

NORTH CAROLINA UNIFORM POWER OF ATTORNEY ACT: SUCCESS THROUGH PREPARATION

BY JANICE L. DAVIES

RISK MANAGEMENT PRACTICE GUIDE OF LAWYERS MUTUAL

ABOUT THE AUTHOR:



JANICE L. DAVIES is an attorney at Davies Law PLLC in Charlotte. Ms. Davies is the Chair of the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association and the Chair of its subcommittee for the North Carolina Uniform Power of Attorney. She is a Fellow in the American College of Trust and Estate Counsel and a North Carolina Board Certified Specialist in Estate Planning and Probate Law. Ms. Davies is licensed to practice law in North Carolina, South Carolina, Florida, Pennsylvania and the District of Columbia. She received her LL.M. degree in Estate Planning from the University of Miami School of Law, her J.D. degree from Campbell University, Norman Adrian Wiggins School of Law, and her B.S. degree from Pfeiffer University. Ms. Davies' practice areas include estate and trust planning and transfer tax planning for individuals, succession planning for closely-held businesses, and probate and administration of estates. Her professional activities include North Carolina Bar Association (Member: Estate Planning and Fiduciary Law section (Council and Chair of Legislative Committee) and Tax section); Mecklenburg County Bar Association (Member: Estate Planning and Probate section); and Charlotte Estate Planning Council (Member).

DISCLAIMER: *This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.*

North Carolina Uniform Power of Attorney Act: Success through Preparation

Risk Management Practice Guide of Lawyers Mutual

TABLE OF CONTENTS

Introduction	3
Organization and Comments	4
Applicability, Uniformity of Application and Construction, and Effect on Existing Powers of Attorney	5
Definitions and General Provisions	9
Authorities	22
Gifts	25
Optional Statutory Forms	25
Conclusion	27

LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

5020 Weston Parkway, Suite 200, Cary, North Carolina 27513

Post Office Box 1929, Cary, North Carolina 27512-1929

919.677.8900 | 800.662.8843 | 919.677.9641 FAX | www.lawyersmutualnc.com



Are you aware there is a new power of attorney statute in North Carolina effective January 1, 2018? North Carolina attorneys must prepare for its effective date.

“

Success depends upon previous preparation, and without such preparation there is sure to be failure.

– Confucius

All attorneys in North Carolina who prepare, review, construe, accept, or otherwise address any matter related to a power of attorney must obtain knowledge about the North Carolina Uniform Power of Attorney Act and prepare to represent their clients on any matter related to a power of attorney on or after January 1, 2018 in accordance with the Act. A power of attorney is a common form of surrogate decision making that requires familiarity with agency law and the Act and, therefore, North Carolina attorneys from various practice areas must prepare for the effective date of the Act.

North Carolina attorneys who have attended the NCBA CLE titled “Power of Attorney: 2018 North Carolina Uniform Power of Attorney Act” have made similar comments after attending this CLE. Many attendees said they did not give the new statute the seriousness that they should have. Others were glad that they went to this CLE. Many did not realize a review of the new power of attorney statute would require more than a couple CLE hours. Preparation must include a comprehensive review of the Act to understand its nuances and properly apply the Act. This article will introduce you to the Act, discuss some changes to North Carolina law, and discuss some of the nuances of the Act.


INTRODUCTION

The North Carolina Uniform Power of Attorney Act is effective on January 1, 2018. Governor Cooper signed Senate Bill 569, “An Act to Adopt the Uniform Power of Attorney Act in this State,” into law as Session Law 2017-153 on July 20, 2017. Session Law 2017-153 added Chapter 32C to the North Carolina General Statutes for the North Carolina Uniform Power of Attorney Act.

The Uniform Power of Attorney Act (“UPOAA”) establishes a comprehensive legal framework for the creation and use of powers of attorney and furnishes specific guidance to and protections for principals, clarity for agents, and certainty for third parties asked to accept a power of attorney. A major purpose of the UPOAA is to enhance the effectiveness of the power of attorney. Effectiveness is particularly important because the aging population is large and growing rapidly, and older people are disproportionately vulnerable to incapacitating conditions. Another major purpose of the UPOAA is to prevent, identify, and redress the

abuse or misuse of a power of attorney by an agent. The abuse and misuse of powers of attorney are recognized as serious problems. The UPOAA intends to strike a balance by preserving the durable power of attorney as a private form of surrogate decision making while deterring the use of the durable power of attorney as a tool for financial abuse of an incapacitated principal.

The North Carolina Uniform Power of Attorney Act (“NCUPOAA”) is the result of many hours of review and discussion of North Carolina law on powers of attorney and revision of the UPOAA to retain, change, or update North Carolina law. Before its filing at the North Carolina General Assembly, the proposed draft bill was reviewed and commented on by many interested persons and groups from various disciplines with varied perspectives and interests. After its filing, Senate Bill 569 was amended in the Senate and the House as a result of interest in the Bill by Senators, House Members, national groups, and other persons.



The Uniform Power of Attorney Act (“UPOAA”) establishes a comprehensive legal framework for the creation and use of powers of attorney and furnishes specific guidance to and protections for principals, clarity for agents, and certainty for third parties asked to accept a power of attorney.

Preparation must include a comprehensive review of the Act to understand its nuances and properly apply the Act.

Organization and Comments

Organization.

Chapter 32C of the North Carolina General Statutes consists of the following Articles:

Article 1. Definitions and General Provisions

Article 2. Authority

Article 3. Statutory Forms

Article 4. Miscellaneous Provisions

Article 1 contains definitions and general provisions about creation and use of a power of attorney. Most, but not all, of these provisions are default rules. The mandatory rules in this Article may protect the principal, the agent, and the persons asked to rely on the agent's authority.

Article 2 provides default definitions for the various authorities that may be granted to an agent. Certain authorities, referred to as specific authorities, must be granted with express language because of the heightened risk those authorities pose to the principal's property and to the estate plan of the principal.

Article 3 provides the following optional statutory forms:

- G.S. 32C-3-301 North Carolina Statutory Short Form Power of Attorney
- G.S. 32C-3-302 Agent's Certification as to the Validity of Power of Attorney and Agent's Authority
- G.S. 32C-3-303 North Carolina Limited Power of Attorney for Real Property

Article 4 contains provisions concerning the relationship of Chapter 32C to other laws and to existing powers of attorney.

Comments.

Session Law 2017-153 authorizes annotations to be printed in Chapter 32C. These annotations include most of the Official Comments for the UPOAA and all explanatory comments of the drafters of the NCUPPOAA. NC Comments are important for attorneys to identify references in, and portions of, the Official Comments that require a different reading for the NCUPPOAA, identify changes to North Carolina law as a result of the NCUPPOAA, and identify modifications to the UPOAA by the North Carolina drafters for the NCUPPOAA.

Applicability, Uniformity of Application and Construction, and Effect on Existing Powers of Attorney

Applicability.

Chapter 32C applies to all powers of attorney, except for those specifically excluded in (1)-(4) of G.S. 32C-1-103. Chapter 32C does not apply to any of the following: (1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction; (2) a power to make health care decisions; (3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; (4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

Chapter 32C has no effect on Health Care Powers of Attorney and Consents to Health Care for Minors provided for under Article 3 and Article 4 of Chapter 32A. Session Law 2017-153 repeals Articles 1, 2, 2A, 2B, and 5 of Chapter 32A. Articles 3 and 4 of Chapter 32A were not changed.

Uniformity of Application and Construction.

G.S. 32C-4-401 provides that, with regard to uniformity of the power of attorney law among the jurisdictions that enact the UPOAA, consideration may be given to the need to promote uniformity. Section 401 of the UPOAA provides that consideration **shall** be given (emphasis added). This change was made from “shall” to “may” by a North Carolina legislator after the proposed draft bill was delivered to the General Assembly.

Effect on Existing Powers of Attorney.

The effect on existing powers of attorney is provided for in G.S. 32C-4-403. It addresses the applicability of Chapter 32C to a power of attorney and judicial proceedings concerning a power of attorney on, after, and before January 1, 2018 and to rules of construction and presumptions regarding a power of attorney before January 1, 2018, except as otherwise provided in Chapter 32C.

