



ATTORNEYS AT LAW

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A Modernization of the North Carolina Uniform Power of Attorney Act

The North Carolina Uniform Power of Attorney Act, codified in N.C. Gen. Stat. § 32C-1-101 et seq. (the “Act”), went into effect on January 1, 2018.

The Act, which governs all powers of attorney executed in North Carolina on or after January 1, 2018, has implications for any business or financial transactions in which a power of attorney is used and also has particular relevance and application to real property transactions. The Act contains several new statutory forms and some new terminology, but it also provides the basic framework needed to ensure the effectiveness of powers of attorney.

In general, a power of attorney (“POA”) is a legal document in which a person, the principal, appoints another person, the agent, to make decisions, conduct transactions, and sign documents on behalf of the principal. Powers of attorney are important in times of necessity and also as a convenience when a person is unavailable to sign documents.

The Act repealed many of the existing statutes that addressed powers of attorney, but the Act did not repeal or affect healthcare powers of attorney or consent to healthcare for minors.

There are several key differences between prior versions of the Act and the new Act. The new Act utilizes the term “agent” rather than “attorney-in-fact”, to avoid any confusion between an attorney and an attorney-in-fact. Additionally, notary acknowledgement is now required for a POA, whereas, the prior Act only required witnesses to sign. Also, under the prior Act, a POA was required to be recorded in order to be durable (that is, to survive death or incapacity). This is no longer a requirement. Under the Act, the durability of a POA is presumed unless the POA specifically states that it is terminated by the incapacity of the principal. The term “disability” from the prior Act was replaced with “incapacity” under the new Act, acknowledging that a disability does not necessarily prevent one from making business decisions.

Types of Authority

The Act provides for two general categories of authority that can be delegated to an agent: general authority and specific authority.

A POA that gives the agent authority to “do all acts that a principal could do. . .” is a conveyance of general authority and incorporates powers covering numerous subjects, ranging from real property to stocks and bonds to operation of an entity. § 32C-2-201(d). If that is the case, the agent will have authority over all acts described in the statute that relate to those subjects, and those acts from the statute are incorporated into the POA.

The Act also provides a short-form Power of Attorney, which is a non-exclusive method to grant a general-authority POA. This short form, however, might not meet a person’s needs and objectives in all cases.

Specific Authority: Acts Prohibited Unless Expressly Granted

Certain powers, however, are prohibited unless they are expressly granted in the POA, per §32C-2-201 of the Act. The rationale behind this provision of the Act is to prevent agents from abusing and misusing their powers. Express language in a POA is needed in order to give an agent the power to do any of the following actions:

- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Delegate authority granted under a POA;
- Waive principal’s right to be beneficiary of a joint and survivor annuity;
- Exercise fiduciary powers that the principal has authority to delegate; or
- Renounce or disclaim property.

Gifts

In order for an agent to make a gift under a POA, in addition to an express grant of authority in the POA, the gift must be consistent with the principal's objectives if those objectives are actually known by the agent, and if unknown, the gift must be consistent with the principal’s best interest based on all relevant factors, including:

- Value and nature of principal's property;
- Principal's foreseeable obligations and need for maintenance;
- Minimization of taxes (income, estate, inheritance, gift);
- Eligibility for a benefit, program, or assistance under statute or regulation;
- Principal's personal history of making or joining in making gifts; and
- Principal's existing estate plan.

Again, the purpose of this provision of the Act is to address the heightened risk of abuse of power by agents.

Agent's Duties

An agent is not required to accept appointment as an agent and has no continuing obligation to exercise powers under a POA, but if the agent does act, §32C-1-114 of the Act states that the agent must:

- Act in accordance with principal's reasonable expectations to the extent actually known by agent, and otherwise, in the principal's best interest;
- Act in good faith;
- Act only within scope of authority granted in POA;
- Act loyally for principal's benefit; and
- Act so as not to create a conflict of interest that impairs agent's ability to act impartially.

Even if a POA authorizes an agent to act, unless the POA provides otherwise, the agent may not exercise "general" or "specific" authority under a POA to create in the agent, or in an individual to whom the agent owes a legal obligation of support, any interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise. This would constitute self-dealing on the part of the agent.

Coagents and Successor Agents

The Act also addresses the possibility that the POA can name coagents and successor agents. Unless the POA expressly requires coagents to act jointly, each coagent can exercise authority independently without the knowledge, consent, or joinder of other coagents. This can raise

particular issues if two coagents have differing ideas about how to exercise authority under a POA, but the clarification in the Act allows a third party to rely on the action of one coagent. Additionally, unless the POA provides otherwise, a successor agent will have the same authority granted to original agent. A successor agent, however, cannot act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

Recording Required for Real Estate Transactions

While the Act does not require a POA to be recorded, a POA affecting real property is required to be recorded in the county in which the property is located or the county in which principal is domiciled. § 47-28.

Accepting or Refusing a POA

The Act also explains when a person is liable for refusing to accept a POA. If a POA does not comply with the statute as to acknowledgement or other requirements, a person is not liable for refusing to accept the POA. Otherwise, within seven (7) business days after a POA is presented, one must accept the POA, refuse the POA, or request additional information. Additional information could include an Agent's Certification as to the validity of the POA and the agent's authority, an English translation of the POA, or an opinion of counsel as to any matter of law concerning the POA. Within five (5) business days after receiving the additional information, one must either accept or refuse POA.

The Act provides a form Agent's Certification under which an agent attests to the validity of the POA and the agent's authority thereunder. For real property transactions, many title insurance companies recommend/require the Agent's Certification for each real estate transaction (and they also recommend/require recording it).

Termination of POA

The Act also provides several circumstances under which a POA will automatically terminate. A POA terminated when any of the following events occur:

- The principal dies;
- If the POA is not durable, when the principal is incapacitated;
- The principal revokes the POA;
- The POA provides that it terminates upon a date or an event;

- The purpose of the POA is accomplished;
- The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns without a successor agent; or
- The guardian of the principal's estate or general guardian terminates it.

In light of the Act and its changes, we recommend that any prior powers of attorney that are still in use be reviewed and potentially updated in order to conform to the Act. Please do not hesitate to contact Brad Jacobs at bjacobs@tuggleduggins.com or (336) 271-5223 or contact Brittany Teague at bteague@tuggleduggins.com or (336)271-5249.

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