts for the benefit of others

_____ To participate in either judicial or nonjudicial modification of a trust as permitted in Fla. Stat. Chapter 736

III. Options for Drafting Gifting Authority⁴ & ⁵

a. Statutory Language

I expressly authorize my agent to:

Initials: _____ (C) make gifts

⁴ Estate Planning Powers. Subject to the duties of my Agent as provided in §709.2114, Florida Statutes, and other applicable law, including, but not limited to, the duty to attempt to preserve my estate plan if consistent with my best interests, I hereby grant to my Agent the authority to carry out the following actions for me and on my behalf **which I have herein signed or initialed next to:**

_____ a. To make gifts of my property to my spouse and/or one or more of my descendants or to the acting trustee(s) of any trust for my benefit or for the benefit of my spouse and/or one or more of my descendants; provided, however, that the aggregate gifts, outright or in trust, to or for the benefit of my Agent during a calendar year shall not exceed the maximum amount allowable to me as an annual exclusion for federal gift tax purposes, or if I am married at the time of the gifts, twice that amount, or allowable to me as a qualified transfer for medical or educational expenses for federal gift tax purposes. Such gifts shall be made or not made in my Agent's sole discretion, and no one shall have any rights against my Agent with respect to my Agent's decisions (i) to make or not make such gifts, (ii) to make gifts outright or to one or more trusts, (iii) to exclude one or more of my descendants or trusts from such gifts, and (iv) regarding the amounts of such gifts. If my Agent is my spouse or a descendant of mine, my Agent is authorized to make gifts to himself or herself pursuant to the authority granted in this paragraph. The authority granted to my Agent under this paragraph shall include the authority to withdraw from any trust, whether revocable or irrevocable, in which I have a current beneficial interest, such amounts of the principal or accrued or collected but undistributed income of such trusts as I would be permitted to withdraw, pursuant to any withdrawal right contained in such trusts, for the purpose of making any gift which my Agent may make pursuant to this paragraph.

⁵ **Gifts.** To make gifts:

(1) of any of my real or personal property to my spouse and lineal descendants **and their spouses** as my agent shall see fit, consistent with my estate plan or if it is in my best interest to make such gifts. Any gift to a minor may be made to any appropriate custodian for the minor under a Uniform Transfers to Minors Act or to a trustee of a trust created for the minor's benefit or to a tuition savings account or prepaid tuition plan as defined under Section 529 of the Code ("529 Plan") for the benefit of such individual (without regard to who is the account owner of, or responsible person for, such account), or to an Education IRA for the benefit of such individual. _____
Initial

(2) of my real or personal property for educational or medical expenses pursuant to Section 2503(e) of the Code consistent with my estate plan or, if it is in my best interest, to make such gifts. _____
Initial

(3) Any gifts shall not exceed **EITHER** the **(INITIAL ONLY ONE ALTERNATIVE)**

(a) annual amounts allowed per donee per calendar year under Sections 2503 and Section 2523 of the Code _____; or
Initial

(b) the maximum amounts allowed under Sections 2503, 2505 and 2523 of the Code _____
Initial

Provided that the aggregate amount of gifts made in any one calendar year to my agent shall not exceed the greater of 5% of my assets at the time of the gift, or \$5,000 or the amount allowed under Section 2514(e) of the Code as not to cause such a power to be a general power of appointment. _____
Initial

b. Statutory Language Expanded – Agent may make gifts for his/her benefit

I expressly authorize my agent to:

Initials: _____ (C) make gifts (including gifts for the benefit of the person then acting as my agent), however, the authority to make gifts is limited as provided in the Act at section 709.2202(3) to gifts known as annual exclusion gifts

c. Statutory Language Expanded – Agent may not make gifts for their benefit

I expressly authorize my agent to:

Initials: _____ (C) make gifts, however, the authority to make gifts is limited as provided in the Act at section 709.2202(3) to gifts known as annual exclusion gifts. My agent may not make gifts for his/her benefit.

d. Beyond the Statutory Language

I expressly authorize my agent to:

