

N.C. UNIFORM POWER OF ATTORNEY ACT

DECEMBER 12, 2017

PRESENTED BY

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ROADMAP

1. Overview of the Act and the Authority Granted under a POA
2. Requirements for Execution of a Valid POA
3. Determining when a POA is effective
4. The Act and Guardianship
5. The Agent's Duties
6. Court proceedings under the Act



THE OVERVIEW



N.C. UNIFORM POWER OF ATTORNEY ACT

- Governor signed on July 20, 2017
 - www.ncleg.net
 - Senate Bill 569
 - Session Law 2017-153
- **Effective date is January 1, 2018**
- NCUPOAA = “The Act” for this presentation



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SESSION LAW 2017-153

- **Repeal** of Chapter 32A – Articles 1, 2, 2A, 2B and 5
- **No Change** to Chapter 32A – Article 3 (HCPOA) and Article 4 (Consent to Health Care for Minors)

NOTE: Powers conferred by former G.S. 32A-2 shall apply to G.S. 32A-1 Short Form that was created before January 1, 2018, G.S. 32C-4-403(d)



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CHAPTER 32C

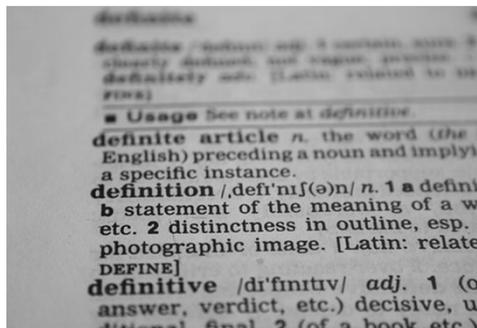
- Article 1 – Definitions and General Provisions
- Article 2 – Authority
- Article 3 – Statutory Forms
- Article 4 – Miscellaneous



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DEFINITIONS, G.S. 32C-1-102(1)-(16)

- (1) **Agent**
- (2) Durable
- (5) Good Faith
- (6) Incapacity
- (8) **Person**
- (9) **Power of Attorney**
- (11) **Principal**
- (12) Property
- (15) State



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GENERAL V. SPECIFIC AUTHORITY

- Authority requiring **specific** grant; grant of **general authority** – G.S. 32C-2-201
- Incorporation of authority – G.S. 32C-2-202; options include:
 - Descriptive term, e.g. “real property”
 - Statutory reference, e.g. “32C-2-204”
 - General authority language, e.g. “all acts that the principal could do”
- Construction of authority, generally – G.S. 32C-2-203



GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the North Carolina Uniform Power of Attorney Act, Chapter 32C of the General Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

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Session Law 2017-153

Senate Bill 569

-
- Real Property
 - Tangible Personal Property
 - Stocks and Bonds
 - Commodities and Options
 - Banks and Other Financial Institutions
 - Operation of Entity or Business
 - Insurance and Annuities
 - Estates, Trusts, and Other Beneficial Interests
 - Claims and Litigation
 - Personal and Family Maintenance
 - Benefits from Governmental Programs or Civil or Military Service
 - Retirement Plans
 - Taxes
 - All Preceding Subjects

GENERAL AUTHORITIES

General Authority	G.S. Reference
Real Property	32C-2-204
Tangible Personal Property	32C-2-205
Stocks and Bonds	32C-2-206
Commodities and Options	32C-2-207
Banks and other Financial Institutions	32C-2-208
Operation of Entity	32C-2-209
Insurance and Annuities	32C-2-210



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GENERAL AUTHORITIES, CONTINUED

General Authority	G.S. Reference
Estates, Trusts, and other Beneficial Interests	32C-2-211
Claims and Litigation	32C-2-212
Personal and Family Maintenance	32C-2-213
Benefits from Governmental Programs or Civil or Military Service	32C-2-214
Retirement Plans	32C-2-215
Taxes	32C-2-216



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SPECIFIC AUTHORITIES – “HOT POWERS”

G.S. 32C-201(a)(1) if **express in power of attorney**

- a. Make a gift.
- b. Create or change rights of survivorship.
- c. Create or change a beneficiary designation.
- d. Delegate authority granted under the power of attorney.
- e. Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
- f. Exercise fiduciary powers that the principal has authority to delegate.
- g. Renounce or disclaim property, including a power of appointment.
- h. Exercise authority over the content of electronic communication, as defined in 18 U.S.C. § 2510(12), sent or received by the principal.