G.S. 32C-4-403 requires sufficient consideration by North Carolina attorneys in order to understand some of the nuances of the NCUPOAA. In G.S. 32C-4-403(a)(1), it clearly states that Chapter 32C

NOTES

Chapter 32C does not apply to any of the following:

- (1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;
- (2) a power to make health care decisions;
- (3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity;
- (4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

applies to a power of attorney **created before, on, or after January 1, 2018** (emphasis added). This rule is consistent with the rule provided in the UPOAA. However, G.S. 32C-4-403(a)(1) further provides that this is the rule unless there is clear indication of a contrary intent in the terms of a power of attorney or unless application of a particular provision of Chapter 32C would substantially impair rights of a party.

intent in the terms of a power of attorney or unless the application of the rule of construction or presumption would substantially impair rights of a party created under North Carolina law in effect prior to January 1, 2018 in which case the rule of construction or presumption does not apply and the superseded rule of construction or presumption applies.

The effect on existing powers of attorney is provided for in G.S. 32C-4-403. It addresses the applicability of Chapter 32C to a power of attorney and judicial proceedings concerning a power of attorney on, after, and before January 1, 2018 and to rules of construction and presumptions regarding a power of attorney before January 1, 2018, except as otherwise provided in Chapter 32C.

G.S. 32C-4-403 requires sufficient consideration by North Carolina attorneys in order to understand some of the nuances of the NCUPPOAA.

With regard to judicial proceedings concerning a power of attorney, G.S. 32C-4-403(a)(2) and (3) provide that Chapter 32C applies to those proceedings **commenced before, on or after January 1, 2018** (emphasis added). However, it also provides this is the rule for proceedings commenced before January 1, 2018 unless the court finds that application of a provision of Chapter 32C would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that the particular provision of Chapter 32C does not apply and the superseded law applies.

Rules of construction and presumptions in Chapter 32C for a power of attorney executed **before January 1, 2018** are addressed in G.S. 32C-4-403(a)(4) (emphasis added). It specifically provides that a rule of construction or presumption provided by Chapter 32C applies to powers of attorney executed before January 1, 2018. However, it also provides that this is the rule unless there is a clear indication of a contrary

G.S. 32C-4-403(b) provides that if a right is acquired, extinguished, or banned upon the expiration of a prescribed period that commenced under the law of North Carolina other than this Chapter 32C before January 1, 2018, that statute continues to apply to the right even if it has been repealed or superseded. Also, G.S. 32C-4-403(c) provides that references to prior statutes in powers of attorney, whether executed on or after the adoption of Chapter 32C, shall be deemed to refer to the corresponding provisions in Chapter 32C unless application of the rule of construction would substantially impair substantial rights of a party.

Finally, G.S. 32C-4-403(d) is applicable to a Statutory Short Form Power of Attorney created in accordance with G.S. 32A-1 before January 1, 2018. It provides that the powers conferred by former G.S. 32A-2 shall apply. This provision retains the description and definition of those powers conferred by G.S. 32A-2 to apply to a former Statutory Short Form Power of Attorney **executed before January 1, 2018**.

A comparison of Section 403 of the UPOAA and G.S. 32C-4-403 along with a brief discussion of the Official and North Carolina Comments below should provide further insight to the reader for Chapter 32C and, more specifically, G.S. 32C-4-403. The comparison strikes the language stricken from the UPOAA and underlines the language added the NCUPOAA by the North Carolina drafters.

(a) Except as otherwise provided in this ~~[act]~~ Chapter, the following apply on January 1, 2018. ~~[the effective date of this [act]]~~:

(1) This Chapter ~~[act]~~ applies to a power of attorney created before, on, or after ~~[the effective date of this [act]]~~, January 1, 2018 unless there is clear indication of a contrary intent in the terms of a power of attorney or unless application of a particular provision of this Chapter would substantially impair rights of a party.

(2) This Chapter ~~[act]~~ applies to a judicial proceeding concerning a power of attorney commenced on or after January 1, 2018. ~~[the effective date of this [act]]~~;

(3) This Chapter ~~[act]~~ applies to a judicial proceeding concerning a power of attorney commenced before January 1, 2018. ~~[the effective date of this [act]]~~ unless the court finds that application of a provision of this Chapter ~~[act]~~ would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that particular provision of this Chapter does not apply and the superseded law applies.;~~and~~

(4) ~~an act done before [the effective date of this [act]] is not affected by this [act].~~ A rule of construction or presumption provided by this Chapter applies to powers of attorney executed before January 1, 2018, unless there is a clear indication of a contrary intent in the terms of a power of attorney or unless the application of the rule of construction or presumption would substantially impair rights of a party created under North Carolina law in effect prior to January 1, 2018, in which case the rule of construction or presumption does not apply and the superseded rule of construction or presumption applies.

(b) If a right is acquired, extinguished, or banned upon the expiration of a prescribed period that commenced under law of this State other than this Chapter before January 1, 2018, that statute continues to apply to the right even if it has been repealed or superseded.

(c) References to prior statutes and powers of attorney, whether executed on or after the adoption of this Chapter shall be deemed to refer to the corresponding provisions this Chapter unless application of the rule of construction would substantially impair substantial rights of a party.

(d) Notwithstanding the provisions of this Chapter, the powers conferred by former G.S. 32A-2 shall apply to a Statutory Short Form Power of Attorney that was created in accordance with former G.S. 32A-1 prior to January 1, 2018.

There is no Official Comment to Section 403 of the UPOAA, but there is a North Carolina Comment to G.S. 32C-4-403. That Comment provides that the addition of the rule of construction and presumption in subdivision (a)(4) is based on language in G.S. 36C-11-1106(b) of the North Carolina Uniform Trust Code and G.S. 31D-6-603(a)(4) of the North Carolina Uniform Powers of Appointment Act. Subsection (b) was added based on G.S. 31D-6-603(b) of the North Carolina Uniform Powers of Appointment Act. In looking at the Official Comment and the North Carolina Comment to G.S. 36C-11-1106 and G.S. 32D-6-603, they provide, *inter alia*, an intent that the Uniform Trust Code and the Uniform Powers of Appointment Act have the widest possible effect within constitutional limits. Those Acts are not fully retroactive. For instance, constitutional limitations preclude application of rules of construction or presumption to alter property rights that became irrevocable prior to the effective date of the Acts. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under these Acts. In summary, the comparison and comments speak to the intent for the NCUPPOAA to have the widest possible effect within constitutional limits.

In light of subsection (c) and understanding that the powers conferred by G.S. 32A-2 may not have a

corresponding provision to the authorities in Article 2 of Chapter 32C, subsection (d) was added to G.S. 32C-4-403. It provides that the powers conferred by former G.S. 32A-2 shall apply to a Statutory Short Form Power of Attorney that was created in accordance with former G.S. 32A-1 ***prior to January 1, 2018*** (*emphasis added*).

G.S. 32A-1 is repealed in Session Law 2017-153. **Therefore, the former Statutory Short Form Power of Attorney in G.S. 32A-1 should not be executed on or after January 1, 2018.** Even if such form were valid, the matters initialed do not have the definitions in G.S. 32A-2 pursuant to G.S. 32C-4-403(d). Therefore, the meaning of the matters initialed by the principal may involve a determination that includes the application of G.S. 32C-4-403(a) (1) and (c), a judicial proceeding to determine any meaning, or an opinion of counsel as to the matter requested by a person asked to accept the power of attorney. Knowing that G.S. 32A-1 is repealed and understanding the need for a determination of any meaning of the matters initialed by the principal, North Carolina **attorneys should avoid executing the Statutory Short Form Power of Attorney in G.S. 32A-1 on or after January 1, 2018.** At the end of this article are directions to access another form available for consideration by North Carolina attorneys to execute with their clients on or after January 1, 2018.

IMPORTANT NOTE:

The former Statutory Short Form Power of Attorney in G.S. 32A-1 should not be executed on or after January 1, 2018.

Definitions and General Provisions

Terminology.

