

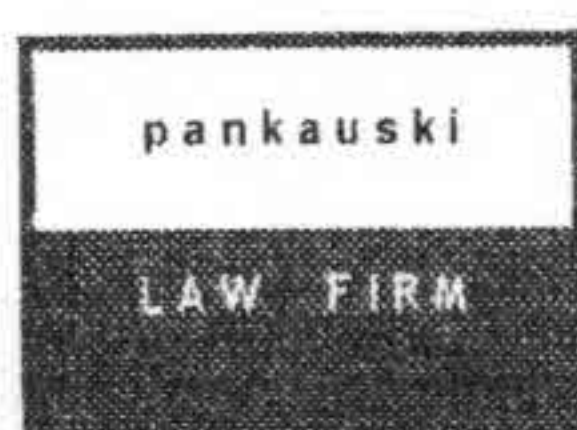
# RECENT FLORIDA LEGISLATIVE CHANGES

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## RECENT FLORIDA LEGISLATIVE CHANGES

The following is an outline of recent 2011 Florida Legislative Changes. Many changes are similar to the Uniform Power of Attorney Act, the Uniform Trust Code, and the Uniform Probate Code. Listed below are the subject matters of the changes, followed by the date of passage, and the effective date.

### **I. Florida Power Of Attorney Act - New Chapter 709**

*Summary: Chapter 709 of the Florida Statutes has been completely re-written and divided into two parts. Part 1: Powers of Appointment (Fla. Stats. 709.02-709.07), and Part 2: Powers of Attorney (Fla. Stats. 709.2101-709.2402). The previous statutes regarding Powers of Attorney (Fla. Stat. 709.01, 709.015, 709.08, and 709.11) have been repealed and replaced by Florida Statutes 709.2101 et. seq.*

*Date Passed: June 21, 2011.*

*Effective Date: October 1, 2011.*

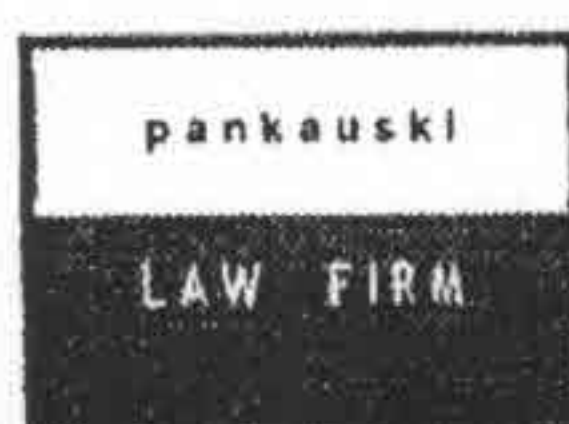
*Substantive Changes:*

#### A. Execution Requirements.

- i. Powers of attorney validly executed prior to October 1, 2011 will remain valid.
- ii. Powers of attorney executed after October 1, 2011 must be:
  - a. Signed by the principal;
  - b. Signed by 2 subscribing witnesses; and
  - c. Be acknowledged by principal before notary.

*NOTE: These requirements are new for non-durable powers of attorney.*

*Exception: Military powers of attorney must only comply with 10 U.S.C. sec. 1004(b).*



## B. Non-FL Powers of Attorney.

Powers of attorney executed in another state must meet requirements of the state of execution, but are now “portable” between states.

## C. Springing Powers of Attorney After October 1, 2011.

- i. Springing and contingent powers of attorney created after the effective date of the Act are invalid.
- ii. Pre-Act springing powers of attorney will remain durable or springing under new Act.