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GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- Make a gift, subject to the limitations provided in G.S. 32C-2-217
 Create or change rights of survivorship
 Create or change a beneficiary designation
 Authorize another person to exercise the authority granted under this power of attorney
 Waive my right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
 Exercise fiduciary powers that I have authority to delegate
 Disclaim or refuse an interest in property, including a power of appointment
 Access the content of electronic communications.

EXERCISE OF SPECIFIC AUTHORITY IN FAVOR OF AGENT (OPTIONAL)

UNLESS INITIALED, an agent MAY NOT exercise any of the grants of specific authority initialed above in favor of the agent or an individual to whom the agent owes a legal obligation of support.

SPECIFIC AUTHORITIES – “HOT POWERS” CONT’D

G.S. 32C-201(a)(2) if express in power of attorney **or in trust instrument**

- a. Exercise the powers of the principal as settlor of a revocable trust in accordance with G.S. 36C-6-602.1
- b. Exercise 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)



GIFTS ARE DIFFERENT



Language in the POA	Agent’s Gift Authority
POA silent or says agent has all powers of the principal	No authority to make gifts.
POA only says the agent has the authority to make a gift or references G.S. 32C-2-217	Agent ONLY has the authority to make gifts as set forth in G.S. 32C-2-217, subject to G.S. 32C-2-201(b) and (c)
Any other authority to make gifts.	Must be specifically set forth in the POA, subject to G.S. 32C-2-201(b) and (c) unless POA says otherwise

** Note the court may authorize any gift that is reasonable under the circumstances, including a gift that is in addition to or differs from a gift authorized by the POA. G.S. 32C-2-218.*



CERTAIN ACTS

- Gifts authorized **by court order**
 - G.S. 32C-2-218

- Certain acts authorized **by the court**
 - G.S. 32C-2-219



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OPTIONAL STATUTORY FORMS, G.S. 32C-3

- NC Statutory Short Form Power of Attorney
 - G.S. 32C-3-301

- NC Agent's Certification as to Validity of Power of Attorney and Agent's Authority
 - G.S. 32C-3-302

- NC Limited Power of Attorney for Real Property
 - G.S. 32C-3-303



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DURABILITY, G.S. 32C-1-104

- Durable (unless instrument expressly terminates by the incapacity of the principal)
- Presumptively durable; automatically durable; no express words required
- Recording not required for durability
- Other statutes may require recording (e.g., real estate transactions)



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REQUIREMENTS FOR EXECUTION OF A VALID POA



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EXECUTION, G.S. 32C-1-105

- Signed by principal or signed by another at principal's direction in principal's **conscious presence**
- Acknowledged
- Presumption that signature is genuine if acknowledged by notary or other individual authorized by law to take acknowledgments



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VALIDITY, G.S. 32C-1-106

Executed	When	Valid if complies with
In North Carolina	On or after January 1, 2018	G.S. 32C-1-105
In North Carolina	Before January 1, 2018	N.C. law at time of execution
Outside North Carolina		Jurisdiction that determines meaning and effect



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MEANING AND EFFECT, G.S. 32C-1-107

The meaning and effect of a power of attorney is determined by:

- The law of the jurisdiction indicated in the power of attorney
 - Look for meaning and effect provision in power of attorney
 - Meaning and effect for optional NC Statutory Short Form Power of Attorney is NC
- If law of the jurisdiction is NOT in the power of attorney, **then the law of the jurisdiction in which the power of attorney was executed**



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VALIDITY, G.S. 32C-1-106, ANOTHER POINT

- Military power of attorney
 - 10 USC §1044b
- Photocopy or electronically transmitted copy of an original power of attorney has same effect as original



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DETERMINING WHEN A POA IS EFFECTIVE



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POA EFFECTIVE WHEN SIGNED, G.S. 32C-1-109

Similar to prior law, the default rule is that a POA is effective when it is signed, **unless** POA expressly says otherwise.



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NEW N.C. STATUTORY SHORT FORM POA

EFFECTIVE DATE

This power of attorney is effective immediately.

NOMINATION OF GUARDIAN (OPTIONAL)

INITIAL below ONLY if you WANT your acting agent to be your Guardian.

() If it becomes necessary for a court to appoint a guardian of my estate or a general guardian, I nominate my agent acting under this power of attorney to be the guardian to serve without bond or other security.



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POA EFFECTIVE IN FUTURE - SPRINGING

If POA effective upon a future event or contingency, the principal may designate in the POA one or more persons* to determine **in a writing or other record** that the event or contingency has occurred.

- Person includes individuals and entities such as a corporation or trust.



Practice note:

If an agent presents a springing POA, look for the writing or other record that the event or contingency has occurred to determine whether the agent has the authority to act.



