St. Thomas Law Review

Volume 24
Issue 1 *Fall 2011*

Article 3

2011

Florida's Adoption of the Uniform Power of Attorney Act: Is It Sufficient to Protect Florida's Vulnerable Adults

Rebecca C. Bell

FLORIDA'S ADOPTION OF THE UNIFORM POWER OF ATTORNEY ACT: IS IT SUFFICIENT TO PROTECT FLORIDA'S VULNERABLE ADULTS?

BY REBECCA C. BELL

INTRODUCTION

Fred was a widower who lived in Florida apart from any other family members. He had very little contact with his three children in recent years. His one son lived on the other coast of Florida and his two daughters lived out of state. He recently attended a seminar conducted by a financial advisor who recommended that he execute a durable power of attorney so that someone could pay his bills when he was unable. Fred lived on a limited fixed income and was unwilling to pay an attorney for a power of attorney. He visited the local library and used the free internet access to download a free power of attorney form. He completed the form, naming his son, Sam, as the agent because he lived the least distance from him. The form contained a line to check if Fred wanted Sam to have gift-giving authority. Fred checked the line, thinking he wished Sam to continue making the periodic gifts to his favorite local charity. Fred took the form to his local bank branch where two of the bank tellers witnessed and notarized his signature. Fred's assets consisted of his home and savings accounts containing approximately $200,000.

Shortly after he executed his power of attorney at the bank, Fred suffered a heart attack while at home. A neighbor found him and called an ambulance. The neighbor also saw the durable power of attorney on the counter and contacted Sam. Unbeknownst to Fred, Sam had lost his job and now supported himself through unemployment payments. Sam arrived and decided to move into Fred's home since Fred had a lengthy recovery

ahead. Sam used the power of attorney to access Fred's bank accounts and pay Fred's bills. Sam also began using Fred's money for his own expenses. Fred's condition required twenty-four-hour care, so Sam placed him in a nursing home. Sam quickly used all of Fred's money on himself and even obtained a line of credit on Fred's home. When Fred died in the nursing home less than six months later, his two daughters were notified. The daughters produced a will Fred executed ten years ago, which included a residuary clause devising his property equally among his three children. Fred's two daughters are left trying to determine how their father's savings were spent.

Fred's son financially exploited his father. Financial exploitation is a form of elder abuse.[1] If a third party had detected the abuse during Fred's lifetime, options for protection and intervention could have included reporting the abuse to Adult Protective Services or petitioning for an emergency temporary guardianship.[2] Civil and criminal penalties were also available to punish the financial exploitation.[3] What options existed, however, for prevention or early detection of such abuse? Revisions to durable power of attorney laws seek to address the need for such options.

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved the Uniform Power of Attorney Act ("UPOAA")[4] in 2006.[5] The Florida Bar Real Property, Probate and Trust Law Section

1. *See* FLA. STAT. § 415.102(8) (2011). Sam's acts are consistent with the definition of exploitation because he stood in a position of trust and confidence with his father, who was a vulnerable adult, and knowingly deprived his father of his funds for the benefit of himself. *Id.* § 415.102(8)(a)(1). Furthermore, exploitation includes "[b]reaches of fiduciary relationships, such as the misuse of a power of attorney . . . resulting in . . . transfer of property . . . ." *Id.* § 415.102(8)(b).

2. *See generally* LORI A. STIEGEL & ELLEN VANCLEAVE KLEM, AARP PUB. POL'Y INST., POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT, A COMPARISON OF CURRENT STATE LAWS WITH THE NEW UNIFORM POWER OF ATTORNEY ACT 6 (2008) (finding in adult protective service programs an increase in financial exploitation cases, especially involving power of attorney abuse).

3. *See, e.g.*, FLA. STAT. § 415.1111 (providing for a civil cause of action against a perpetrator of abuse, neglect, or exploitation to recover actual and punitive damages); *Id.* § 825.103 (providing for criminal penalties for exploiting an elderly person or disabled adult). *See generally* LORI A. STIEGEL, AM. BAR ASS'N, DURABLE POWER OF ATTORNEY ABUSE: A NATIONAL CENTER ON ELDER ABUSE FACT SHEET FOR CONSUMERS 3 (2008); LORI A. STIEGEL, AM. BAR ASS'N, DURABLE POWER OF ATTORNEY ABUSE: IT'S A CRIME TOO, A NATIONAL CENTER ON ELDER ABUSE FACT SHEET FOR CRIMINAL JUSTICE PROFESSIONALS 1–3 (2008).

4. UNIF. POWER OF ATTORNEY ACT.

5. *See id.*; *Acts: Power of Attorney*, UNIF. LAW COMM'N: THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney (last visited Sept. 2, 2011). Currently, ten states have enacted the UPOAA (Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nevada, New Mexico, Virginia, and

created legislation to adopt the UPOAA, with modifications, "to update Florida's power of attorney law to reflect changes in the general law of agency, support portability of powers of attorney and provide additional protections for Florida citizens."[6] Florida adopted the UPOAA, with significant modifications, with the passage of Senate Bill 670 in the 2011 Florida legislative session.[7] This article evaluates the effectiveness of the Florida Power of Attorney Act ("Florida's Act") in providing additional protections for Florida residents executing a power of attorney, while maintaining the principal's autonomy. Part II provides the development and purposes of the UPOAA, which appealed to the drafters of the Florida Act. Part III details the benefits and limitations of the UPOAA and the Florida Act's modifications as related to the agent's duties, authorities, and liabilities. Florida's modifications of the UPOAA, however, require improvement to further protect the principal. Finally, Part IV examines the weaknesses that remain in the durable power of attorney laws and the viability of additional reforms suggested by other authors. The author concludes that the best additional reforms should address educating the principal and agent better, which includes revising the law to add agent requirements to further abuse prevention. Appendix A provides a chart of the UPOAA sections relating to the agent's duties, authorities, and liabilities with the Florida Act's modifications for comparison.

PART II

The original Uniform Power of Attorney Act ("Original Act"), before the new UPOAA was approved in 2006,[8] had last been amended in 1987[9] and was viewed as largely ineffective in its purpose of uniformity in that

Wisconsin). *Acts: Power of Attorney*, *supra*. Ohio and Texas introduced the UPOAA in their 2011 legislative sessions. *Id.*

6. Legislative Position Request Form, Florida Bar Real Property, Probate and Trust Law Section, Executive Council Meeting Agenda (Sept. 25, 2010), at 212 (on file with the Florida Bar Real Property, Probate and Trust Law Section), *available at* http://www.rpptl.org/Content/PDFs/RPPTL_ExCouncil_09_25_10_AGENDA.pdf.

7. *See* S. 670, 113th Gen. Assemb., Reg. Sess. (Fla. 2011); Florida Power of Attorney Act, FLA. STAT. § 709.2101-709.2402 (repealing chapter 709 in its entirety and creating a new chapter 709 effective October 1, 2011); CS/SB 670: Power of Attorney, THE FLORIDA SENATE, http://www.flsenate.gov/Session/Bill/2011/0670 (follow "Bill History" panel) (last visited Oct. 20, 2011). Senate Bill 670 was passed by the Senate on May 2, 2011 with a 39-0 vote and on May 4, 2011 by the House with a 115-0 vote. CS/SB 670: Power of Attorney, *supra*. The Governor approved the Florida Act on June 21, 2011. *Id.* For the specific modifications made by the Florida Act of the UPOAA, see Appendix A *infra*.

8. *See* UNIF. POWER OF ATTORNEY ACT.

9. *See* UNIF. POWER OF ATTORNEY ACT Prefatory Note; UNIF. DURABLE POWER OF ATTORNEY ACT (amended 1987), 8A U.L.A. 233 (2003).

many states had adopted non-uniform provisions to address issues not addressed in the Original Act.[10] NCCUSL conducted a national study in 2002 that revealed this lack of uniformity.[11] Standards for agent conduct and liability and the authority to make gifts were among the topics that had become increasingly divergent among the states.[12] The study also revealed that states had, although not necessarily in a divergent manner, restricted the powers of the agent to dissipate the principal's estate or alter the principal's estate plan.[13] The study further revealed other topics necessitating revisions of the Original Act,[14] which are not germane to the issues discussed in this article. The survey distributed as part of the study[15] revealed a high degree of consensus that powers of attorney should, among other requirements,

> require gift making authority to be expressly stated in the grant of authority . . . provide a default standard for fiduciary duties . . . permit the principal to alter the default fiduciary standard . . . require notice by an agent when the agent is no longer willing or able to act . . . include safeguards against abuse by the agent . . . [and] include remedies and sanctions for abuse by the agent . . . .[16]

Although uniformity certainly was an objective of the revised UPOAA, the intent to increase the acceptance of an agent's authority while maximizing flexibility for the agent, yet still preventing and remedying abuses by the agent, were of equal importance.[17] One of the most

---

10. *See* LINDA S. WHITTON, ABA SECTIONS OF REAL PROPERTY, PROBATE & TRUST LAW & TAXATION, EXPLORING THE UNIFORM POWER OF ATTORNEY ACT 1 (2005), *available at* http://apps.americanbar.org/rppt/meetings_ cle/2005/fall/Whitton.pdf.