There are sixteen definitions in G.S. 32C-1-102 to apply to Chapter 32C. The term “agent” replaces the term “attorney-in-fact” in an effort to avoid confusion in the lay public about the meaning of the term and the difference between an attorney-in-fact and an attorney at law. See, G.S. 32C-1-102(1). The term “incapacity” replaces the term “disability” in recognition that disability does not necessarily render an individual incapable of property and business management, and the definition of “incapacity” stresses the inability to manage property and business affairs. See, G.S. 32C-1-102(6).

Durability.

The new rule for durability is sometimes referred to as automatic durability or a power of attorney is presumptively durable. G.S. 32C-1-104 provides that a power of attorney is durable unless it expressly provides that it is terminated by the principal’s incapacity. Therefore, a power of attorney will not need to be recorded for it to be durable or, more specifically, a power of attorney will not need to be registered for it to be valid after the incapacity of the principal. Also, an express statement or words in a power of attorney regarding the principal’s intent that the power of attorney is durable or not affected by the principal’s subsequent incapacity is no longer required.

As a practical matter, you may still desire to include an express statement in a power of attorney regarding the principal’s intent for the power of attorney to be unaffected by the principal’s subsequent incapacity should the agent wish to use the power of attorney, for instance, in a jurisdiction that has not yet enacted the UPOAA or still requires an express statement in the

There are sixteen definitions in G.S. 32C-1-102 to apply to Chapter 32C.

power of attorney for it to be durable.

For a practical example related to durability and the effect of Chapter 32C on existing powers of attorney, assume that the principal created a general power of attorney before January 1, 2018. A general power of attorney created before January 1, 2018 would not have an express statement or words regarding the principal’s intent that the power of attorney is durable or not affected by the principal’s subsequent incapacity. Assuming the general power of attorney is silent as to durability and taking into consideration that Chapter 32C applies to a power of attorney created before January 1, 2018 as provided for in G.S. 32C-4-403(a)(1) and (4), a general power of attorney created before January 1, 2018 is automatically durable on January 1, 2018 unless there is a clear indication in the terms of a power of attorney or unless application of this particular provision of Chapter 32C would substantially impair rights of a party.

Finally, a general, nondurable power of attorney created on or after January 1, 2018 must expressly provide in the power of attorney that it is terminated by the principal’s incapacity.

Execution and Acknowledgment.

The requirement that the signature of the principal on a power of attorney must be acknowledged is new to North Carolina law, even though the former Statutory

Short Form Power of Attorney in G.S. 32A-1 provided for acknowledgement. As in the UPOAA, G.S. 32C-1-105 provides that a signature on a power of attorney is presumed genuine when acknowledged.

A power of attorney may be signed by another person who is directed by the principal to sign the principal's name on the power of attorney in the principal's "conscious presence." This provision in G.S. 32C-1-105 is new to North Carolina law. For a signature to be sufficient, the test generally requires that the signing take place within the range of the senses, typically sight or hearing, of the individual who is directed that another sign the individual's name.

G.S. 47-43.1, which pertains to execution of a power of attorney under seal, is changed in Section 2.3 of the Session Law 2017-153. A possible trap for the unwary was the requirement that a power of attorney must be executed under seal for the agent to execute an instrument under seal. The change to G.S. 47-43.1 simply struck the last sentence of that section stating "[f]or such instrument to be executed under seal, the power of attorney must have been executed under seal." Therefore, a power of attorney is not required to be executed under seal and, consistent with this change, the seal is not required for the North Carolina Statutory Short Form Power of Attorney in G.S. 32C-3-301.

As a practical matter, two witnesses and an acknowledgement on a power of attorney may allow a power of attorney to be 'more portable' to, or for use in, other jurisdictions. For instance, South Carolina adopted the South Carolina Uniform Power of

Attorney Act effective as of January 1, 2017, but South Carolina still has a recording requirement. S.C. Code Ann. § 62-8-109(c) provides, as follows:

After the principal's incapacity, an agent may exercise the authority granted unto the agent under the power of attorney only if the power of attorney has been recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. If the principal resides out of State, the power of attorney may be recorded in any county where property of the principal is located at the time the instrument is recorded. The power of attorney may be recorded before or after the principal's incapacity. After the principal's incapacity and before recordation, the agent's authority cannot be exercised.

Generally, a power of attorney is required to have two witnesses along with an acknowledgement to record it in South Carolina in the same manner as a deed. See, S.C. Code Ann. § 30-5-30. Thus, an attorney may want to consider whether a client's North Carolina power of attorney may be needed in South Carolina.

Validity.

G.S. 32C-1-106 addresses validity of a power of attorney (i) when the execution of a power of attorney in North Carolina is before, on, or after the effective date of Chapter 32C and (ii) when the execution of a power of attorney is not in North Carolina. Chapter 32A has no counterpart to this section of Chapter 32C.

As a practical matter, two witnesses and an acknowledgement on a power of attorney may allow a power of attorney to be 'more portable' to, or for use in, other jurisdictions.

For a power of attorney executed in North Carolina on or after January 1, 2018, it is valid if the execution of the power of attorney complies with G.S. 32C-1-105. A power of attorney executed in North Carolina before January 1, 2018 is valid if the execution of the power of attorney complies with the law of North Carolina as it existed at the time of execution. For a power of attorney executed other than in North Carolina, it is valid in North Carolina if, when the power of attorney was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to G.S. 32C-1-107.

By way of illustration, please see the table below.

WHEN EXECUTED	WHERE EXECUTED	VALID IF COMPLIES WITH
On or after January 1, 2018	In North Carolina	G.S. 32C-1-105
Before January 1, 2018	In North Carolina	NC law at time of execution
Before, on or after January 1, 2018	Outside North Carolina	Jurisdiction that determines Meaning and Effect pursuant to G.S. 32C-1-107

As for military powers of attorney, the requirements for their execution are provided for in 10 U.S.C. § 1044b, as amended.

G.S. 32C-1-106(d) provides that a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original, except as otherwise provided by statute other than Chapter 32C. A recording statute requirement is the most cited example when an original power of attorney is or may be required. This rule allows for the convenient use of a photocopy or an electronically transmitted copy of the power of attorney rather than the agent 'carrying around' the original power of attorney.

Here is an example when this convenience may give rise to further consideration by the principal or the North Carolina attorney for the principal. Before January 1, 2018, when a power of attorney was effective upon its execution, the principal may have held the original power of attorney and only arranged for the delivery of the original power of attorney when the principal intended for the agent to act on the agent's authority in the power of attorney. Essentially, on or after January 1, 2018, the principal would hold the original power of attorney and any copies of it under this arrangement for later delivery.

Meaning and Effect.

The meaning and effect of a power of attorney is determined by the law of the jurisdiction expressed in the power of attorney. G.S. 32C-1-107 also provides that if a power of attorney does not indicate the jurisdiction, then the meaning and effect of the power of attorney shall be determined by the law of the jurisdiction in which the power of attorney was executed.

By way of illustration, please see the table below if the power of attorney is executed outside of North Carolina.

WHERE EXECUTED	MEANING AND EFFECT IN POWER OF ATTORNEY	VALID IF COMPLIES WITH
Outside North Carolina	North Carolina	G.S. 32C-1-105
Outside North Carolina	None or silent	Law of the jurisdiction in which the power of attorney was executed

As for military powers of attorney, the requirements for their execution are provided for in 10 U.S.C. § 1044b, as amended.

By way of example, if the power of attorney is prepared in accordance with Chapter 32C for the client who resides in North Carolina, the power of attorney does not include a meaning and effect provision or is silent as to its meaning and effect, and the power of attorney is executed by the client while the client is traveling outside North Carolina, the power of attorney is valid if its execution complies with the law of the jurisdiction in which the power of attorney was executed.