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When POA Effective	Additional Documentation to Show POA Effective and Agent with Authority to Act
Effective when signed	No additional documentation needed – just POA
Springing POA – Effective upon future event or contingency + person identified in POA + willing and able to act	Writing or other record from the person in POA identified with authority to determine event or contingency occurred
Springing POA on Incapacity – Effective upon future incapacity + person not identified in POA or unwilling or unable to act	Refer to G.S. 32C-1-109(c) for documents needed

GUARDIANSHIP AND THE NCUPOAA



POA + GUARDIANSHIP

G.S. 32C-1-108(A)

- Principal under a POA may nominate a person to serve as the principal's guardian of the estate, guardian of the person, or general guardian in the POA.

Note, the statutory short form only nominates a GOE or GG, not a GOP.

NOMINATION OF GUARDIAN (OPTIONAL)

INITIAL below ONLY if you WANT your acting agent to be your Guardian.

() If it becomes necessary for a court to appoint a guardian of my estate or a general guardian, I nominate my agent acting under this power of attorney to be the guardian to serve without bond or other security.



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POA + GUARDIANSHIP, CONTINUED

G.S. 32C-1-108(A)

The clerk **shall appoint** the principal's most recent nominee in a POA as guardian unless:

- good cause is shown, or
- the nominee is disqualified from serving, such as the nominee is unable to get bonded before receiving property.

Note, if a principal nominates a guardian of the person in both the POA and a health care POA, the nomination in the health care POA controls.



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GUARDIAN'S RIGHT TO INFORMATION

- The agent is accountable to the Guardian of the Estate or General Guardian if appointed **after** the POA is executed
- A guardian of the estate and a general guardian have the right to request and the agent has a **duty to disclose** receipts, disbursements, and transactions conducted on behalf of the principal.
- If the agent fails to turn over such information, then the guardian may bring a proceeding before the clerk to compel disclosure by agent.



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PROTECTIONS AND TRANSPARENCY

Actions before CSC, transferable by party to superior court:

- Proceeding before the clerk to remove the agent, allow the successor agent to step in and act, if any
- Action by any interested person to compel production of evidence substantiating expenditures made by the agent or to account
- No gifts unless specific authority in the POA or an action filed before the clerk to authorize a gift
- No changes to estate plans unless specific authority in POA or an action filed before the clerk to authorize change



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THE GUARDIAN, THE POA, AND THE AGENT

G.S. 32C-1-108(B)

If the clerk appoints a guardian of the estate or general guardian or other fiduciary, the **POA is not terminated** and the **agent's authority** continues unless it is limited, suspended, or **terminated** by the court.

Note, G.S. 32C-1-116(a)(2) provides that an interested person may bring an estate proceeding before the clerk to terminate the POA or to terminate, limit, or suspend the agent's authority under the POA.



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LIMIT OR SUSPEND AUTHORITY OF AGENT

G.S. 32C-1-108(B)

If the clerk appoints a guardian of the estate or general guardian or other fiduciary, the POA is not terminated and the **agent's authority continues unless it is limited, suspended, or terminated by the court.**

Note, G.S. 32C-1-116(a)(2) provides that an interested person may bring an estate proceeding before the clerk to terminate the POA or to terminate, limit, or suspend the agent's authority under the POA.



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AMEND POA

G.S. 32C-116(B)(1)

- **Change from prior law:** guardian may not amend POA without court authority.
 - Proceeding to modify or amend a POA under the Act is filed before a judge.

Limit + Suspend agent's authority vs. **Amend** POA

CSC Jurisdiction

No CSC Jurisdiction



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THE AGENT UNDER A POA



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AGENT'S DUTIES

G.S. 32C-1-114

Two Categories under the Act:

1. Can't be waived by principal in the POA – the **"Mandatory Three"**
2. May be altered or eliminated by the principal in the POA – the **"Waivable Seven"**

Note, there may be other duties expressly imposed by the terms of the POA.

* CSC may see estate proceedings filed to enforce duties or to request relief because of agent's failure to comply with duties.



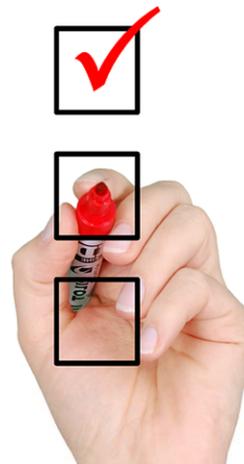
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AGENT'S MANDATORY THREE DUTIES

G.S. 32C-1-114(A)

(NO MATTER WHAT POA SAYS)

1. Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest.
2. Act in good faith.
3. Act only within the scope of authority granted in the power of attorney.