11. *See id.* NCCUSL reviewed state power of attorney legislation and statutes across the country. *Id.*

12. *See* UNIF. POWER OF ATTORNEY ACT Prefatory Note; STIEGEL & KLEM, *supra* note 2, at 22–30 (charting the differences between state provisions and the UPOAA provisions).

13. *See id.*

14. *See id.* Other topics included execution requirements, portability, and activation of contingent powers. *Id.*

15. *Id.* The purpose of the survey was to determine whether the non-uniformity was due to difference in opinion regarding default rules or simply a lack of a uniform model. *Id.*

16. *Id.* The Joint Editorial Board for Uniform Trust and Estate Acts, including Susan Gary, Linda Whitton, Rebecca Morgan, and Karen Boxx, who were commissioned to conduct a study of the Original Act, distributed a survey to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. *See id. See also* Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAT'L ACAD. ELDER L. ATT'Y J. 1, 2–3 (2007). There were 371 surveys returned, representing forty-four jurisdictions. UNIF. POWER OF ATTORNEY ACT Prefatory Note.

17. *See* UNIF. POWER OF ATTORNEY ACT Prefatory Note.

important impacts of the UPOAA was that it defined the rules related to agents.[18] Professor Karen Boxx, before the passage of the UPOAA, compared the inadequate guidelines for agents to the clear guidance given to trustees by the terms of the trust instrument and by the court to guardians.[19] To meet these concerns, the UPOAA provides guidance in the areas of an agent's acceptance of appointment,[20] default rules for co-agents and successor agents,[21] default rules for agent reimbursement and compensation,[22] mandatory and default rules for an agent's duties,[23] exoneration of an agent,[24] judicial review of an agent's conduct,[25] agent liability,[26] default rules for agent resignation,[27] and restrictions on gifting authority.[28]

The Florida Legislature has acknowledged the importance of creating a minimally restrictive alternative to guardianship in order to allow persons who are only partially unable to take care of their own needs, a form of assistance that least interferes with the ability of a person to act on his or her own behalf.[29] As recognized by those conducting the study to revise the UPOAA,[30] power of attorney acts need to maintain a balance, however, between maximizing a person's autonomy and providing protection against abuse and exploitation.[31] The Florida Act seeks to ensure this balance by adopting the UPOAA with its concentration on defining the rights and responsibilities of the agent while also establishing more effective methods of preventing, detecting, and remedying abuses.[32]

---

18. *See id.*

19. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 44 (2001).

20. *See* UNIF. POWER OF ATTORNEY ACT § 113.

21. *See id.* § 111.

22. *See id.* § 112.

23. *See id.* § 114.

24. *See id.* § 115.

25. *See id.* § 116.

26. *See* UNIF. POWER OF ATTORNEY ACT § 117.

27. *See id.* § 118.

28. *See id.* § 201.

29. FLA. STAT. § 744.1012 (2011).

30. *See* WHITTON, *supra* note 10, at 2; *see also* UNIF. POWER OF ATTORNEY ACT Prefatory Note; *supra* note 11 and accompanying text.

31. *See* UNIF. POWER OF ATTORNEY ACT Prefatory Note; Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 355 (2008). In Linda S. Whitton's communications with state committees that are evaluating the adoption of the UPOAA, she has determined that the committees are concerned with abuse of the power of attorney as much as third party refusal and maintaining the principal's autonomy. Whitton, *supra*.

32. *See* Chapter 709 White Paper, Florida Bar Real Property, Probate and Trust Law Section,

PART III.

With respect to the powers granted in the power of attorney, the drafters of the revised UPOAA acknowledged a tension between having a broad grant of powers, which increases the flexibility and likelihood of acceptance, and requiring powers that were required to be specifically delegated, which protect the principal from casually granting such powers or being unaware of the powers being granted to the agent.[33] This tension was resolved in favor of protecting the principal.[34] In fact, the chief mechanism of preventing abuse is the UPOAA's requirement for the power of attorney to include express language to authorize actions that "have [significant] potential [for] dissipating the principal's property or altering the principal's estate plan . . . ."[35]

The Florida Act provides even greater protection of the principal through more stringent requirements.[36] The Florida Act's drafters recognized a tension between estate planning and elder law practitioners' interests in maximizing the agent's flexibility to make donative transfers and create trusts for planning purposes, and the interest in preventing dishonest or fraudulent transfers.[37] The UPOAA addresses this tension by allowing donative transfers, but including provisions that ensure the principal's decision to include this authority is an informed decision.[38] The Florida Act created more stringent requirements than the UPOAA by requiring that the principal sign or initial next to the powers expressly stated. Although cumbersome for the principal at the execution of the document, the principal will be prevented from overlooking any

---

Executive Council Meeting Agenda (Sept. 25, 2010), at 214–15 (on file with the Florida Bar Real Property, Probate and Trust Law Section), *available at* http://www.rpptl.org/Content/PDFs/RPPTL_ExCouncil_09_25_10_AGENDA.pdf.

33. *See* WHITTON, *supra* note 10, at 6; *see also* STIEGEL & KLEM, *supra* note 2, at 5 (listing "broad decision-making authority" as a characteristic that makes it easier for an agent to financially exploit an incapacitated principal).

34. *See* UNIF. POWER OF ATTORNEY ACT § 201(a) (listing authorities requiring specific grants of authority).

35. *See* WHITTON, *supra* note 10, at 6; Whitton, *supra* note 31, at 347–48. A minority of the UPOAA drafters felt that these powers should be non-delegable based on the power to make a last will and testament being non-delegable. *See* Whitton, *supra* note 31, at 348. The drafters also recognized that there are inter-vivos reasons for allowing such authority such as donative transfers, tax planning, and qualifying for public benefits. *Id.*

36. *See* FLA. STAT. § 709.2202(1) (2011) (requiring the principal to sign or initial next to each specific authority granted in the power of attorney).

37. *See* Chapter 709 White Paper, *supra* note 32, at 215; *see also supra* note 35 and accompanying text (discussing the grant of "hot powers" in UPOAA and the minority view to avoid inclusion all together, the result being compromise due to inter-vivos planning reasons).

38. *See* White Paper, *supra* note 32, at 216.

unintentional grants of authority. The restrictions on gift-giving authority are common in many state statutes.[39]

The Florida Act also places greater restrictions on the agent's authorities, than the UPOAA, by stating that some authorities are non-delegable.[40] It has followed the approach in the guardianship statutes by preventing certain authorities from being delegated.[41] The Act continues in its approach of incorporating principles that shape other fiduciary roles, such as guardians and trustees, by paralleling the guardianship statutes' aspects of non-delegable authorities.

Although the UPOAA does require express language for certain grants of authority,[42] along with some other limitations on grants of authority,[43] it does allow for grants of general authority.[44] The Florida Act, on the other hand, does not provide for any blanket authority to act.[45] The committee that created the Florida Act was concerned that a principal might not be aware of all authorities granted to the agent if incorporation by reference was permitted.[46] The UPOAA, unlike the Florida Act, does provide a safeguard to the principal by requiring the agent to only make gifts of the principal's property if it is consistent with the principal's objectives, if known to the agent, and, if unknown, is consistent with the best interests of the principal.[47] The concern, however, regarding a general grant of authority still remains in the example of the UPOAA's allowance of payments by the agent to certain family members for "personal and family maintenance" under a general grant of authority, which is not dependent, or limited, by provisions regarding gifting.[48]

The UPOAA, unlike the Florida Act, restricts gifting authority by the duty to preserve the principal's objectives and estate plan. However, this restriction is unnecessary in the Florida Act because the requirement is

39. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1514 (McKinney 2009) (requiring express gifting authority but also providing an option for a statutory gift rider); 20 PA. CONS. STAT. § 5601.2 (2011) (requiring specific gifting authority).

40. *See* FLA. STAT. § 709.2201(3).

41. *See id.* § 744.3215(2). The authorities that may not be delegated to the guardian are the rights to marry, to vote, to personally apply for public benefits, to have a driver's license, to travel, and to seek or retain employment. *Id.*

42. *See* UNIF. POWER OF ATTORNEY ACT § 201(a), 8B U.L.A 94 (West Supp. 2011–2012).

43. *See id.* § 201(b) & (d).

44. *See id.* § 201(c) (allowing a principal to grant to an agent authority to do all acts that the principal could do unless stated otherwise in the power of attorney).

45. *See* Chapter 709 White Paper, *supra* note 32, at 230.

46. *See id.* at 230–31.

47. *See* UNIF. POWER OF ATTORNEY ACT § 217(c).