Taking this example one step further for specificity, if this power of attorney is simply executed by the client at the client's business office a few miles away in South Carolina, sections 62-8-105, 62-8-106, and 62-8-107 of S.C. Code Ann. would require that the power of attorney be signed by the principal (or in the principal's presence by another individual as directed by the principal to sign the principal's name), attested with the same formality and with the same requirements as to witnesses as a will in South Carolina, and acknowledged or proved pursuant to S.C. Code Ann. § 30-5-30 (discussed above) to be a valid power of attorney. The same requirements regarding witnesses to a will in South Carolina would require that the power of attorney be signed by at least two individuals each of whom witnessed either the signing or the principal's acknowledgment of the signature or of the will. See, S.C. Code Ann. § 62-2-502, for the execution requirements of a will in South Carolina. But see, S.C. Code Ann. § 62-2-505, for choice of law as to execution of a will if its execution complies with the law at the time of execution of the place where the testator is domiciled at the time of execution if this choice of law provision is intended to be applicable or is applicable here. Simply stated, a meaning and effect provision expressed in this power of attorney as North Carolina would allow the validity of the power of attorney executed in South Carolina to be determined under G.S. 32C-1-106 for its execution in accordance with G.S. 32C-1-105.

North Carolina is the jurisdiction expressed, for meaning and effect, in the North Carolina Statutory Short Form Power of Attorney provided for in G.S. 32C-3-301. Therefore, as provided for in G.S. 32C-1-106, the North Carolina Statutory Short Form Power of Attorney executed in North Carolina or executed other than in North Carolina is valid if its execution complies with G.S. 32C-1-105.

Nomination of Guardian.

G.S. 32C-1-108(a) is similar to G.S. 32A 10(b) in that a principal may nominate a guardian of the estate, guardian of the person, or general guardian for the principal in a power of attorney for consideration by the clerk of superior court if a protective proceeding for the principal's estate or person begins after the principal executes the power of attorney. The clerk shall make the appointment in accordance with the principal's most recent nomination except for good cause shown or disqualification. G.S. 32C-1-108(a). For clarification, the North Carolina drafters added that the nomination of a guardian of the person in a health care power of attorney controls over any such nomination in a power of attorney.

Similar to the first sentence of G.S. 32A 10(a), the first sentence of G.S. 32C-1-108(b) provides generally that if the clerk appoints a guardian or other fiduciary for the principal, the agent is accountable to that guardian or fiduciary as well as to the principal.

Last, but certainly not least for this section, is the last sentence of G.S. 32C-1-108(b). With all of the similarities of G.S. 32C-1-108 to G.S. 32A 10, the last sentence of G.S. 32C-1-108(b) gave rise to much discussion. The North Carolina drafters modified the UPOAA here by substituting the words "in accordance with this Chapter" in place of the words "by the court." This change was made to take into account the power to terminate a power of attorney and the authority of an agent (i) by a guardian of the estate or a general guardian pursuant to G.S. 32C 1 110(a)(7) and (b) (5) which modified Section 110 of the UPOAA in this regard and (ii) by the clerk of superior court who

also has the authority to limit or suspend authority of an agent pursuant to G.S. 32C 1 116(a)(2) where a guardian of the estate or general guardian has been appointed. Unfortunately, the words "by the court" were not struck as intended by the North Carolina drafters and, therefore, there are pending corrections to be addressed by technical corrections to the NCUPOAA. The intent of the NC drafters is to allow the clerk to terminate a power of attorney or to limit, suspend or terminate the authority of an agent where a guardian of the estate or a general guardian has been appointed and to allow a guardian of the principal's estate or general guardian to terminate the power of attorney and/or to terminate an agent's authority.

When power of attorney effective.

G.S. 32C-1-109(a) provides that a power of attorney is effective when executed. Further, it provides that the principal may express in the power of attorney that the power of attorney becomes effective at a future date or upon the occurrence of a future event or contingency to create what is commonly referred to as a springing or contingent power of attorney. G.S. 32C-1-109 is more comprehensive than G.S. 32A 8. One alternative in G.S. 32A 8 is that the power of attorney shall become effective after the principal becomes incapacitated or mentally incompetent.

Subsection (b) of G.S. 32C-1-109 is new to North Carolina law, and it provides that, in the power of attorney, the principal may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

For clarification, the North Carolina drafters added that the nomination of a guardian of the person in a health care power of attorney controls over any such nomination in a power of attorney.

If a power of attorney becomes effective upon incapacity (and no person is authorized by the principal in the power of attorney to determine the principal's capacity or such person is unable or unwilling to make the determination), then the power of attorney becomes effective upon a determination in a writing or other record in one of two manners pursuant to G.S. 32C-1-109(c).

First, the power of attorney becomes effective upon determination in a writing or other record, after personal examination of the principal, by two individuals who are either a physician, a licensed psychologist, or both, that the principal is incapacitated within the meaning of G.S. 32C-1-102(6)a. G.S. 32C-1-102(6) a provides that the principal does not have capacity if the principal has the inability to manage property or business affairs because the principal has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance. Unlike the UPOAA, G.S. 32C-1-109(c)(1) requires two individuals who are physicians, licensed psychologists or both, rather than only one, to determine the principal's incapacity. Also, before a determination of the principal's incapacity is made by such individuals, a personal examination of the principal by such individuals is required.

Second, the power of attorney becomes effective upon determination in a writing or other record by an attorney-at-law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of G.S. 32C-1-102(6)b. G.S. 32C-1-102(6)b provides that the principal does not have capacity if the principal has the inability to manage property or business affairs because the principal is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return. These references to the definition of incapacity take into consideration other pending corrections to be addressed by technical corrections to the NC UPOAA. Incapacity is defined in G.S. 32C-1-102(6)a. and b., not in G.S. 32C-

1-102(5)a. and b. as incorrectly referred to in G.S. 32C-1-109(c) (and in G.S. 32C-1-116(f)).

The North Carolina drafters added a sentence to the end of G.S. 32C-1-109(c) to clarify that, when a power of attorney becomes effective under subsection (c), the effectiveness of the power of attorney continues after the subsequent capacity of the principal unless the power of attorney or the agent's authority is terminated pursuant to G.S. 32C 1 110(a) or (b).

Termination.

G.S. 32C-1-110 addresses when a power of attorney terminates and when the agent's authority terminates. Unfortunately, at the legislature, the name of this section was changed from "Termination of power of attorney or agent's authority" to "Termination of power of attorney," which causes confusion when discussing this section because subsection (a) of G.S. 32C-1-110

NOTES

A POWER OF ATTORNEY TERMINATES

1. when the principal dies;
2. the principal becomes incapacitated if the power of attorney is not durable;
3. the principal revokes the power of attorney;
4. the power of attorney provides that it terminates;
5. the purpose of the power of attorney is accomplished;
6. the principal revokes the authority of the agent or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent under the power of attorney;
7. or a guardian of the estate of the principal or general guardian terminates the power of attorney.

addresses termination of a power of attorney while subsection (b) addresses termination of an agent's authority. To avoid that confusion, the addition of "or agent's authority" to the end of the title for this section is another pending correction to be addressed by technical corrections to the NCUPOAA.

G.S. 32C-1-110(a) provides that a power of attorney terminates when the principal dies; the principal becomes incapacitated if the power of attorney is not durable; the principal revokes the power of attorney; the power of attorney provides that it terminates; the purpose of the power of attorney is accomplished; the principal revokes the authority of the agent or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent under the power of attorney; or a guardian of the estate of the principal or general guardian terminates the power of attorney.

G.S. 32C-1-110(b) provides that the authority of an agent terminates when the principal revokes the agent's authority in writing; the agent is removed, dies, becomes incapacitated, or resigns; the court enters a decree of divorce between the principal and the agent (unless the power of attorney otherwise provides); the power of attorney terminates; or a guardian of the estate of the principal or general guardian terminates the agent's authority.

The North Carolina drafters added G.S. 32C-1-110(a) (7), which was not provided for in the UPOAA, and it provides that a guardian of the principal's estate or general guardian may terminate the power of attorney. This addition provides consistency with G.S. 32A-10(a) that provides a guardian of the estate has the power

to revoke a power of attorney. Consistent with that change is the addition that provides for a guardian of the principal's estate or general guardian to terminate an agent's authority. G.S. 32C-1-110(b)(5). Also, with regard to the termination of an agent's authority, a writing requirement for the revocation by the principal of an agent's authority is added to G.S. 32C-1-110(b) (2), which is not provided for in the UPOAA.