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AGENT'S WAIVABLE SEVEN DUTIES

G.S. 32C-1-114(B)

(UNLESS POA SAYS OTHERWISE)

1. Act **loyally** for the principal's benefit.
2. Act so as **not to create a conflict of interest** that impairs the agent's ability to act impartially in the principal's best interest.
3. Act with the **care, competence, and diligence** ordinarily exercised by agents in similar circumstances.
4. Keep a **record** of all receipts, disbursements, and transactions made on behalf of the principal.
5. **Cooperate with a person that has authority to make health care decisions** for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.



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AGENT'S WAIVABLE SEVEN DUTIES

G.S. 32C-1-114(B)

(UNLESS POA SAYS OTHERWISE)

6. Attempt to **preserve the principal's estate plan**, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including the following:
 - a. The value and nature of the principal's property.
 - b. The principal's foreseeable obligations and need for maintenance.
 - c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.
 - d. Eligibility for a benefit, a program, or assistance under a statute or regulation.
7. **Account** to the principal or a person designated by the principal in the POA.



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VIOLATION BY AGENT OF G.S. CHAPTER 32C

Violation = Breach of Fiduciary Duty

Remedies for breach granted by the court:

1. Injunctive relief
2. Compel agent to redress breach by paying money, restoring property, or other
3. Order agent to account
4. Suspend the agent
5. Remove the agent
6. Reduce or deny compensation
7. ***Any other appropriate relief***

See G.S. 32C-1-117(b) for a complete list of remedies



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CO-AGENTS

G.S. 32C-1-III(A)

Principal may designate **two or more** persons to serve as co-agents.

- How do they exercise their authority?



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CO-AGENTS, CONTINUED

G.S. 32C-1-III(A)

- **POA silent** – default: exercise authority independently of one another
 - Do not need knowledge, consent or joinder of other agents to bind principal
- **POA may expressly provide otherwise**, i.e. must act by majority or unanimous consent



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CO-AGENTS, CONTINUED

G.S. 32C-1-III(A)

- If there are co-agents and a co-agent dies, resigns, becomes incapacitated, or otherwise fails to act, then the remaining agent or co-agents may continue to act **unless** the POA provides otherwise.



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SUCCESSOR AGENTS

G.S. 32C-1-111(B)

- Principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve.



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JUDICIAL PROCEEDINGS UNDER THE NCUPOAA



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PRIMARY JUDICIAL RELIEF PROVISIONS

G.S. 32C-1-116

New: **POA Estate Proceedings**



TWO TYPES OF POA JUDICIAL PROCEEDINGS

Estate Proceedings

Begin with clerk but some may be transferred to superior court

Civil Actions

Begin and stay with judge in civil division



POA CIVIL ACTIONS – BEFORE A JUDGE

G.S. 32C-1-116(B)

Clerk may **not** hear these actions.

1. Modify/Amend POA instrument
2. By/Against Creditors or Debtors of Agent or Principal
3. Claims for Monetary Damages, including claims for breach of fiduciary duty, fraud, and negligence
4. To set aside a POA based on Undue Influence/Lack of Capacity
5. Recovery of property transferred/conveyed by Agent with intent to hinder, delay or defraud



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JURISDICTION OVER ESTATE PROCEEDINGS

Jurisdiction	Initiation	Decided By
Original, exclusive before the clerk	Begins with clerk	Stays with clerk
Original non-exclusive with clerk	Begins with clerk	Transfer to superior court allowed <i>on party motion</i>



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JURISDICTION EXCLUSIVE TO CLERK IN POA ESTATE PROCEEDINGS

- To compel an accounting and evidence of expenditures by agent
- To terminate a POA
- To limit, suspend, or terminate agent's authority where a general guardian or guardian of estate has been appointed
- To determine agent compensation



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DETERMINING AGENT COMPENSATION

Question	Description	Authority
When	Subsequent to a principal's incapacity, a clerk may decide an agent's compensation when POA does not specify a compensation amount or a method of determining compensation.	G.S. 32C-1-112(b)
How	In accord with statutory provisions for fiduciary compensation	G.S. 32-59 and G.S. 32-54(b)



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NON-EXCLUSIVE CLERK JURISDICTION SUBJECT TO TRANSFER ON PARTY MOTION TO SUPERIOR COURT

General Types of G.S. 32C-1-116(a)(4) Estate Proceedings

- To determine an agent's authority and powers
- To construe terms of a POA created or governed by the Act
- To determine any question arising in the performance by an agent of the agent's powers and authority under a POA governed by the Act

... including **but not limited to** certain **specific proceedings**



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NON-EXCLUSIVE CLERK JURISDICTION, CONTINUED

Specific proceedings are set forth in G.S. 32C-1-116(a)(4) as examples of G.S. 32C-116(a)(4) jurisdiction.