48. *See id.* § 213.

instead listed as a mandatory duty of the agent.[49] The duty to preserve the principal's estate plan is only a default duty under the UPOAA subject to modification by the power of attorney language.[50]

Although some provisions defining the relationship between principal and agent appear to further protect the principal,[51] the section on reimbursement and compensation of the agent[52] can create an area for potential abuse. Reimbursements of expenses incurred on behalf of the principal is clearly evident while "reasonable compensation" (although the same as a typical provision for a trustee in a trust agreement) can be more difficult to ascertain when this might become a fraudulent transfer. The Florida Act's restriction of compensating only "qualified agents"[53] decreases the potential for abuse to some degree.[54] The last category of "qualified agent," which is any Florida resident who does not act for multiple principals,[55] however, is much too broad to create much protection of the principal against an agent who decides to "steal" the principal's money under the label of compensation. The Florida Act's restriction on compensation, however, deters an agent from attempting to act as a professional guardian without supervision of the court.[56] During the drafting of the Florida Act, financial institutions raised concerns about unlicensed and unregulated individuals developing a business of acting as agents for a profit.[57]

Defining the manner of the agent's acceptance is crucial towards the goal of preventing abuse as it establishes when the fiduciary relationship is created.[58] An agent may be unaware of his or her appointment under a power of attorney and, thus, clear rules regarding how the agent accepts his

49. *See* FLA. STAT. § 709.2114(1)(a)(4) (2011).

50. *See* UNIF. POWER OF ATTORNEY ACT § 114(b)(6).

51. *See, e.g., id.* § 114(b)(6); FLA. STAT. § 709.2114(1)(a)(3).

52. *See* UNIF. POWER OF ATTORNEY ACT § 112; FLA. STAT. § 709.2112(1)–(3).

53. *See* FLA. STAT. § 709.2112(3).

54. *See* Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 27 (2007) (suggesting legislatures should note that most agents are family members serving without compensation).

55. *See* FLA. STAT. § 709.2112(4).

56. *Id.* § 709.2112(3) (providing that a "qualified agent" who may receive compensation can be any resident of the state of Florida as long as the agent has never acted as an agent for more than three principals at the same time).

57. *See* Chapter 709 White Paper, *supra* note 32, at 224.

58. *See* UNIF. POWER OF ATTORNEY ACT § 113 cmt., 8B U.L.A. 78 (West Supp. 2011–12); STIEGEL & KLEM, *supra* note 2, at 47 (explaining that clear demarcation of acceptance makes it clear when fiduciary duties are imposed and provides a basis for redress if the agent breaches those duties).

or her appointment protect both the principal and agent.[59] The Florida Act's additional language in the agent's acceptance section creates a significant divergence from the UPOAA; as the White Paper indicates, "[t]his is not an all or nothing thing"[60] when it was "an all or nothing thing" with the UPOAA.[61] The drafters of the Florida Act, however, felt this limitation on the scope of acceptance was necessary to balance the agent's liability for failure to act, as the scope of the agent's acceptance determines in what areas the agent must act after the agent's acceptance.[62]

The agent's understanding of how to resign is as important as the agent's understanding of the manner of acceptance in order to prevent a gap in the agent's handling of the principal's affairs and the duties owed to the principal.[63] Although the Florida Act's requirements for giving notice benefits the principal,[64] the incapacitated principal, or even a principal with diminished capacity, remains unprotected if there is no appointed guardian, coagent, or successor agent.[65] The UPOAA provides better protection of the principal by requiring the resigning agent to give notice to additional categories of persons if a guardian, coagent, or successor agent is not present.[66] Providing the option to give notice to a governmental agency having authority to protect the welfare of the principal ensures that there will always be someone to whom the agent can give notice of the resignation.[67]

Once the fiduciary relationship is created between the principal and agent, the agent needs to understand his or her fiduciary duties in order to ensure that the principal is protected from abuse.[68] States have been fairly uniform in establishing the fiduciary relationship between principal and agent but less clear on defining the fiduciary's duties and the meaning of

59. *See id.*

60. Chapter 709 White Paper, *supra* note 32, at 223.

61. *See* UNIF. POWER OF ATTORNEY ACT § 113 (differing from the Florida Act by not limiting the agent's acceptance to those duties the agent manifests acceptance of through his or her assertions or conduct).

62. *See* Chapter 709 White Paper, *supra* note 32, at 223.

63. *See* UNIF. POWER OF ATTORNEY ACT § 118 cmt.

64. *See* FLA. STAT. § 709.2121 (2011) (requiring notice to be in writing and specifying methods of delivery and appropriate recipients of notice so as to ensure the receipt of notice).

65. *See id.* § 709.2118.

66. *See* UNIF. POWER OF ATTORNEY ACT § 118(2).

67. *See id.* § 118(2)(C).

68. *See* STIEGEL & KLEM, *supra* note 2, at 5 (listing an "unclear standard for agent conduct" as a characteristic of the power of attorney, thus making it easy for the agent to financially exploit the principal).

the fiduciary relationship between principal and agent.[69] The UPOAA sought to remedy this problem by delineating mandatory duties and also, default duties that could be modified by express statements in the power of attorney.[70] The fact that these mandatory rules for the agent cannot be changed sends a clear message to the agent regarding expectations for a fiduciary.

The default rules are further clarified to protect the principal by requiring an agent to use his or her special skills or expertise if the agent was chosen because of such skills or expertise in exercising care, competence, and diligence.[71] A third party would have difficulty proving that a principal chose an agent because of special skills or expertise without the principal communicating such intention, or the preparer of the power of attorney documenting such information. The language should provide the agent with definitive guidelines for his or her actions.[72] If the principal does not wish to hold the agent to a standard based upon the agent's skills or expertise, the power of attorney should contain language modifying the default rule, such as exoneration language.[73]

Although the Florida Act specifically states that an agent is a fiduciary, the UPOAA only acknowledges the fiduciary relationship in the commentary.[74] The Restatement (Third) of Agency states that an "[a]gency is the fiduciary relationship that arises when one person a ['principal'] manifests assent to another person [an 'agent'] that the agent shall act on behalf and subject to the principal's control, and the agent manifests assent

69. *See* FLA. STAT. § 709.08(8) (repealed 2011) (defining the attorney in fact as a fiduciary that is required to observe the same standard of care as trustees, but not defining the standard); *see also* STIEGEL & KLEM, *supra* note 2, at 22–30 (listing the nine states only that have statutes with at least substantial similarity to § 114 of the Uniform Power of Attorney Act). *See generally* Boxx, *supra* note 19 (highlighting the ambiguity of the definition of a fiduciary relationship between the principal and agent and of the duties the agent owes to principal); Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574 (1996) (identifying the difference between legislatures' definitions of an agent's duties and how most states have not addressed whether fiduciary principles should govern the agent). The lack of uniformity between state adopted remedies causes ambiguity in the principal-agent relationship, which must be resolved in order to protect against abuse of the power of attorney. *See* Boxx, *supra*.

70. *See* UNIF. POWER OF ATTORNEY ACT § 114 (defining the role of the agent by the duties the agent owes to the principal).

71. *Id.* § 114(e); *cf.* FLA. STAT. § 518.11(1)(a) (requiring a similar duty of the fiduciary to use special skills under Florida's Prudent Investor Rule).

72. *See* UNIF. POWER OF ATTORNEY ACT § 114(e); FLA. STAT. § 709.2114(4).

73. *See* UNIF. POWER OF ATTORNEY ACT § 114 cmt.; UNIF. POWER OF ATTORNEY ACT § 115 cmt.

74. *Id.* § 114 cmt.

or otherwise consents so to act."[75] Florida is in the minority in specifying this relationship within the statute.[76] However, the specification is beneficial in that it is abundantly clear that the fiduciary relationship governs all aspects of the agent's duties and actions.[77]

The Florida Act gives more weight to the duty to attempt to preserve the principal's estate plan by making it mandatory, although the agent does not have a duty to ascertain the principal's estate plan.[78] An agent who acts in good faith may also escape liability from failure to preserve the principal's estate plan, which weakens the protection of this duty.[79]

The mandatory duty in the Florida Act requiring the agent to maintain records of the transactions performed on behalf of the principal improves on the UPOAA's allowance of modification of this duty by the power of attorney. The UPOAA, however, provides that the agent must disclose these records if requested by certain persons or agencies.[80] It "codifies the agent's common law duty to account to a principal."[81]

The Florida Act's divergence from the UPOAA in making the agent's authority non-delegable follows Florida's prior power of attorney statute,[82] which presumes that the principal's intention was for the agent to personally perform the acts authorized in the durable power of attorney.[83] The Florida Act, however, allows the agent to delegate his or her authority regarding investment functions as one exception.[84]

---

75. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

76. *Compare* Andrew H. Cook, *Is the Agent Under a DPA a Fiduciary?*, *in* DURABLE POWERS OF ATTORNEY 2011 (BNA Tax and Accounting Center, Tax Management Portfolios, Ser. No. 859-2nd, 2011), *available at* http://taxandaccounting.bna.com/btac/dis play/split_ display.adp?vname=tmegtporep (stating that South Carolina's power of attorney statute also includes fiduciary language), *with* S. 670, 2011 Leg., 113th Sess. (Fla. 2011). *See also* S.C. CODE ANN. § 62-5-501(A)(1) (2011) (including, in the statute, that "[t]he attorney in fact has a fiduciary relationship with the principal and is accountable and responsible as a fiduciary").