There are four subsections of G.S. 32C-1-110 that are new to statutory power of attorney law in North Carolina and may simply offer clarity related to termination. First, the mere lapse of time after the execution of a power of attorney does not terminate an agent's authority unless the power of attorney otherwise provides and, of course, unless the agent's authority is otherwise terminated. G.S. 32C-1-110(c). Second, termination of an agent's authority or termination of a power of attorney is not effective as to the agent or another person, who without actual knowledge of the termination, acts in good faith under the power of attorney and such acts are binding on the principal or the principal's successors in interest unless the act is otherwise invalid or unenforceable. G.S. 32C-1-110(d). Third and similar to the second, incapacity of the principal of a nondurable power of attorney does not revoke or terminate the power of attorney as to the agent or another person, who without actual knowledge of the incapacity, acts in good faith under the power of attorney and such acts are binding on the principal or the principal's successors in interest unless the act is otherwise invalid or unenforceable. G.S. 32C-1-110(e). The last of these four subsections provides that the execution of a power of attorney does not revoke a previous power of attorney executed by the principal unless the subsequent power of attorney

There are four subsections of G.S. 32C-1-110 that are new to statutory power of attorney law in North Carolina and may simply offer clarity related to termination.

provides that the previous power of attorney is revoked or all other powers of attorney are revoked. G.S. 32C-1-110(f).

With regard to subsection (g) of G.S. 32C-1-110, it is not part of the UPOAA. It is familiar, however, because it is similar to G.S. 32A-13 providing the methods to revoke a power of attorney, with a couple of modifications. One modification is to provide that the proof of service on the agent must be made under Rule 5 rather than Rule 4 of the North Carolina Rules of Civil Procedure when the power of attorney is registered and revoked by the registration of an instrument of revocation. G.S. 32C-1-110(g)(1). The other modification is to eliminate the requirement of delivery of the revocatory instrument to the agent when the power of attorney is not registered. G.S. 32C-1-110(g)(2).

Co-agents and successor agents.

G.S. 32C-1-111 is new to North Carolina law or, more specifically, did not have a counterpart in Chapter 32A. With the statutory authority in G.S. 32C-1-111(a), a principal may still designate two or more persons to act as co-agents. Also, a principal may expressly require in the power of attorney that co-agents act jointly. There is a default provision, however, in subsection (a) of G.S. 32C-1-111. Each agent may exercise a co-agent's authority independently unless the power of attorney expressly requires an agent to act jointly. To clarify this default rule, the North Carolina drafters added that a co-agent may exercise the authority to act independently without the knowledge, consent or joinder of any other co-agent or co-agents.

Under existing law, the death or loss of capacity of one, two, or more agents authorized to act jointly terminates the authority of the survivor. See Narron, *Powers of Attorney: Scope and Practical Applications* (July, 2004), (citing Restatement (2d) of Agency, §123 (1958)). One of the most frequently encountered issues with co-agents under existing law arises when one of the co-agents dies or becomes incapacitated.

If the terms of the power of attorney do not address the death or incapacity of a co-agent, a default rule was added to G.S. 32C-1-111(a) by North Carolina drafters. The default rule is the remaining agent or co-agents may continue to act as agent if any one or more co-agents resigns, dies, becomes incapacitated, or otherwise fails to act.

A principal may still designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. G.S. 32C-1-111(a). Further, in a power of attorney, a principal may authorize an agent or other person designated by name, office or function to designate one or more successor agents. Subsection (b) of G.S. 32C-1-111 states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. With this default provision, a principal may wish to consider whether a successor agent is an appropriate person to exercise all authorities given to the original agent (e.g., the authority to make gifts).

Liability, or lack thereof, for a co-agent is addressed in subsections (c) and (d) of G.S. 32C-1-111. The default rule is an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. However, if an agent has actual knowledge of a breach or imminent breach of fiduciary duty, the agent must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Further, if an agent fails to notify the principal or to take action to safeguard the princi-

The default rule is the remaining agent or co-agents may continue to act as agent if any one or more co-agents resigns, dies, becomes incapacitated, or otherwise fails to act.

pal's best interest, the agent is liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification or taken such action.

Compensation and reimbursement.

G.S. 32C-1-112 is generally consistent with North Carolina law and does not specifically follow Section 112 of the UPOAA. G.S. 32C-1-112(a) allows the principal, in the terms of a power of attorney, to specify the amount of compensation or the way the compensation is to be determined for an agent and, if so specified in the power of attorney, the agent is entitled to the compensation specified therein. Also, the North Carolina drafters brought forward G.S. 32A-11(c) so that when the power of attorney does not specify the amount of compensation or the way the compensation is to be determined, the agent is entitled to receive reasonable compensation as determined by the clerk of superior court in accordance with G.S. 32-59 after considering the factors set forth in G.S. 32-54(b). With regard to reimbursement for expenses, and unless the power of attorney provides otherwise, an agent is entitled to reimbursement for expenses properly incurred on behalf of the principal.

Agent's Acceptance.

G.S. 32C-1-113 provides that 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 unless otherwise provided in the power of attorney. This default rule is important because an agent's acceptance is a reference point for commencement of the agency relationship and the imposition of the agent's duties in G.S. 32C-1-114.

An agent's acceptance is not specifically addressed in Chapter 32A, but G.S. 32C-1-113 is similar to exist-

ing North Carolina law. In *State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005), the court stated that "[a]gency is a relationship which cannot be forced on a person in invitum." Also, in *Holleman v. Aiken*, 193 N.C. App. 484, 504-505, 668 S.E.2d 579, 592 (2008), the court provides that "[a]n agency relationship arises when parties manifest consent that one shall act on behalf of the other and subject to his control."

Agent's Duties.

G.S. 32C-1-114(a) provides three mandatory duties of an agent when exercising a power under the power of attorney. G.S. 32C-1-114(b) provides seven default duties of an agent when exercising a power under the power of attorney, but it also provides that an agent who accepts appointment does not have an affirmative duty to exercise the powers or to continue to exercise the powers granted to the agent by the power of attorney.

The three mandatory duties of an agent when exercising a power under a power of attorney require an agent (1) to act in accordance with the reasonable expectations of the principal to the extent actually known by the agent and, otherwise, in the principal's best interest; (2) to act in good faith; and (3) to act only within the scope of authority granted in the power of attorney. G.S. 32C-1-114(a)(1)-(3).

The seven default duties of an agent require an agent (1) to act loyally for the benefit of the principal; (2) to act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the best interest of the principal; (3) to act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; (4) to keep a record of all receipts, disbursements, and transactions made on behalf of the principal; (5) to cooperate with a person that has authority to make health care decisions for the principal to carry out the reasonable expectations of the principal to the extent actually known by the agent

or, otherwise, act in the best interest of the principal; (6) to attempt to preserve the estate plan of the principal, to the extent actually known by the agent, if preserving the plan is consistent with the best interest of the principal based on all relevant factors, including the value and nature of the principal's property, the principal's foreseeable obligations and need for maintenance, minimization of taxes (including income, estate, inheritance, generation-skipping transfer, and gift taxes), and eligibility for a benefit, a program, or assistance under a statute or regulation; and (7) to account to the principal or a person designated by the principal in the power of attorney. G.S. 32C-1-114(b)(1)-(7). As default duties, the principal may exclude one or more or all of these default duties in the power of attorney.

In addition to addressing the duties of an agent, this section also provides some standards to protect an agent from liability. An agent is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan if an agent acts in good faith when exercising power under the power of attorney. G.S. 32C-1-114(c). Also, an act by an agent that is in good faith for the best interest of the principal is not voidable, and the agent is not liable solely because the agent also benefits from the act or has an individual interest or a conflicting interest in relation to the principal's property or affairs. G.S. 32C-1-114(d). Further, an agent is not liable for the decline in value of the principal's property absent a breach of duty by the agent to the principal. G.S. 32C-1-114(f).

When an agent exercises an authority to delegate to another person the authority granted to the agent by the principal or an agent engages another person on behalf of the principal, the agent must exercise care, competence, and diligence in selecting and monitoring the person. If an agent exercises such care, competence, and diligence, an agent is not liable for an act, error of judgment, or default of that person. G.S. 32C-1-114(g).