*Exception: Military Powers of Attorney (deployment-contingent).*

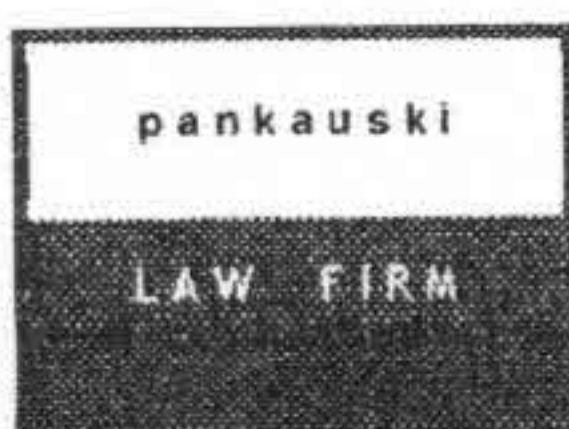
## D. Amending Powers of Attorney.

- i. To amend the power of attorney you must revoke old power of attorney and execute a new one in amended form.
- ii. Direct amendments to an existing power of attorney are not permitted.

## E. Revoking Power of Attorney.

- i. Execution of a new power of attorney, by itself, does not revoke prior powers of attorney.
- ii. Revocation of a power of attorney must be in a writing signed by the principal. It can be:
  - a) In a new power of attorney, or
  - b) In some writing signed by principal.
    - No requirement that the writing be witnessed or notarized.
- iii. Principal should give notice to prior agent and all principal’s financial institutions.

(Revocation has less stringent requirements than to execution.)



F. Suspending and Terminating Power of Attorney.

- i. If the agent is unaware of the suspension or termination, then it has no effect so long as agent acts in good faith and without knowledge of suspension or termination.
- ii. An unaware agent's acts still bind the principal and its successors in interest.
- iii. Power of attorney is suspended upon initiation of proceeding to determine principal's capacity, until the petition is dismissed/withdrawn, but the agent can petition the court for continued authority.
- iv. Power of attorneys terminate upon the happening of:
  - a) The date specified in power of attorney for termination;
  - b) Accomplishment of the purpose of the power of attorney;
  - c) Death of the principal or revocation of the power of attorney by the Principal;
  - d) If the power of attorney is not durable, when the principal loses capacity;
  - e) If a power of attorney is durable, upon an adjudication of incapacity (unless the court determines otherwise); or
  - f) When the agent's authority terminates and the power of attorney does not provide for an alternate agent.

G. Copy and E-signature.

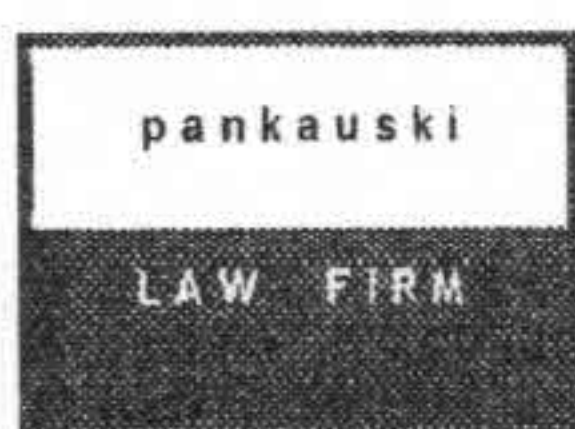
Unless the power of attorney provides otherwise, a photocopy or electronically transmitted copy has same effect as original.



#### H. Agent.

- i. Agent must accept power of attorney, in order for agent to be bound.
- ii. Acceptance may be by whatever method specified in the power of attorney **OR** by exercising authority/performing duties.
- iii. Scope of acceptance may be limited to those aspects of power of attorney for which agent's assertions/conduct reasonably manifest acceptance.
- iv. The duty that the agent may have to act is defined by scope of agent's acceptance of power of attorney.
- v. Each co-agent may exercise its authority independently; a majority or unanimity of named agents' agreement is no longer required.
- vi. Banking transactions require only one agent's signature, **even if document requires all agents to act.**
- vii. Principal may designate one or more successor agents.
- viii. Principal cannot authorize an agent to designate its own successor/co-agent.
- ix. Termination of agent's authority if agent dies/becomes incapacitated/resigns/is removed; also upon the filing of an action for dissolution of the marriage of the agent and the principal.