77. *See* § 709.2114(1) (stating that Florida's power of attorney statute also specified that the agent is a fiduciary); *see also* FLA. STAT. § 709.08(8) (repealed 2011).

78. Chapter 709 White Paper, *supra* note 32, at 13.

79. UNIF. POWER OF ATTORNEY ACT § 114(c); FLA. STAT. § 709.2114(3).

80. *See* UNIF. POWER OF ATTORNEY ACT § 114(h).

81. *Id.* § 114 cmt.; RESTATEMENT (THIRD) OF AGENCY § 8.12(3) (2006).

82. *See* FLA. STAT. § 709.08(3)(a) (repealed 2010).

83. *See* Robert Morgan & John Clardy, Changes in Durable Powers of Attorney and Creditors Rights, *in* 14th Annual Public Benefits, Florida Bar Continuing Legal Education Committee and the Elder Law Section (Mar. 12, 2010) (discussing the Florida Bar Real Property, Probate and Trust Law Section's comments to the UPOAA that were either adopted or rejected).

84. *Id.* at 14; *see also* UNIF. POWER OF ATTORNEY ACT Refs & Annos. The drafting committee for the Florida Act recognized that section 518.112 of the Florida Statutes, which allows a fiduciary to delegate its investment functions, is not clear on its application to agents

The drafters of the Florida Act changed the duties regarding the principal's known reasonable expectations and best interests out of concern that the UPOAA's language could be interpreted to authorize an agent to take specific measures in order to act in accordance with the principal's reasonable and actually known expectations.[85] The UPOAA drafters' approach of having the best interest standard as an alternative to the reasonable expectations standard, rather than co-equal as in the Florida Act, is based upon a similar standard for health-care surrogates, which equates the reasonable expectation standard to the substituted judgment standard, which, in turn, best preserves the principal's wishes and protects an incapacitated person's autonomy.[86] The difficulty with the best interest standard lies in its subjectivity, as the agent is using the agent's interpretation of the principal's wishes.[87] The principal's reasonable expectations, however, is an objective standard based upon the principal's documented wishes.[88] The best interest standard can also result in an undesirable paternalistic approach by the agent, which diminishes the principal's autonomy.

Self-neglect by a principal provides an example of how a best interest standard might result in a paternalistic approach if the principal's personal lifestyle choice is to not have the basic necessities of life.[89] The lack of any

---

under durable powers of attorney, even though Florida law defines an agent under a power of attorney as a fiduciary, and recommended revisions to section 518.112 to address this ambiguity. *See* UNIF. POWER OF ATTORNEY ACT Refs & Annos.

85. *See* Chapter 709 White Paper, *supra* note 32, at 12.

86. *See* HEALTH-CARE DECISIONS ACT § 2(e), 9IB U.L.A. 94 (West 2005).

> An agent shall make a health-care decision in accordance with the principal's individual instruction, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make decisions in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

Id.; *see also* UNIF. POWER OF ATTORNEY ACT § 114 cmt. 8B U.L.A. 80 (West Supp. 2011–2012) ("Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for 'substituted judgment' over 'best interest' as the surrogate decision making standard that better protects an incapacitated person's self-determination interests.").

87. *See* UNIF. POWER OF ATTORNEY ACT § 114 cmt. Although a principal is not required to expressly state his or her expectations, which is uncharacteristic for a power of attorney and more appropriate for a trust, the Act commentary does suggest that the principal provide a written statement regarding his or her expectations if such expectations could be viewed as being in conflict with the principal's best interest and possibly, subject the agent's actions to judicial review. UNIF. POWER OF ATTORNEY ACT § 114 cmt.

88. *See* UNIF. POWER OF ATTORNEY ACT § 114(a)(1).

89. *See* NAT'L CTR. ON ELDER ABUSE, AM. PUB. HUMAN SERVS. ASS'N ET AL., NAT'L ELDER ABUSE INCIDENCE STUDY 12 (1998), http://www.aoa.gov/AoARoot/AoA_

definition of "best interest" provides another difficulty with this standard. Florida statutes do not define "best interest," even though multiple statutes make reference to this standard.[90] In the initial stages of drafting the Florida Act, the committee acknowledged that "best interest" is subjective and discussed whether to create a definition of "best interest," but decided that "the term is fact-specific and it must be left to the courts to interpret on an individual basis."[91] Commentary for both the Florida Act and the UPOAA suggest specifying principal's intent in writing when the principal's intent and the principal's best interests may be viewed in conflict.[92] If the principal has not addressed such a conflict in writing in advance of incapacity, the Florida Act's approach of having the reasonable expectations and best wishes standards as co-equal standards, as opposed to the UPOAA's hierarchal approach, can create an ambiguous standard for the agent.[93] In describing the UPOAA hierarchal approach, Linda Whitton provides the example of a principal who wishes to remain living at home as long as possible despite the expense of in-home care, rather than moving to an institutional setting, which might be considered in the best interests of the principal from a financial perspective.[94] Under the UPOAA, the agent is expected to understand that the known reasonable expectations of the principal take precedent over the principal's best interests.[95] For actions

---

Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Fu ll.pdf (providing a definition of self-neglect that excludes a mentally competent person who makes a conscious decision to engage in acts that threaten his or her health and safety).

90. *See, e.g.*, FLA. STAT. § 744.474(20) (2010) (relating to matters where the guardian must act in the best interests of the ward); *Id.* § 733.602(1) (2009) (requiring the personal representative to act in the best interests of interested persons); *Id.* § 736.04115(1) (2007) (providing for judicial modification of an irrevocable trust when in the best interests of the beneficiaries); *cf.* HEALTH-CARE DECISIONS ACT § 5(f) (stating that a patient's best interests are in accordance with the patient's known values).

91. UNIF. POWER OF ATTORNEY ACT Refs & Annos.

92. *See* UNIF. POWER OF ATTORNEY ACT § 214 cmt. ("[W]hen a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against a later challenge.").

93. *See* Chapter 709 White Paper, *supra* note 32, at 12 (stating that, unlike the Uniform Act, Florida's Act has no express hierarchy, rather the "dual duties" are co-equal). *Compare* UNIF. POWER OF ATTORNEY ACT § 114(a)(1), *with* FLA. STAT. § 709.2114(1)(a)(1) *and* FLA. STAT. § 709.2114(1)(a)(3).

94. *See* Whitton, *supra* note 31, at 349; *see also* FLA. STAT. § 709.2114(1)(a)(1) & (2)(d). Section 709.2114(1)(a)(3) does provide the exception of acting contrary to a principal's best interests when it is cooperating with the person who has authority to make healthcare decisions for the principal. FLA. STAT. § 709.2114(1)(a)(1) & (a)(3). Decisions regarding a person's living environment could be considered a healthcare decision, but it is also a financial decision, thus still creating a potential conflicting standard for the agent. *Id.* § 709.2114(2)(d).

95. *See* UNIF. POWER OF ATTORNEY ACT § 114(a)(1) ("[A]n agent . . . shall act in

creating a conflict of interest with the agent, both the Florida Act and the UPOAA, however, have addressed the ambiguity of the best interest standard by qualifying it to allow the agent to act in a conflicting manner so long as the circumstances merit such action.[96]

A major difference appears when viewing the manner in which the Florida Act and the UPOAA allow an agent to engage in a conflict of interest.[97] The difference exists in the default duty of loyalty in both acts. The Florida Act's duty of loyalty requiring the agent to "[a]ct loyally for the *sole* benefit of the principal"[98] is in accord with the common law duty of loyalty[99] and a trustee's duty under the Florida Trust Code.[100] Under the standards for the agent in the Florida Act, "even if an agent acts competently and in the best interest of the principal, the agent can incur liability for actions that also benefit the agent or that otherwise involve a conflict of interest."[101] Whereas the UPOAA only suggests that the principal specify the principal's wishes regarding an action creating conflict of interest to protect the agent from liability,[102] the Florida Act requires such express authority.[103] The UPOAA appears to protect the

---

accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest.").

96. *See* UNIF. POWER OF ATTORNEY ACT § 114(d); FLA. STAT. § 709.2114(1)(a)(3). In addition to the exception of section 709.2114(2)(d) of the Florida Statutes, section 709.2114(1)(a)(3) qualifies the best interest standard by section 709.2202. *Id.* § 709.2114(1)(a)(3). The UPOAA states that the agent is not necessarily violating the principal's best interest if the agent benefits from the action or the action creates a conflict of interest. UNIF. POWER OF ATTORNEY ACT § 114(d).