G.S. 32C-1-114(h) addresses disclosure of receipts, disbursements, and transactions conducted on behalf of

NOTES

7 summarized default duties of an agent

- (1) to act loyally for the benefit of the principal;
- (2) to act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the best interest of the principal;
- (3) to act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- (4) to keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) to cooperate with a person that has authority to make health care decisions for the principal to carry out the reasonable expectations of the principal to the extent actually known by the agent or, otherwise, act in the best interest of the principal;
- (6) to attempt to preserve the estate plan of the principal, to the extent actually known by the agent, if preserving the plan is consistent with the best interest of the principal based on all relevant factors; and
- (7) to account to the principal or a person designated by the principal in the power of attorney.

the principal. The default rule is 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 of the estate, general guardian, or upon the death of the principal, by the personal representative or successor in interest of the principal's estate. As a default rule, this is the rule unless the principal otherwise provides in the power of attorney. The North Carolina drafters did not retain language from the UPOAA that would allow another fiduciary acting for the principal or a government agency to request this disclosure from an agent.

It is important to revisit another default rule discussed above and provided for in G.S. 32C-1-114(b)(7), which

was added to the default rules at the General Assembly. The default rule provides that the agent has a duty to account to the principal or a person designated by the principal in the power of attorney. Comparing these two default rules or duties when applicable during the principal's lifetime, one is to account to the principal (or the persons, if any, designated by the principal in the power of attorney) and the other is to not disclosure receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian of the estate or general guardian. Therefore, unless the principal provides otherwise in the power of attorney, an agent must account to the principal in accordance with G.S. 32C-1-114(b)(7). As for a person designated by the principal in a power of attorney, the intent of a designee is to address the possible desire of a principal to have the agent account to a designated person if the principal becomes incapacitated. This language, however, is applicable to appoint a designee if the principal is incapacitated or not. The principal may want an account from the agent delivered to a designee in the power of attorney even though the principal has capacity. This language allowing a designee does not intend to require a person to be designated by the principal. With the addition of G.S. 32C-1-114(b)(7) and assuming that the principal does not otherwise change the default rules in the power of attorney regarding accounts and disclosure, a principal would not need to request disclosure of the receipts and disbursements because the principal would receive an account from the agent. Finally, if the principal does not want to require the agent to account to the principal, but simply wants to allow the agent to disclose to the principal upon the principal's request, then the principal must provide in the power of attorney that G.S. 32C-1-114(b)(7) does not apply.

Exoneration of Agent.

G.S. 32C-1-115 allows for a provision in a power of attorney relieving an agent of liability for breach of duty that is binding on the principal and the principal's successors

in interest, except to the extent the provision relieves the agent of liability for breach of duty committed in bad faith or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.

This section is new to North Carolina law for powers of attorney. In G.S. 36C-10-1008 of the North Carolina Uniform Trust Code, however, the terms of a trust that relieve a trustee for breach of trust are unenforceable to the extent such terms relieve the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or interests of the beneficiaries. For North Carolina power of attorney law, the North Carolina drafters changed the standard in Section 115 of the UPOAA under which an exculpatory provision would not apply to bad faith (rather than dishonesty, with an improper motive) so that it was consistent with G.S. 36C-10-1008.

Further, consistent with the exculpatory provision in G.S. 36C-10-1008, the North Carolina drafters excluded Section 115(2) of the UPOAA which provides that an exculpatory provision would not apply if it was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal. With this exclusion, an agent may customarily rely on an exculpatory provision. And, a legitimate limitation on liability provided in an exculpatory provision of a power of attorney is not further complicated by the language of Section 115(2) of the UPOAA.

Judicial Relief.

Judicial relief is an important addition to North Carolina law. G.S. 32C-1-116, which only a portion of is a part of the Uniform Power of Attorney Act, addresses jurisdiction and the rules and procedures by which a proceeding may be brought under Chapter 32C. These rules and procedures are similar to the rules and procedures set forth for bringing an action involving an estate under Article 2 of Chapter 28A or an action involving a trust under Article 2 of Chapter 36C of the North Carolina

General Statutes. Subsection (a) of G.S. 32C-1-116 provides the proceedings in which the jurisdiction of the clerk of superior court is exclusive except for those proceedings in subdivision (4) of subsection (a), the jurisdiction for which is concurrent. G.S. 32C-1-116(b) lists the actions for which the clerk does not have jurisdiction, G.S. 32C-1-116(c) addresses the persons who may bring a proceeding under subsection (a), and G.S. 32C-1-116(d) provides for the venue of a proceeding under subsection (a). G.S. 32C-1-116(e) provides that nothing in Chapter 32C affects the rights of a person to file an action for declaratory relief, and G.S. 32C-1-116(g) provides for an appeal of an order of the clerk of superior court in a proceeding commenced under subsection (a). Finally, if a petition is filed under G.S. 32C-1-116(a) and the principal files a motion pursuant to G.S. 32C-1-116(f), the clerk must dismiss the petition unless the clerk determines that the principal is incapacitated within the meaning of G.S. 32C-1-102(6).

As one example of the importance of judicial relief, a proceeding may be brought to compel an accounting by the agent pursuant to G.S. 32C-1-116(a) by a person authorized to do so in G.S. 32C-1-116(c). This accounting may simply dispel any concerns of the person who brought the proceeding and thereby avoid the potential for a guardianship proceeding. If, in this example, the principal makes a motion to dismiss the petition to compel an accounting and the clerk finds that the principal has capacity as defined in G.S. 32C-1-102(6), the clerk must dismiss the petition.

Agent's liability.

Section 117 of the UPOAA was replaced by G.S. 32C-1-117, and there is no counterpart in former Chapter 32A. It is a breach of fiduciary duty for an agent to violate Chapter 32C. G.S. 32C-1-117(a). The remedies for a breach that has occurred or may occur are listed in G.S. 32C-1-117(b), and the court, for good cause shown, may relieve an agent from liability for any breach in accordance with G.S. 32C-1-117(c).

These provisions for breach of fiduciary duty under Chapter 32C are similar to those provisions for breach of trust provided for under G.S. 36C-10-1001.

The damages for breach of fiduciary duty under Chapter 32C in G.S. 32C-1-117(d) and (e) are similar to the damages for breach of trust provided for under G.S. 36C-10-1002(a) and G.S. 36C-10-1002(b), respectively. At the legislature, G.S. 32C-1-117(d)(1) and (2) were modified to strike the terms "greater of" and the term "or" was replaced with "and."

The liability of an agent for any profits made by the agent arising from dealing with property subject to the power of attorney, and the lack of liability of an agent for a loss or depreciation in value of the property subject to the power of attorney or for not having made a profit, even absent a breach of fiduciary duty, in G.S. 32C-1-117 are similar to the liability, or lack thereof, in the absence of breach provided under G.S. 36C-10-1003(a) and G.S. 36C-10-1003(b), respectively.

G.S. 32C-1-117(h) allowing the court to award costs and expenses, including reasonable attorney fees, as provided in G.S. 6-21(2) in a judicial proceeding involving a claim for breach of a fiduciary duty under a power of attorney is similar to G.S. 36C-10-1004. As provided in G.S. 32C-1-115 discussed above, the principal may expressly provide exoneration of

As one example of the importance of judicial relief, a proceeding may be brought to compel an accounting by the agent by a person authorized to do so. This accounting may simply dispel any concerns of the person who brought the proceeding and thereby avoid the potential for a guardianship proceeding.

an agent in a power of attorney, which may relieve an agent of liability for a breach of fiduciary duty, except to the extent the exoneration provision relieves the agent of liability for breach of duty committed in bad faith or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.

Agent's resignation; notice.

G.S. 32C-1-118 provides that unless the power of attorney expresses a different method for an agent's resignation, an agent may resign by giving written notice of resignation to the following: (1) to the principal if the principal is not incapacitated, and (2) if the principal is incapacitated, to (i) the guardian of the principal's estate, the guardian of the principal's person, or general guardian if one has been appointed, and (ii) any co-agent or, if none, the successor agent next designated.