#### I. Duties-- 2 Categories.



- i. Mandatory Duties (5) – These duties apply *notwithstanding* contrary provisions in the power of attorney. They are non-modifiable statutory requirements and cannot be “drafted around”.
- a) Duty *not to act* in manner *contrary* to principal’s actually known reasonable expectations.
  - b) Duty not to act in manner contrary to principal’s best interest.
  - c) Duty to preserve principal’s estate plan.
    - Duty only exists to the extent plan is actually known; no duty to ascertain principal’s plan.
    - Even if plan known, agent incurs no liability for failing to preserve if acting in good faith.
    - Applies only when preservation of plan is in principal’s best interest.
  - d) Duty to perform personally.
    - Powers and duties of agent are generally non-delegable.
    - *EXCEPTION: Delegations permitted under Florida Prudent Investor Act.*
  - e) Duty to keep adequate records.
    - Agent must keep record of all receipts, disbursements, and transactions.
    - Disclosure required only at request of principal, court-appointed guardian, fiduciary acting for principal, governmental agency, or personal representative/successor upon principal’s death.
    - Upon receiving valid request, agent has 60 days to comply, with additional written 60 day extension if agent needs the time.



ii. Modifiable (Default) Duties (3) – These duties apply *in absence* of contrary provisions. They can be modified by the document (i.e. “drafted around”).

a) Duty to act with care, competence, diligence.

b) Duty to act loyally and avoid conflicts of interest, including with agent’s affiliates.

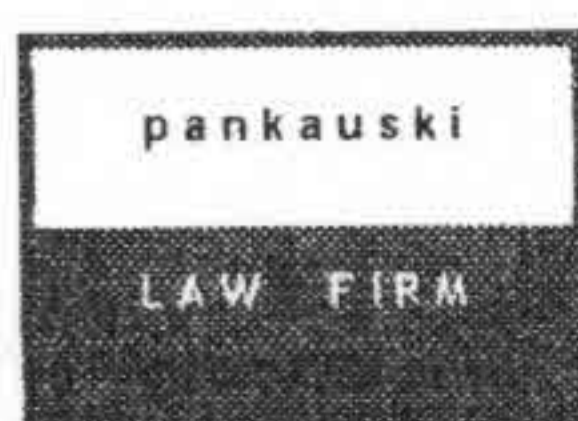
- Agent’s affiliates: Agent’s spouse/descendant/sibling/parent, and their spouses; corporation or other entity in which the agent or a person that owns a significant interest in the agent, has an interest that might affect the agent’s best judgment; agent when acting in fiduciary capacity for another.

- *If* there is evidence that the agent or the affiliate had a personal interest in the exercise of power, then the agent/affiliate has burden of proving by clear and convincing evidence that agent acted: solely in interest of principal; or in good faith and the conflict was expressly authorized in power of attorney.

c) Duty to cooperate with health-care providers.

- Agent has default duty to cooperate with person who has authority to make health-care decisions for principal to carry out principal’s reasonable expectations if actually known by agent.
- If expectation not actually known, agent must act consistently with principal’s best interest.

***NOTE: Principal may no longer grant broad authority and state general language in a power of attorney. Principal must list each authority granted, along with an initial next to each authority.***



**Exception: Principal can grant general authority to conduct banking and investment transactions.**

J. Exoneration Provisions.

- i. Power of attorney may exonerate agent for liability for acts, omissions, or decisions made in good faith.
- ii. **Exceptions:** Cannot relieve agent of liability for breaches committed dishonestly, with improper motives, or reckless indifference to purposes of power of attorney or principal's best interest. Also cannot be inserted as a provision in the power of attorney as a result of abuse of confidential or fiduciary relationship with principal.

K. Statutory Restrictions of Agent.

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

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

L. Agent Liability.

- i. Agent-principal relationship is a fiduciary one.
- ii. Agent's liability limited to scope of Acceptance of Powers.
- iii. Agent's liability limited to actual knowledge regarding:





- a) Taking action to safeguard the principal's interests when the agent knows of a breach or imminent breach by another agent;
- b) Acting in a manner not contrary to the principal's expectations;
- c) Preserving the principal's estate plan; and
- d) Cooperating with the principal's health care decision-maker.