97. *Compare* UNIF. POWER OF ATTORNEY ACT § 114(b), *with* FLA. STAT. § 709.2114(2).

98. § 709.2114(2)(a) (emphasis added).

99. *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006); *see also* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

> Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Meinhard, 164 N.E. at 546 (citation omitted).

100. *See* FLA. STAT. § 736.0802(1) ("[A] trustee shall administer the trust solely in the interests of the beneficiaries.").

101. Chapter 709 White Paper, *supra* note 32, at 16.

102. *See* UNIF. POWER OF ATTORNEY ACT § 114 cmt. (suggesting that if the principal wishes for the agent to have the authority to engage in actions that create a conflict, the preparer of the document should modify the default rules to authorize such action); *see also id.* § 217 cmt. ("To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the UPOAA, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both.").

103. *See* FLA. STAT. § 709.2114(1)(a)(3) ("[T]he agent may not act in a manner that is

agent over the principal with regard to engaging in conflicts of interest.[104] The Florida Act's language heightens the protections of the principal over the agent.[105]

The New York case of *In re Estate of Ferrera*[106] illustrates the need for the additional language in the Florida Act that provides a remedy for agent abuse of a power of attorney when an agent has engaged in a conflict of interest. Additionally, this case also illustrates the problem with imposing the best interest standard because it can result in abuse of the principal's autonomy.[107] "The facts of any given case aside, such an interpretation elevates a policy of protecting vulnerable principals over one which allows principals the freedom to delegate authority for any lawful purpose, including a purely donative one."[108] The protective measures of the UPOAA,[109] combined with the added protections of the Florida Act,[110] should provide a manner in which to preserve the principal's autonomy and freedom to create surrogate authority.

The principal who wishes to ensure that his or her agent may carry out a specified transaction without fear of liability may include an exoneration clause.[111] The exception to the exoneration clause included in both the UPOAA[112] and the Florida Act[113] provides a safeguard to the principal, as it creates a minimum standard of conduct that is similar to the good faith standard for trustees.[114] The Florida Act's express requirement for the

---

contrary to the principal's best interest.").

104. *See* UNIF. POWER OF ATTORNEY ACT§ 114(d). UPOAA § 114(c) also gives protection to the agent by qualifying the duty to preserve the principal's estate plan by stating that the agent is not liable to a beneficiary of the principal's estate plan as long as the agent has acted with "care, competence and diligence." *Id.* § 114(c) & (d). Additional protections are provided to the agent by limiting liability and duties in certain circumstances in the remaining language of the section. *See id.* § 114(f)–(h). These protections for the agent are similar to those afforded trustees. *Id.* § 114 cmt.

105. *See* FLA. STAT. § 709.2114(1)(a)(3).

106. *In re* Estate of Ferrera, 852 N.E.2d 138 (N.Y. 2006).

107. *See* Whitton, *supra* note 31, at 361–63 (discussing *Ferrera* in the context of the autonomy versus protection of the principal tension).

108. *Id.* at 362–63.

109. *See generally* UNIF. POWER OF ATTORNEY ACT § 114 (stating the provisions showing agents' duties).

110. *See generally* FLA. STAT. § 709.2114 (listing agents' duties); *infra* notes 184–92 and accompanying text.

111. UNIF. POWER OF ATTORNEY ACT § 115; *see* FLA. STAT. § 709.2115.

112. *See* UNIF. POWER OF ATTORNEY ACT § 115(1) & (2).

113. FLA. STAT. § 709.2115(1) & (2).

114. UNIF. POWER OF ATTORNEY ACT § 115 cmt.; *see, e.g.*, UNIF. TRUST CODE § 1008, 7C U.L.A. 654 cmt. (2006) (stating that a trustee's failure to follow a good faith standard cannot be excused by the trust instrument); FLA. STAT. § 736.1011 (providing similar requirements for an

agent to act in good faith provides a standard for the agent that is abundantly clear.[115] The good faith element in the Florida Act's exoneration statute is also consistent with other sections of the Florida Act and the UPOAA, such as absolving the agent from liability for failure to preserve the principal's estate plan as long as the agent acts in good faith.[116] While the Florida Act does not define good faith,[117] the UPOAA defines it as "honesty in fact."[118] A "breach of duty committed dishonestly" is an exception to an agent's exoneration,[119] and thus, the good faith requirement appears repetitive. However, the additional emphasis on the agent acting honestly provides further protection to the principal by clearly defining the agent's boundaries in performing acts on behalf of the principal.

In addition to providing deterrents for abuse, both the UPOAA and the Florida Act provide means to detect and remedy abuse.[120] Means of detection include the ability of third parties, including a governmental agency having authority to protect the welfare of the principal, to request an accounting from the agent.[121] The broad group of people who can request judicial review, one category being any interested person, and the fact a court must grant the appropriate relief, serve as additional means of detection and remedying abuse.[122] The judicial standing afforded by this section of the UPOAA and the Florida Act provides, in many cases, the only means to detect and stop abuse.[123] The Florida Act's addition that allows the court to award costs and attorney's fees[124] assists with remedying power of attorney abuses. The expansive list of people who have judicial standing also provides a checks and balance system for the

---

exculpatory clause in the Florida Trust Code).

115. FLA. STAT. § 709.08(4)(h) (repealed 2011). The Florida Act's modification of the UPOAA exoneration of agent language is based upon language in Florida's prior durable power of attorney statute, which allowed the principal to exonerate the agent for acts in good faith. *Id.*

116. *See* UNIF. POWER OF ATTORNEY ACT § 114(c); FLA. STAT. § 709.2114(1)(a)(3).

117. *See* FLA. STAT. § 709.2102 (defining various key terms not including good faith).

118. UNIF. POWER OF ATTORNEY ACT § 102(4).

119. UNIF. POWER OF ATTORNEY ACT § 115(1); *see* FLA. STAT. § 709.2115(1).

120. *See* UNIF. POWER OF ATTORNEY ACT § 114(h) & 116; FLA. STAT. § 709.2114(6); FLA. STAT. § 709.2116.

121. *See* UNIF. POWER OF ATTORNEY ACT §114(h); FLA. STAT. § 709.2114(6). In response to an increase in the financial exploitation of the elderly, a governmental agency, such as Adult Protect Services, which conducts investigations of elder abuse, is included in the list of persons and entities that may request an accounting of the agent. UNIF. POWER OF ATTORNEY ACT § 114 cmt. (citations omitted).

122. *See* UNIF. POWER OF ATTORNEY ACT § 116(a)(8) cmt.; FLA. STAT. § 709.2116(2)(d).

123. UNIF. POWER OF ATTORNEY ACT § 116 cmt.; *see* FLA. STAT. § 709.2116(1).

124. FLA. STAT. § 709.2116(3); *see id.* § 709.08(11) (repealed 2011). The award of attorney's fees and costs follows prior Florida law. *Id.* § 709.08(11) (repealed 2011).

narrow list of persons and entities that may request an accounting, which narrowness was designed to protect the principal's financial privacy.[125]

Although a broad list of persons and entities may seek judicial review of suspected power of attorney abuse, neither the UPOAA nor the Florida Act requires such action.[126] Both the UPOAA and the Florida Act require an agent who has knowledge of a breach or imminent breach of fiduciary duty by a co-agent or successor agent to take any appropriate action to safeguard the principal's best interest.[127] Further providing for methods of detecting and remedying abuse, the UPOAA and the Florida Act require a third party to report any suspected abuse to local adult protective services office to avoid incurring liability for refusing to accept a power of attorney.[128]

The provisions for the agent's liability under both acts use very similar language,[129] but they differ in the sections that qualify the agent's liability.[130] Limiting the agent's acceptance to the portions of the power of attorney on which the agent has acted upon is unique to the Florida Act.[131] The agent's liability is also limited to instances when actual knowledge is required.[132] Both acts require actual knowledge for the requirement that the agent take action to protect the principal from a breach of duty of a co-agent or successor agent,[133] preserve the principal's estate plan,[134] uphold the principal's reasonable expectations regarding healthcare decisions,[135] and acts generally regarding a principal's expectations.[136] As stated

125. UNIF. POWER OF ATTORNEY Y ACT § 116 cmt.

126. *See* UNIF. POWER OF ATTORNEY ACT § 116(a) (stating merely that persons *may* petition the court, not *must* petition the court); FLA. STAT. § 709.2116(1) (asserting that the courts may construe and enforce the power of attorney, but are not required to do so).

127. *See* UNIF. POWER OF ATTORNEY ACT § 111(d); FLA. STAT. § 709.2111(4) (requiring an agent to act only if the agent has knowledge of the breach of fiduciary duty).