Initials: _____ (C) make gifts of my property to any individual (including the person then acting as my agent) or entity, outright or in trust; provided, however, the authority to make gifts is limited as provided in the Act at section 709.2202(3) to gifts known as annual exclusion gifts.

e. Beyond the Statutory Language – Limited Class of Beneficiaries

I expressly authorize my agent to:

Initials: _____ (C) make gifts of my property, outright to, or in trust for the benefit of, the persons or entities specified below. However, the authority to make gifts is limited as provided in the Act at section 709.2202(3) to gifts known as annual exclusion gifts. Gifts may only be made to:

[List of Beneficiaries]

IV. Options for Drafting Authority to Create or Change Rights of Survivorship⁶

a. Statutory Language

I expressly authorize my agent to:

Initials: _____ (D) create or change rights of survivorship

b. Statutory Language Plus

I expressly authorize my agent to:

Initials: _____ (D) create or change rights of survivorship with respect to any of my property

c. Statutory Language Plus Limited

I expressly authorize my agent to:

Initials: _____ (D) create or change rights of survivorship with respect to my residence located at *[address]*, more formally known as *[legal description]*

V. Options for Drafting Authority to Create or Change a Beneficiary Designation⁷

a. Statutory Language

I expressly authorize my agent to:

Initials: _____ (E) create or change beneficiary designations

b. Statutory Language Plus

I expressly authorize my agent to:

⁶Initials: _____ I authorize my agent to create or change the rights of survivorship on any and all of my property, real or personal, including bank and investment accounts, insurance policies, annuities, qualified or nonqualified retirement plans, and real property interests, and to do so by any means, including changing ownership, such as adding a joint owner. My Agent may designate survivorship rights and the form of title, including, but not limited to, as tenants in common, joint tenants, or tenants by the entirety.

⁷ _____ **Survivorship and Other Designations.** I authorize my agent to change a beneficiary designation for any accounts or financial instruments, including life insurance policies, annuities, or retirement accounts of any nature.

Initials:_____ (E) designate, or change the designation of, a beneficiary or beneficiaries

c. Limited to Select Beneficiaries

I expressly authorize my agent to:

Initials:_____ (E) designate, or change the designation of, a beneficiary or beneficiaries for *[list beneficiary designations to be created or changed]*

d. Limited to Select Beneficiaries and to Specified Type of Asset

I expressly authorize my agent to:

Initials:_____ (E) designate, or change the designation of, a beneficiary or beneficiaries for any financial account or financial forms to the following individuals

[list beneficiaries]

VI. Options for Drafting Authority to Waive the Principal's Right to be a Beneficiary of a Joint and Survivor Annuity, Including a Survivor Benefit Under a Retirement Plan

a. Statutory Language

I expressly authorize my agent to:

Initials:_____ (F) waive my right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

b. Limited to Annuities

I expressly authorize my agent to:

Initials:_____ (F) waive my right to be a beneficiary of a joint and survivor annuity, but not to a survivor benefit under a retirement plan

VII. Options for Drafting Authority to Disclaim Property and Powers of Appointment^{8 & 9}

a. Statutory Language

I expressly authorize my agent to:

Initials: _____ (G) disclaim property and powers of appointment

b. Limited to Otherwise to Lineal Descendants

I expressly authorize my agent to:

Initials: _____ (G) disclaim property and powers of appointment, provided that the disclaimer results in the property at issue passing to one of my lineal descendants.

c. Excluding Testamentary Powers of Appointment

I expressly authorize my agent to:

Initials: _____ (G) disclaim property and powers of appointment, except for powers of appointment that I currently exercise in my Last Will and Testament

6. Conclusion

Under Florida's new power of attorney act, drafting the Estate Planning Powers is more structured and requires increased care and consideration than previously. Within the new structure, a significant amount of flexibility for achieving the client's goals is available.

⁸ _____ To execute on my behalf written disclaimers of (i) any property or interests in property which would otherwise pass to me by inter vivos or testamentary gift, devise or bequest or by intestate succession or (ii) any powers of appointment I may have.

⁹ **Disclaimer.** To claim, disclaim or waive any interest in property that I have or would otherwise receive, including, but not limited to, homestead and elective share.