M. Co-agent and Successor Agent Liability.

- i. Agent who has actual knowledge of breach by another agent has duty to take reasonably appropriate actions to safeguard principal's best interests, including informing principal if not incapacitated.
- ii. A co-agent or successor agent who does not participate/ conceal another agent's breach is not liable for that breach.
- iii. Successor agent has no duty to review conduct of predecessor.
- iv. Successor agent has no duty to institute proceeding against predecessor for any actions as prior agent.

N. No Blanket or Default Powers.

Blanket grant of authority is *not* sufficient to grant any possible authority to agent.

O. Additional Formalities.

- i. Principal must sign or initial each individual authority given, and cannot sign generally.



- ii. Agent may amend, modify, revoke, or terminate a trust for which the principal is the settlor only if the trust instrument explicitly provides for such by settlor's agent.

## II. Probate, Guardianship, Estates & Trusts (Chapter 2011-183, House Bill No. 325)

Summary: Statutory clarification of the lawyer-client privilege for fiduciaries; significant changes to the intestate shares of surviving spouses; new provisions to reform a will and related fee and cost provisions; new provision applying fraud, duress, and undue influence to will and trust revocations; new provisions clarifying when a will or trust contest may begin; a rebuttable presumption provision in guardianships; and clarification regarding application of Fla. R. Civ. P. 1.525 in trust actions.

*Date Passed:* June 21, 2011.

*Effective Date:* July 1, 2011 unless stated otherwise.

*Substantive Changes:*

### A. Section 90.5021 Fiduciary lawyer-client privilege.

- i. Only person/entity acting as fiduciary is considered client of lawyer.
- ii. Applicable to personal representatives, trustees, administrators ad litem, guardians, guardians ad litem, curators, conservators, and attorneys in fact.
  - a) "Notice of Administration" must now include a statement informing beneficiaries that the fiduciary privilege applies to lawyer employed by personal representative.
  - b) Trustee must give beneficiaries notice that the fiduciary privilege applies when giving notice of the acceptance of



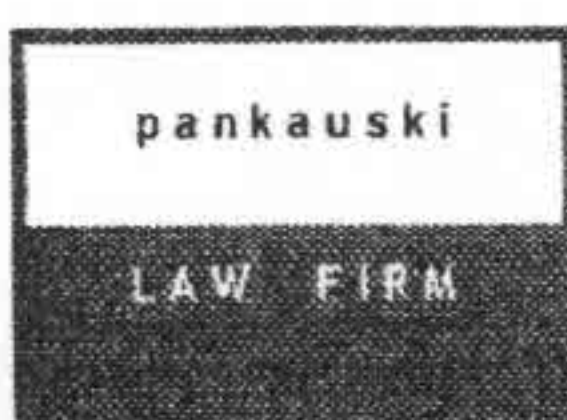
the trust or notice of the existence of the trust (Notice of Trust to Beneficiaries).

- iii. "Fiduciary exception" is no longer applicable. Prior case law on fiduciary lawyer-client privilege is now superseded by statute. *See particularly Jacob v. Barton*, 877 So.2d 935 (Fla. 2d DCA 2004).
- iv. Fiduciary's communications with attorney are protected to same extent as if person was not acting as a fiduciary, whether or not communications are for benefit of beneficiary.
- v. Crime-fraud exception to lawyer-client privilege unaffected.

B. Section 732.102 Spouse's share of intestate estate.

- i. If Decedent dies, survived by descendants, all of whom are descendants of the Surviving Spouse, and Surviving Spouse has no descendants other than the Decedent's descendants, the Surviving Spouse receives entire intestate estate (no longer first \$60,000 plus one-half of balance).
- ii. If there are any surviving descendants of Decedent, who are not also descendants of Surviving Spouse, or if Surviving Spouse has descendants who are not descendants of Decedent, Surviving Spouse's intestate share is one-half of intestate estate.
- iii. Effective Date October 1, 2011.