128. *See* UNIF. POWER OF ATTORNEY ACT § 120(c)(6); *see also* FLA. STAT. § 709.2120(2)(e) (requiring a third party to report abuse to avoid liability for the refusal to accept a power of attorney over local adult protective services).

129. *Compare* UNIF. POWER OF ATTORNEY ACT § 117 (imposing liability on the agent to restore the value of the principal's property prior to the violation and to reimburse the principal for attorney's fees and costs paid on the behalf of the agent), *with* FLA. STAT. § 709.2117 (making the agent liable for restoring the value of the principal's property and reimbursing the principal for attorney's fees and costs used in connection with the defense of the agent's actions).

130. *See infra* notes 131–39 and accompanying text.

131. FLA. STAT. § 709.2113.

132. *See infra* notes 133–36 and accompanying text.

133. UNIF. POWER OF ATTORNEY ACT § 111(d); FLA. STAT. § 709.2111(4).

134. UNIF. POWER OF ATTORNEY ACT § 114(b)(6); FLA. STAT. § 709.2114(1)(a)(4).

135. UNIF. POWER OF ATTORNEY ACT § 114(b)(5); FLA. STAT. § 709.2114(2)(d).

136. UNIF. POWER OF ATTORNEY ACT § 114(a)(1); FLA. STAT. § 709.2114(1)(a)(1).

previously,[137] an agent having actual knowledge does not incur liability if the agent acts in good faith while failing to preserve a principal's estate plan.[138] The UPOAA, however, does not limit the agent's liability to amounts specified in this section and does not limit remedies for additional civil or criminal penalties under individual state statutes.[139]

PART IV

The advantages of a durable power of attorney include its simplicity, flexibility, ability to maintain the principal's autonomy, privacy, and low cost. However, these factors also contribute to the ease of abuse.[140] The key to reforming the durable power of attorney laws is by preserving these advantages but ensuring prevention, detection, and remedies for abuse, with the greatest emphasis being on prevention of abuse. This part will focus on two different areas of reform: "(a) reforms that better educate principals, [and] (b) reforms that better educate and deter agents from fraud."[141]

Eliminating a statutory form of power of attorney is the first reform aimed at better educating the principal.[142] Although the statutory form does enhance the simplicity and uniformity of the power of attorney, its

137. *See supra* notes 79, 115–16 & 132–36 and accompanying text.

138. UNIF. POWER OF ATTORNEY ACT § 114(c); FLA. STAT. § 709.2114(3).

139. *See* UNIF. POWER OF ATTORNEY ACT § 123 ("The remedies under this [act] are not exclusive and do not abrogate any right or remedy under the law of this state other than this [act].").

140. Marti Starkey et al., *Striking a Balance Under the New Uniform Power of Attorney Act*, 35 EST. PLAN. 21, 22 (2008); *see* UNIF. POWER OF ATTORNEY ACT Prefatory Note (indicating the survey conducted by JEB revealed the need to maintain flexibility by the principal).

141. Kim Vu-Dinh, *Reforming Power of Attorney Law to Protect Alaskan Elders From Financial Exploitation*, 27 ALASKA L. REV. 1, 12 (2010). The author examined two other areas of reform: (1) "reforms that protect third parties and require them to prevent fraud from occurring when fraud is evident, while [(2)] reforms that create additional remedies for defrauded victims." However, (1) is effectively addressed by the UPOAA and the Florida Act and (2) is addressed by elder abuse statutes outside the power of attorney statutes, and which is outside the scope of this article. *Id.*

142. *See* Julia Calvo Bueno, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, 16 NAELA Q. 20, 26 (2003) (arguing that more educated principals will aid in decreasing exploitation of the elderly); Dana Shilling, *LICENSE TO STEAL? The Uniform Power of Attorney Act and Other Tools to Fight Power of Attorney Abuse*, 218 ELDER LAW ADVISORY 1, 3 (2009) (explaining that the Uniform Statutory Form Power of Attorney Act is superseded by the UPOAA); *see also* UNIF. POWER OF ATTORNEY ACT Refs & Annos; UNIF. POWER OF ATTORNEY ACT § 301 cmt. ("[I]n the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen."). Colorado, Idaho and New Mexico kept the statutory form option when adopting the UPOAA; Maine, however, omitted this section. *See* UNIF. POWER OF ATTORNEY ACT Refs & Annos.

usefulness in encouraging third party acceptance is diminished when the option exists to modify and personalize the document. Assuming that legal advice is not sought for the execution of a statutory form,[143] eliminating the statutory form increases the chances of a principal obtaining legal advice before executing the power of attorney.[144] Similarly, reform directed at decreasing or eliminating the availability of free, downloadable forms from the internet can help ensure better education of the principal.[145] The Florida Act, by eliminating any broad grant of authority,[146] makes the availability of free, downloadable forms more difficult.

The second reform aimed at educating the principal cannot be codified in the law, but instead requires the best practices by the drafter of the power of attorney. The drafter needs to discuss with the principal his or her goals and priorities to determine future potential conflicts and inclusion of an appropriate "hot powers" provision.[147] A common conflict exists between preserving a principal's estate plan and assisting with another family member's care or planning to obtain public benefits.[148] The principal may choose to include an exoneration clause, particularly if the principal expects challenges from third parties to the agent's authority and the agent may be engaging in conflicts of interest. However, an exoneration clause should be included on a limited basis.[149] The drafter should caution the principal from including an exoneration clause because, without the exoneration clause, the potential liability for abuse of the power of attorney offers a strong deterrent.[150]

Requiring the principal to sign next to any "hot powers" included in

143. *But see* Bueno, *supra* note 142, at 22 (discussing states that use statutory forms, accompanied by a disclosure statement, which aid in providing legal information to the principal).

144. *See, e.g.*, *In re* Estate of Ferrera, 852 N.E. 2d 138, 143 (N.Y. 2006) (holding that when a New York statutory short form was used, "some additional provision which is [not inconsistent with] the other provisions of the statutory short form power of attorney" could be used). In this case, the child of the decedent did not consult with an attorney, but instead, used the New York short form and had the power of attorney notarized. *Id.* at 140.

145. *See, e.g.*, MEDLAWPLUS, http://www.medlawplus.com (last visited Sept. 2, 2011) (providing a financial power of attorney for $10.99 but also providing a free trial for each form listed).

146. *See* FLA. STAT. § 709.2202(1) (2011).

147. *See* UNIF. POWER OF ATTORNEY ACT § 201(a).

148. *See* Whitton, *supra* note 31, at 364.

149. *See* UNIF. POWER OF ATTORNEY ACT § 115 cmt. The comment for UPOAA § 115 acknowledges that the exoneration clause should be used infrequently and only when a principal's objectives cannot otherwise be met, as the inclusion of the clause eliminates a deterrent for an agent's abuse. *Id.*

150. *See id.*

the power of attorney, as the Florida Act requires,[151] provides a third reform aimed at the principal. Specifying these powers may be the only way to prevent an agent from acting contrary to the principal's expectations.[152] The fourth and fifth approaches to reform are also not statutory but focus on the efforts of the drafter. The drafter should spend a considerable amount of time and discussion with the principal on choosing the agent with care. The solvency of the chosen agent should be considered so that the agent has less incentive to steal and if the agent does steal, the agent should have assets from which the principal can recover.[153] In addition to solvency, the drafter should be familiar with common characteristics of abusers. The drafter should also encourage the principal to communicate with family members about his or her choice of agent and offer to notify the newly appointed agent(s).[154] These steps are especially important if the principal anticipates a challenge to the agent's authority by family members.

The drafter should also encourage communication with third parties with whom the agent might be dealing, such as banks or brokerage houses,[155] and possibly offer to provide a copy to such entity for review by its legal department to ensure acceptance in advance of the agent's use. Finally, throughout all of the drafter's discussions with the principal, the drafter should also be assessing the capacity of the principal to ensure the principal has the requisite legal capacity to execute a durable power of attorney.[156] This threshold determination may serve as the best tool in preventing abuse. States that require only testamentary capacity should consider raising the requisite capacity standard to donative capacity,

151. *See* FLA. STAT. §709.2202(1).

152. *See* Whitton, *supra* note 31, at 360.

153. *See* Russell E. Haddleton, *The Durable Power of Attorney is on the Way*, 24 PROB. & PROP. J. 50, 52 (2010).

154. *See* Jennifer L. Rhein, Note, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals,* 17 ELDER L.J. 165, 198–97 (2009); *see also* Whitton, *supra* note 54, at 51 ("The more clearly a principal communicates and memorializes personal preferences and objectives, the more difficult it will be for contentious family members to engage in revisionist history.").

155. *See* Whitton, *supra* note 31, at 364.

156. *See* Lawrence A. Frolik & Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 313 (2006) (finding case law that consistently holds that a principal appointing an agent must have the capacity to contract, which means having the capacity to understand the nature and effect of the act in which he or she is engaged, and which is a higher standard than testamentary capacity); *see also* AM. BAR ASS'N COMMISSION ON LAW AND AGING & AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 6 (2005) (finding that traditionally, the standard is capacity to contract).

particularly where the durable power of attorney specifically authorizes the agent to make gifts.