This resignation is required to be in writing, which is an addition made to Section 118 of the UPOAA by the North Carolina drafters. Section 118(2) of the UPOAA is not included in G.S. 32C-1-118, allows notice be given to the principal's caretaker, another person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal when notice could not be given to a guardian, a co-agent, or successor agent.

Acceptance of and reliance upon power of attorney.

G.S. 32C-1-119 protects persons who in good faith accept an acknowledged or unacknowledged power of attorney. There is an interplay among the principal, the agent, and the person asked to accept the power of attorney. This interplay is a fundamental goal of the NCUPOAA.

For instance, with the requirement in G.S. 32C-1-105 that the principal's signature on a power of attorney must be acknowledged, it places the burden on the principal rather than the person accepting the power of

attorney because G.S. 32C-1-119(b) allows a person who in good faith accepts an acknowledged power of attorney without knowledge that the signature is not genuine to rely upon the presumption under G.S. 32C-1-105 that the signature is genuine.

To encourage more acceptance of an acknowledged or unacknowledged power of attorney, G.S. 32C-1-119(c) provides the person asked to accept a power of attorney with a good faith standard. The person may request a certification from an agent, but is not required to do so in order to avail itself of the protections of its good faith acceptance. Further, under G.S. 32C-1-119(d)(2) and (3), a person may request an English translation of a power of attorney and an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

Liability for refusal to accept acknowledged power of attorney.

G.S. 32C-1-120 promotes the acceptance or enhances the effectiveness of powers of attorney. It provides safe harbors for the refusal of a power of attorney by a person who is asked to accept a power of attorney. For instance, G.S. 32C-1-120(a) provides that a person who is asked to accept an unacknowledged power of attorney is not required to accept it, and is not liable for refusing to accept it. Also, a person is not required to accept an acknowledged power of attorney if any of the circumstances listed in G.S. 32C-1-120(c)(1)-(9) exist. Further, a person is not required to do any of those actions described in G.S. 32C-1-120(d)(1)-(3).

G.S. 32C-1-120(b)(1) provides that a person asked to accept a power of attorney has no later than seven days after presentation of an acknowledged power of attorney for acceptance to (i) accept it, (ii) refuse to accept it pursuant to G.S. 32C-1-120(c) and (d), or (iii) request a certification, a translation, or an opinion of counsel pursuant to G.S. 32C-1-119(d). If a person

requests a certification, a translation, or an opinion of counsel, G.S. 32C-1-119(b)(2) provides that the person shall either (i) accept it or (ii) refuse to accept the power of attorney pursuant to G.S. 32C-1-120(c) and (d) within five business days after receipt of the requested item in reasonably satisfactory form. Finally, G.S. 32C-1-120(b)(3) directs that a person may not require an additional or different form of power of attorney if the power of attorney presented reasonably appears to authorize the agent to conduct the business the agent desires to conduct. This timetable is particularly crucial for attorneys who will be using a power of attorney as part of a transaction.

There are still enforcement mechanisms in G.S. 32C-1-120(e) when a person refuses in violation of G.S. 32C-1-120 to accept an acknowledged power of attorney. Having said that, however, G.S. 32C-1-120(g), (h), and (i) provide, respectively that, nothing in Chapter 32C amends or modifies the rights of banks and other depository institutions to terminate any deposit account in accordance with applicable law, a person who is presented with a power of attorney is not deemed to have unreasonably refused to accept the power of attorney solely because of the person's failure to accept the power of attorney within seven business days, and a person who promptly requests a certification, a translation, or an opinion of counsel is not deemed to have unreasonably refused to accept a power of attorney prior to receipt of the requested items in reasonably acceptable form.

Chapter 32C is new to the principal, the agent, and the person asked to accept a power of attorney, just as it is new to North Carolina attorneys. Without acceptance of a power of attorney by the person who is asked to accept it, the agent is unable to act for the principal. Similar to when an attorney is asked to opine to the terms of an instrument, a person asked to accept a power of attorney desires time to review the power of attorney. The allowance of that time is expressly provided for in G.S. 32C-1-120 and, therefore, it is unreasonable for the principal or the agent to expect a person who is asked to accept a power of attorney to do so immediately upon

its presentation, without review, or without the requested items in a reasonably acceptable form. When advising the principal or an agent on the agent's presentation and use of a power of attorney, consideration should be given to the allowance of time expressed in G.S. 32C-1-120.

Principles of law and equity.

G.S. 32C-1-121 provides that the common law, including the common law of agency, and principles of law and equity supplement Chapter 32C, except to the extent modified by Chapter 32C or another provision of the North Carolina General Statutes. This section does not have a counterpart in Chapter 32A.

Laws applicable to financial institutions and other entities.

G.S. 32C-1-122 makes it clear that Chapter 32C does not supersede any other applicable law to financial institutions or other entities, and the other law controls if inconsistent with the provisions of this Chapter.

Remedies under other law.

G.S. 32C-1-123 confirms that the remedies under Chapter 32C are not exclusive and do not abrogate any right or remedy under North Carolina law, other than Chapter 32C.

Chapter 32C is new to the principal, the agent, and the person asked to accept a power of attorney, just as it is new to North Carolina attorneys. Without acceptance of a power of attorney by the person who is asked to accept it, the agent is unable to act for the principal.

Authorities

A principal grants authorities to an agent in a power of attorney. The authorities, referred to as general authorities, are defined in G.S. 32C-2-204 through G.S. 32C-2-217, and the descriptive terms for the general authorities are as follows:

DESCRIPTIVE TERM	SECTION FOR AUTHORITY IN DESCRIPTION TERM
Real property	G.S. 32C-2-204
Tangible personal property	G.S. 32C-2-205
Stocks and bonds	G.S. 32C-2-206
Commodities and options	G.S. 32C-2-207
Banks and other financial institutions	G.S. 32C-2-208
Operation of entity	G.S. 32C-2-209
Insurance and annuities	G.S. 32C-2-210
Estates, trusts, and other beneficial interests	G.S. 32C-2-211
Claims and litigation	G.S. 32C-2-212
Personal and family maintenance	G.S. 32C-2-213
Benefits from governmental programs or civil or military service	G.S. 32C-2-214
Retirement plans	G.S. 32C-2-215
Taxes	G.S. 32C-2-216
Gifts authorized by general authority	G.S. 32C-2-217

An agent has the general authority if a power of attorney refers to such authority by its descriptive term for the subject or cites the section in which the authority is described, and the reference to the descriptive term or citation for a general authority in a power of attorney incorporates the entire section as if it were set out in full in the power of attorney. G.S. 32C-2-202. Further, G.S. 32C-2-203 describes authorities, incidental to the general authorities, which are authorities often necessary for the implementation or exercise of the general authorities. A principal may modify the grant of a general authority or an incidental authority in the power of attorney.

Other authorities, referred to as specific authorities, require express language in a power of attorney. The express language is required for these “hot powers” because of the risk those authorities pose to the principal’s property and estate plan by an agent. This mandate of express language for “hot powers” may help deter, detect, and redress abuse by an agent who may exceed the scope of authority provided by a power of attorney.

In G.S. 32C-2-201(a)(1), the specific authorities that a principal may expressly grant an agent in a power of attorney include the following authorities:

- to make a gift;
- create or change rights of survivorship;
- create or change a beneficiary designation;
- delegate authority granted under the power of attorney;
- waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- exercise fiduciary powers that the principal has authority to delegate;
- renounce or disclaim property, including power of appointment; and
- exercise authority over the content of electronic communication, as defined in 18 U.S.C. § 2510(12), sent or received by the principal.

G.S. 32C-2-201(a)(2) modifies Section 201 of the UPOAA by deleting an express grant of authority to create, amend, revoke or terminate an inter vivos trust because such matters are already governed by G.S. 36C-6-602.1 and G.S. 36C-4-411(a)(1) and by adding that a principal may expressly grant an agent in a power of attorney or in the terms of the trust to exercise the power of the principal as settlor of a revocable trust in accordance with G.S. 36C-6-602.1 and exercise the powers of the principal as settlor of an irrevocable trust to consent to the trust's modification or termination in accordance with G.S. 36C-4-411(a)(1).