C. Section 732.615 Reformation to correct mistakes.



Court may reform a Will (even if unambiguous), to correct mistakes of law or fact, if proved by clear and convincing evidence.

- D. Section 732.616 Modification to achieve testator's tax objectives  
Court may modify a Will to achieve testator's tax objectives with retroactive effect.
- E. Section 733.1061 Fees and costs  
In proceeding arising out of section 732.615 or 732.616, court shall award attorney's fees and costs as in chancery, and may direct payment from a party's interest.
- F. Section 732.5165 Fraud, duress, mistake, undue influence (Will)  
i. Fraud, duress, mistake, and undue influence are now expressly applicable to revoking a Will, as well as procuring one.
- G. Section 732.518 Will contests  
Contesting validity or revocation of all or part of a will may not commence prior to testator's death.
- H. Section 733.212 Notice of administration  
Notice of administration shall also include that fiduciary lawyer-client privilege applies to the personal representative and any attorney employed by such personal representative.
- I. Section 736.0207 Trust contests  
Cannot contest revocation of revocable trust until after settlor's death.
- J. Section 736.0406 Fraud, duress, mistake, undue influence (Trust)



Fraud, duress, mistake, and undue influence are now expressly applicable to revoking a trust as well as procuring one.

K. Section 736.0813 Duty to inform and account

Beneficiaries must be informed that fiduciary lawyer-client privilege applies to the trustee and any attorney employed by such trustee.

L. Section 744.441 Powers of guardian upon court approval

Addition of a rebuttable presumption that an action challenging ward's revocation of trust is *not* in the ward's best interest if the revocation relates solely to a devise. This does not preclude a challenge after the ward's death.

M. Section 736.0201 Role of court

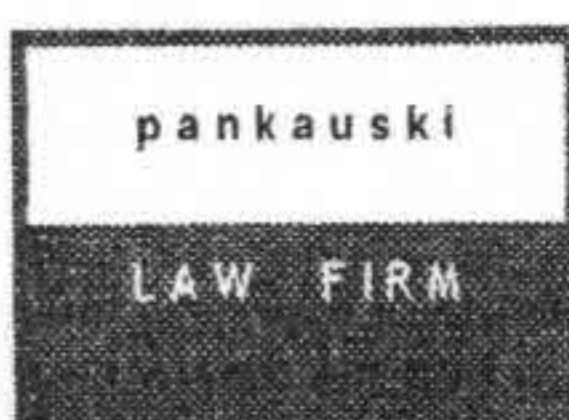
- i. Rule 1.525 of the Florida Rules of Civil Procedure applies to judicial proceedings concerning trusts, except:
  - a) A trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust; and
  - b) A determination by the court directing from what part of the trust fees or costs shall be paid (unless determination is made in action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers).

### **III. Estate Tax - House Bill No. 641 (Revises 198.13)**

*Date Passed:* May 31, 2011.

*Effective Date:* May 31, 2011.

*Substantive Changes:*



Expiration date for a copy of federal estate tax return not required to be filed with Florida Dept. of Revenue for any decedent dying after December 31, 2004 is extended to December 31, 2012, instead of 2010. The change is retroactive to January 1, 2011.

#### **IV. Exemption Of Inherited IRAs Proposed Florida Statute 222.21(2)(c) (Clarifies 222.21; supersedes prior case law)**

*Date Passed:* Pending.

*Effective Date:* Pending.

*Substantive Changes:*

- A. Addition of subsection (c) to clarify that the *interest* of a beneficiary in an inherited individual retirement account (IRA) is exempt from creditor claims of the *owner, beneficiary, and participants*.
- B. Includes direct transfer or eligible rollover to an inherited IRA.
  - i. Proposed clarification would overrule *Robertson v. Deeb*, 16 So.2d 936 (Fla. 2d DCA 2009) and *In re Ard*, WL3400368 (Brkrcty. M.D. Fla) (August 18, 2010) which have held that inherited IRAs are not exempt assets protected from creditors under Florida law.
  - ii. Has retroactive application to all inherited IRAs without regard to the date an account was created.