Reform should also be directed at preventing abuse by better educating the agent and providing deterrents for the agents to commit fraud. Certainly, criminal and civil penalties can provide helpful remedies to victims of abuse and exploitation[157] but may not be very effective deterrents for committing abuse, especially if the agent is unaware of such penalties. Less complex methods of deterring and preventing abuse include the agent signing an affidavit swearing not to commit fraud,[158] recording the durable power of attorney in the public records,[159] and requiring the agent to post a surety bond.[160] The registration of power of attorney and monitoring of the agent by courts are more comprehensive and widely discussed methods of reform regarding agents.[161] However, if courts have not been able to effectively monitor guardianships, they will have difficulty assuming a larger role in monitoring agents under powers of attorney. Cuts in state budgets and lack of funding to the courts and clerks' offices make this solution unrealistic.[162]

Registration does not require as much funding and personnel as monitoring and the formality of a registration requirement before exercise of authority may deter a rogue agent.[163] The more complex and comprehensive the registration system, however, the more likely it will fail. A review of England's relatively new system[164] demonstrates the difficulty and ineffectiveness of a complex registration and monitoring system. In England, the Office of the Public Guardian is charged with "creating and

157. *See* LORI A. STIEGEL, AM. BAR ASS'N COMMISSION ON LAW AND AGING, DURABLE POWER OF ATTORNEY ABUSE, A NATIONAL CENTER ON ELDER ABUSE FACT SHEET FOR CONSUMERS 3 (2008) (highlighting the available remedies for victims of attorney abuse in both the civil and criminal justice system).

158. Vu-Dinh, *supra* note 141, at 15.

159. *Id.*

160. *Id.*

161. *See* Dessin, *supra* note 69, at 616–17. One author states that under the UPOAA, "the durable [power of attorney] is still an imperfect instrument as it lacks a periodic monitoring mechanism." Starkey et al., *supra* note 140, at 24.

162. *See* Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 163–64 (2007) (discussing the results of a survey, which revealed that many courts do not require filing plans for future care of individuals with the court).

163. *See* Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document?*, 11 MARQ. ELDER'S ADVISOR 307, 331 (2010).

164. *See generally* Mental Capacity Act, 2005, c.9, (Eng.) *available at* http://www.legislation.gov.uk/_ukpga/2005/9/ pdfs/ukpga_20050009_en.pdf (creating the role of the new registration system).

maintaining a registry of lasting powers of attorney and enduring powers of attorney and working with social services and other agencies to protect persons of diminished capacity."[165] The process in England greatly resembles a guardianship in terms of the time and expense involved in making the power of attorney effective, and the small fraction of registered powers of attorney, compared to England's population size, provides evidence of its unsuccessfulness.[166] If a principal does not have an agent who is sufficiently trustworthy to fulfill his or her fiduciary responsibilities without supervision, then the principal should not be executing a durable power of attorney. Instead, a principal should consider executing a preneed guardian declaration, or, if appropriate at the time, a voluntary guardianship, either of which uses an existing system that supervises and monitors the fiduciary.[167] Creating and transferring assets to a trust can also serve as an alternative for a person whose affairs require more oversight.

The greatest reforms occurring thus far are more clearly defining an agent's duties and scope of authority.[168] The Florida Act expanded upon the UPOAA's efforts in this area by making more of the duties mandatory, clarifying an agent's fiduciary relationship to the principal, placing more restrictions on the agent regarding matters of delegating authority, and modifying the duties of loyalty and impartiality.[169] The Florida Act falls short, however, by leaving the ambiguous "best interest" standard as a mandatory duty,[170] limiting the acceptance of the agent,[171] not requiring additional categories of persons for notice of resignation, and not providing

165. Haddleton, *supra* note 153, at 51. The comprehensiveness of England's system is evident by the Office of Public Guardian that publishes a 43-page booklet to provide guidance for persons who want to make a power of attorney. *Id.*

166. *See id.* at 51–52 (noting that in November 2008, approximately one year after establishment of the Office of Public Guardian, the Office had received only 4,283 applications for registration and England's population is about 51 million).

167. *See* 39 AM. JUR. 2d *Guardian and Ward* § 205 (2010). It provides:

> In no relation, except that of parent and child or husband and wife, are the elements of confidence on one side and active good faith on the other more essential than in the relation of guardian and ward. Guardianship is generally held to be a trust of the highest and most sacred character.

Id.; *see also* FLA. STAT. § 744.446 (2011) (preventing guardians from engaging in conflicts of interest without court approval).

168. *See* UNIF. POWER OF ATTORNEY ACT Prefatory Note, 8B U.L.A. 57–58 (West Supp. 2011–12) (noting that the UPOAA "is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct").

169. *See* FLA. STAT, § 709.2114(1) (listing agents' duties).

170. *See id.* § 709.2114(4).

171. *See id.* § 709.2113.

a duty to ascertain the principal's estate plan. The latter of these agent matters is the only one that the UPOAA does not address in a better fashion. But both the Florida Act and the UPOAA allow a significant weakness to remain in the durable power of attorney laws by not requiring the agent to expressly and affirmatively acknowledge acceptance of the agent's appointment, duties, and scope of the agent's authority.[172] Pennsylvania's current power of attorney statute contains a requirement of a signed acknowledgement,[173] although the Pennsylvania legislature introduced a bill last year that requires the acknowledgement to include the statement, "I shall preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a will."[174] Flexibility needs to be available for when circumstances require a deviation from the estate plan of the principal; however, an agent who is required to expressly agree to the duty to preserve the estate plan is less likely to abuse his or her authority. This requirement should not only prevent abuse by agents, but also, eliminate a common defense the agent may later use in an action for not realizing he or she was supposed to keep records or not knowing he or she was prohibited from certain actions.[175]

Much of the recommended reforms aimed at educating the principal and the agent may decrease the simplicity of the durable power of attorney and may even result in higher attorney's charges for preparing and executing the document; however, the impact on prevention of abuse should outweigh these slight disadvantages. Certainly these slight disadvantages do not come close to the expense and complexity of a registration and monitoring system, which is unrealistic in its implementation given budget problems of local court and clerk systems.[176] The increased time of the drafter with the client who requests a durable power of attorney, combined with requiring the agent to expressly accept the agent's duties and scope of authority, should further prevent and deter

172. *See* Bueno, *supra* note 142, at 22–23 (discussing Pennsylvania law, which requires a signed disclosure statement from the principal to ensure awareness of the consequences and responsibilities of signing a durable power of attorney, and New Hampshire's law, which does not require the execution of such a disclosure statement but does provide model language for the creation of one).

173. *See* 20 PA. CONS. STAT. § 5601(d) (2011) ("[A]n agent shall have no authority to act as agent under the power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment in substantially the following form . . . .").

174. *See* S.B. 1358, 194th Gen. Assem. (Pa. 2010) at § 5601.

175. *See* Seal, *supra* note 163, at 333.

176. *See* Off. of St. Cts. Admin., *Funding Florida Courts*, THE FLORIDA BAR, http://www.floridabar.org/fundingfloridacourts (last revised May 26, 2011).

abuse by the agent while maintaining the durable power of attorney's simplicity, flexibility, ability to maintain the principal's autonomy and privacy, and low cost.

CONCLUSION

As Professor Whitton, the Reporter of the UPOAA, recognized, there is perhaps no perfect mechanism for surrogate decision-making that strikes a perfect balance between the competing interests of enhancing the usefulness of the power of attorney while at the same time protecting the principal.[177] As with any fiduciary, "(i)t is impossible to make (an agent under a) durable power of attorney completely immune to human nature,"[178] and if a principal does not feel adequate safeguards are in place to protect him or her from an agent's misguided or intentionally dishonest actions, the principal should evaluate a more comprehensive planning mechanism to appoint a surrogate. The principal should conduct such an evaluation in advance of incapacity with a qualified attorney who seeks to properly educate the potential principal and agent of the duties, liabilities, and scope of authority under a power of attorney.

177. *See* Whitton, *supra* note 54, at 12.
178. Haddleton, *supra* note 153, at 50.