The drafters of the NCUPOAA moved a provision from Section 217 (Gifts) of the UPOAA to G.S. 32C-2-201(b) to make this provision applicable not only to the authority to make gifts but to all the specific authorities enumerated in G.S. 32C-2-201(a). G.S. 32C-2-201(b) requires that any specific authority granted to an agent is exercisable by the agent only if the agent determines the exercise is consistent with the objectives of the principal if actually known by the agent and, if unknown, only if the agent determines the exercise is consistent with the best interest of the principal based on all of the relevant

factors. The relevant factors described in G.S. 32C-2-201(b)(1) through (6) are substantially similar to those the clerk of superior court were required to consider in authorizing a gift by court order pursuant to Article 2B of Chapter 32A, and the factors are (1) the value and nature of the property of the principal; (2) the foreseeable obligations and need for maintenance of the principal; (3) minimization of taxes (including income, estate, inheritance, generation-skipping transfer, and gift taxes); (4) eligibility for a benefit, a program, or assistance under a statute or regulation; (5) the personal history of the principal of making or joining in making gifts; and (6) the existing estate plan of the principal.

There is a default limitation on the authority of an agent. This default limitation is applicable to any agent and to all acts or specific authorities described in G.S. 32C-2-201(a). In G.S. 32C-2-201(c), an agent may not exercise authority under a power of attorney to create an interest in the principal's property by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise in the agent or an individual to whom the agent owes a legal obligation of support. As a default provision, the principal may change this limitation for an agent or an act or authority.

Certain acts authorized by the court are provided for in G.S. 32C-2-219. This section is not in the UPOAA and, therefore, is unique to North Carolina law. If an agent under a power of attorney does not have the authority to do an act, the agent may petition the court for authority to do the act described therein if reasonable under the circumstances. G.S. 32C-2-219 does not apply to the authority of an agent to make gifts pursuant to G.S. 32C-2-218 discussed below.

Certain acts authorized by the court are provided for in G.S. 32C-2-219. This section is not in the UPOAA and, therefore, is unique to North Carolina law.

Gifts

Gifts authorized by general authority in G.S. 32C-2-217 applies when the power of attorney grants general authority with respect to gifts. An agent authorized to make gifts by general authority allows the agent to make gifts of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, to or for the benefit of an individual in an amount not to exceed the greater of (i) the amount determined to be in accordance with the history of making or joining in the making of gifts by the principal or (ii) the annual dollar limitation of the federal gift tax exclusion under section 2503(b) of the Internal Revenue Code (without regard to whether the federal gift tax exclusion applies to the gift) or an amount per donee not to exceed twice the annual federal gift tax exclusion limit if the principal's spouse agrees to consent to the split gifts pursuant to section 2503. Also, an agent with the general authority to make gifts may consent, pursuant to section 2503, to splitting of a gift made by the principal's spouse with respect to gifts described in (i) and (ii) herein. G.S. 32C-2-217(b)(2).

An agent authorized to make gifts by general authority also allows the agent to make gifts of any of the principal's property to any organization described in sections 170(c) and 2522(a) of the Internal Revenue Code in accordance with the history of making or joining in the making of gifts by the principal. G.S. 32C-2-217(b)(1)(b).

In accordance with G.S. 32C-2-201(e), a grant of authority to make a gift is subject to (b) and (c) of G.S. 32C-2-201. Subsection (b) requires an agent to exercise the agent's authority only if the agent determines the exercise is consistent with the objectives of the principal if actually known by the agent and, if unknown, only if the agent determines the exercise is consistent with the best interest of the principal based on all of the relevant factors. Subsection (c) provides that, unless the power of attorney provides otherwise, an agent may not exercise authority under a power of attorney to create an interest in the principal's property by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise in the agent or an individual to whom the agent owes a legal obligation of support.

Gifts authorized by court order are provided for in G.S. 32C-2-218. This section is not in the UPOAA and, therefore, is unique to North Carolina law. Article 2B of Chapter 32A provided for an agent to petition the clerk of superior court if the power of attorney did not expressly authorize gifts of the principal's property. G.S. 32C-2-218 is broader because it authorizes an agent to petition the clerk of superior court to make gifts of the principal's property not only when a power of attorney is silent regarding gifts but also when a gift is in addition to, or otherwise differs from, gifts authorized by the power of attorney.

Optional Statutory Forms

Statutory form power of attorney.

In G.S. 32C-3-301, there is an optional statutory form power of attorney. With a power of attorney being a common form of surrogate decision making

and taking into consideration that there is an optional statutory form in G.S. 32A-1, the optional statutory form in Section 301 of the UPOAA was retained but

revised for considerations related to existing North Carolina law. In the development of an optional statutory form that may be prepared, initialed, and executed by laypersons without the benefit of advice from a North Carolina attorney, the desired balance among the principal, the agent, and a person who is asked to accept a power of attorney was considered. Therefore, the optional statutory form retains the ease for the principal to choose the desired general and specific authorities therein by placing initials in front of the authority, provides for all but two of the specific authorities in light of those two authorities are more complex because they involve trust planning not just planning with a power of attorney, embodies most, if not all, of the default rules of Chapter 32C, and encompasses some space for additional provisions and exclusions.

Persons who is asked to accept a power of attorney may favor the predictability of a statutory form because they become familiar to those persons charged with reviewing them and they avoid the complexities of the language included in other power of attorneys, some of which may include provisions that do not allow for ease of review and desired acceptance.

Keeping acceptance in mind when preparing a power of attorney, there are still revisions that North Carolina attorneys should consider for their standard form. Consider the elimination of the requirement by the principal to initial the general authorities desired by the principal and, for that matter, specific authorities

as well. Also, consider the default rules embodied in the optional statutory short form and determine the desired changes by the principal, including the limited space available to make these changes in the optional statutory short form.


An optional, modified form may include a grant of all of the general authorities, a grant of all or some of the specific authorities, and include changes in an organized format, including additions to and further definition of the grants of specific authority and changes to or elimination of default provisions. See below on how to access a modified form.

Agent's Certification.

G.S. 32C-3-302 provides an optional statutory form for an agent's certification. A similar form was provided in Chapter 32A of the North Carolina General Statutes.

Limited power of attorney for real property.

G.S. 32C-3-303 is not in the UPOAA, and is unique to the NCUPOAA. This optional statutory form for a limited power of attorney for real property was developed by various groups interested in this form, such as the NC Bankers Association, North Carolina title companies, and the NCBA Real property Section.



An optional statutory form for a limited power of attorney for real property was developed by various groups interested in this form, such as the NC Bankers Association, North Carolina title companies, and the NCBA Real property Section.

Conclusion

Preparation is the key to success with the North Carolina Uniform Power of Attorney Act for North Carolina attorneys. With such preparation, there should not be a fatal failure.

The NCBA CLE titled “Power of Attorney: 2018 North Carolina Uniform Power of Attorney Act” is available by video replay and On Demand. Register now for a video replay as the number of attendees are limited by location. If you are unable to attend a video replay at a location near you, there is a video replay at the NC Bar Center on January 4, 2018. As for the On Demand offerings for this CLE, it is strongly suggested to demand the presentations in the order that the presentations are listed on the brochure. To access the brochure and register for a video replay or On Demand offering of this CLE, visit goo.gl/bNQ4dA.

The On Demand offering for this NCBA CLE includes a presentation titled “Drafting a North Carolina Power of Attorney, 2017” and its materials. This presentation reviews the new statutory short form and discusses possible revisions to the new statutory short form or the use of a modified form included in the materials for this presentation. If this presentation is the first accessed On Demand, the listener should determine that he or she should access the other On Demand offerings from this NCBA CLE to have the necessary knowledge to apply the recommendations given in this presentation.

To conclude as we began, the North Carolina Uniform Power of Attorney Act is effective on January 1, 2018. All attorneys in North Carolina who prepare, review, construe, accept, or otherwise address any matter related to a power of attorney must obtain knowledge about the North Carolina Uniform Power of Attorney Act and prepare to represent their clients on any matter related to a power of attorney on or after January 1, 2018 in accordance with the Act.