APPENDIX A

Section 111 Coagents and Successor Agents	(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently. (b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent: (1) has the same authority as that granted to the original agent; and (2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve. (c) Except as otherwise provided in the power of attorney and subsection (d), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent. (d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.
Florida Act modification of Section 111	* Adds "including a predecessor agent" to paragraph (d). * Adds the following paragraphs: (5) A successor agent does not have a duty to review

	the conduct or decisions of a predecessor agent. Except as provided in subsection(4), a successor agent does not have a duty to institute any proceeding against a predecessor agent or to file any claim against any predecessor agent's estate, for any of the predecessor agent's actions or omissions as agent. (6) If a power of attorney requires two or more persons must act together as co-agents, then notwithstanding the requirement that they act together, one or more of the agents may delegate to any co-agent the authority to conduct banking transactions as provided in section 709.2208(1), whether the authority to conduct banking transactions is specifically enumerated or incorporated by reference to section 709.2208(1) in the power of attorney.
Section 112 Reimbursement and Compensation of Agent	Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.
Florida Act modification of Section 112	Compensation may not be paid to the agent unless the agent is a "qualified agent."[179] A "qualified agent" is the spouse of the principal, an heir of the principal within the meaning of section 732.103, a financial institution as defined in Chapter 655 with trust powers having a place of business in this state, an attorney or certified public accountant, licensed in this state, or a natural person who is a resident of this state and who has never been an agent for more than three principals at the same time.[180]
Section 113 Agent's Acceptance	Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.
Florida Act modification of	Adds the following language: "(t)he scope of an agent's acceptance is limited to those aspects of the

179. FLA. STAT. § 709.2112(3) (2011).
180. *Id.* § 709.2112(4).

Section 113	power of attorney for which the agent's assertions or conduct reasonably manifests acceptance."[181]
Section 114 Agent's Duties	(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall: (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest; (2) act in good faith; and (3) act only within the scope of authority granted in the power of attorney. (b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall: (1) act loyally for the principal's benefit; (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest; (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal; (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and (6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with 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, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (D) eligibility for a benefit, a program, or assistance under a statute or

181. *Id.* § 709.2113.

	regulation. (c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan. (d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal. (e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances. (f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines. (g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person. (h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

Florida Act modification of Section 114	* Adds "(a)n agent is a fiduciary"[182] as the first sentence in the statute. * Mandatory duty instead of default: to attempt to preserve the principal's estate plan to the extent known if preservation is viewed as in the best interest of the principal in light of factors dealing with the value of the principal's property, the principal's foreseeable needs, taxes, public benefit programs and the principal's previous history, if any, of making gifts.[183] * Adds the principal's gift making history to the list of factors to consider when attempting to preserve the principal's estate plan.[184] * Mandatory duty instead of default: to maintain records of all receipts, disbursements and transactions conducted on behalf of the principal.[185] * Additional mandatory duty: agent not to delegate his or her duty to a third party[186] * Additional mandatory duty: to create and maintain an inventory of the contents of the principal's safe deposit box each time the agent accesses the box, if the agent is given this authority in the power of attorney.[187] * The duties regarding the principal's known reasonable expectations and best interests changed to

182. *Id.* § 709.2114(1).

183. *See id.* § 709.2114(4).

184. *Compare* FLA. STAT. § 709.2114(1)(a)(4)(e), *with* UNIF. POWER OF ATTORNEY ACT § 114(b)(6)(A)–(D), 8B U.L.A. 56 (West Supp. 2011–2012).

185. *Compare* FLA. STAT. § 709.2114(1)(c), *with* UNIF. POWER OF ATTORNEY ACT § 114(b)(4).

186. *Compare* FLA. STAT. § 709.2114(1)(b), *with* UNIF. POWER OF ATTORNEY ACT § 114(g). Section 114 states that an agent is not liable for the acts of those to whom the agent has delegated authority as long as the agent uses "care, competence and diligence in selecting and monitoring the person." UNIF. POWER OF ATTORNEY ACT § 114(g).

187. *Compare* FLA. STAT. § 709.2114(6), *with* UNIF. POWER OF ATTORNEY ACT § 208(6) (allowing for entry into the principal's safe deposit box unless restricted in the power of attorney, but not requiring the agent to maintain an inventory of the contents).

188. *Compare* FLA. STAT. § 709.2114(1)(a)(1)–(3), *with* UNIF. POWER OF ATTORNEY ACT § 114(a)(1).

189. *Compare* FLA. STAT. § 709.2114(2)(a) (emphasis added), *with* UNIF. POWER OF ATTORNEY ACT § 114(b)(1).

190. *Compare* FLA. STAT. § 709.2114(6), *with* UNIF. POWER OF ATTORNEY ACT § 114(h).

	duties **not to act in a manner that is contrary** to these standards instead of a duty to act in accordance with these standards; duties made to be co-equal compared to the UPOAA, which lists the best interest standard as an alternative if the principal's reasonable expectations are unknown.[188] * Adds for the *sole* benefit of principal in duty of loyalty[189] * Does not include (d). * Changes the days to report a requested accounting from 30 to 60 days[190]
Section 115 Exoneration of Agent	A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision: (1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or (2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal
Florida Act modification of Section 115	Adds: the agent having to act in good faith in order to be relieved from liability by an exoneration clause in the power of attorney.[191]
Section 116 Judicial Relief	(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief: (1) the principal or the agent; (2) a guardian, conservator, or other fiduciary acting for the principal; (3) a person authorized to make health-care decisions for the principal; (4) the principal's spouse, parent, or descendant; (5) an individual who would qualify as a presumptive heir of the principal; (6) a person named as a beneficiary to receive any

191. *See* FLA. STAT. § 709.2115.

	property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate; (7) a governmental agency having regulatory authority to protect the welfare of the principal; (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and (9) a person asked to accept the power of attorney. (b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.
Florida Act Modification of Section 116	* Adds the provision allowing the court to award costs and attorney's fees[192] * Adds that if the agent's actions are challenged in a judicial proceeding on the basis of a conflicted transaction, the agent has the burden of proving, by clear and convincing evidence, that the agent acted in the sole interest of the principal or the agent acted in good faith in the principal's best interest, and the action was authorized in the power of attorney.[193] * Adds the provision that language authorizing an agent to engage in a conflicted action is invalid if included because of the abuse of a fiduciary or confidential relationship by the agent or the agent's affiliate.[194] Affiliates of the agent include: 1. The agent's spouse; 2. The agent's descendants, siblings, parents, or their spouses; 3. A corporation or other entity in which the agent, or a person that owns a significant interest in the agent, has an interest that might affect the agent's best judgment; 4. A person or entity that owns a significant interest in

192. *See id.* § 709.2116(3). The award of attorney's fees and costs follows prior Florida law. *See* FLA. STAT. § 709.08(11) (repealed 2011).

193. *See id.* § 709.2116(4).

194. *See id.* § 709.2116(5)(a).

	the agent; or 5. The agent when acting in a fiduciary capacity for someone other than the principal.[195]
Section 117 Agent's Liability	An agent that violates this [act] is liable to the principal or the principal's successors in interest for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.
Florida Act Modification of Section 117	No difference
Section 118 Agent's Resignation; Notice	Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated: (1) to the [conservator or guardian], if one has been appointed for the principal, and a coagent or successor agent; or (2) if there is no person described in paragraph (1), to: (A) the principal's caregiver; (B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or (C) a governmental agency having authority to protect the welfare of the principal.
Florida Act Modification of Section 118	Does not include paragraph (2) but does add specific requirements for giving notice in 709.2121, including requirement that "(n)otice must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document."[196]
Section 201 Authority that Requires	(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney

195. *See id.* § 709.2116(5)(b)(1)–(5).
196. *Id.* § 709.2121(2).

Specific Grant; Grant of General Authority	expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: (1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (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) exercise fiduciary powers that the principal has authority to delegate[; or (8) disclaim property, including a power of appointment]. (b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise. (c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216. (d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 217. (e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls. (f) Authority granted in a power of attorney is

	exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state. (g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.
Florida Act modification of Section 201	* Except as otherwise limited by this section or other applicable law, the agent has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the power of attorney. * (2) provides a list of personal authorities that the principal cannot delegate to the agent, which are: (a) Perform duties under a contract that requires the exercise of personal services of the principal (b) Make any affidavit as to the personal knowledge of the principal; (c) Vote in any public election on behalf of the principal; (d) Execute or revoke any will or codicil for the principal; or (e) Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.[197] * Does not allow the agent to delegate authority granted under the power of attorney; * Eliminates any option for incorporation by reference with only two exceptions that deal with financial institutions.[198] * Requires the additional act of the principal signing or initialing next to each specific authority enumerated in the power of attorney.[199]

197. These non- delegable authorities follow prior Florida law. *See* FLA. STAT. § 709.08(7)(b)(1)–(5) (2010) (repealed 2011).

198. See FLA. STAT. § 709.2202(4). This section allows incorporation by reference by grants of authorization "to conduct banking transactions as provided in section 709.2208(1), [and] to conduct investment transactions as provided in section 709.2208(2)." *Id.*

199. *See id.* § 709.2202(1).

Section 217 Gifts	(a) In this section, a gift "for the benefit of" a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529 [, as amended]. (b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to: (1) make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), [as amended,] without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, [as amended,] in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and (2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, [as amended,] to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses. (c) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate,

	inheritance, generationskipping transfer, and gift taxes; (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and (5) the principal's personal history of making or joining in making gifts.
Florida Act's modification of Section 217	Does not include (c)