These are estate proceedings . . .

- To determine whether and to what extent an agent holds a specific grant of authority under G.S. 32C-2-201
- To approve an agent's ability to make a gift on behalf of a principal where the gift is governed by G.S. 32C-2-207 because the POA grants the agent only general authority with respect to gifts



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EFFECTIVE DATE OF NCUPOAA: JAN. 1, 2018

Provisions apply to judicial proceedings . . .

- Commenced **after** January 1, 2018
- Commenced **before** January 1, 2018 **unless** Court finds the application of a **provision** of the Act would:
 - Substantially interfere with effective conduct of the proceeding OR
 - Prejudice a party's rights

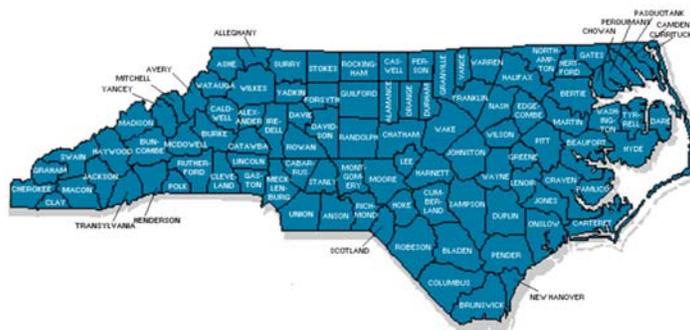


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VENUE FOR NCUPOAA ESTATE PROCEEDINGS

Venue is proper in:

- County where principal resides or is domiciled
- Any county in which an agent resides
- Any county in which property of the principal is located



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GENERAL PROCEDURES FOR POA ESTATE PROCEEDINGS

G.S. 32C-1-116 invokes the **G.S. 28A-2-6** procedures for

- Commencement of an estate proceeding
- Filing a notice of transfer



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APPEAL OF AN ESTATE PROCEEDING G.S. 1-301.3

- **Any party** adversely affected by the Clerk's order in a NCUPOAA estate proceeding may appeal the Clerk's order
- Appeal is "on the record" as with other estate proceedings.



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STANDING TO COMMENCE AN ESTATE PROCEEDING UNDER THE ACT

May be commenced by:

1. Principal or agent
2. General Guardian, Guardian of principal's Person, or Guardian of principal's Estate
3. PR of estate of deceased principal
4. Person authorized to make healthcare decisions for the principal
5. Any other interested person, including a person asked to accept a POA



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MANDATORY DISMISSAL

Upon motion of the principal, the Clerk **shall dismiss** a petition for a POA estate proceeding **unless** the Clerk determines the principal is incapacitated as defined in the Act.



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MANDATORY DISMISSAL, CONTINUED

Incapacity: The inability of an individual to manage property or business affairs because:

- (a) the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance, **or**
- (b) is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return.



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**An Overview of the North Carolina Uniform Power of Attorney Act (Act)¹
S.L. 2017-153 (SB569)**

I. General Provisions

- A. **Old Law.** The Act repeals certain articles in G.S. Chapter 32A related to powers of attorney. Specifically, it repeals Articles 1, 2, 2A, 2B, and 5 of G.S. Chapter 32A. S.L. 2017-153, Sec. 2.8.
- B. **Effective Date.** The Act is effective as of January 1, 2018 and applies to all powers of attorney (POAs) executed on, before, or after January 1, 2018 unless:
- i. There is a contrary intent indicated in the POA, or
 - ii. Application of a provision of the Act would substantially impair the rights of a party. G.S. 32C-4-403(a)(1).
- C. **Terminology.**
- i. A *POA* is a writing that grants authority to an agent to act in the place of the principal. G.S. 32C-1-102(9).
 - ii. The *principal* is the individual that grants authority to an agent in a POA. G.S. 32C-1-102(11).
 - iii. The *agent* is the person granted authority under the POA to act for the principal. An agent may be an individual, corporation, trust, partnership, or other legal or commercial entity. The term “agent” under the Act replaces “attorney in fact” as used in prior NC law. G.S. 32C-1-102(1).
 - iv. A *person* as used in the Act includes both individuals as well as any legal or commercial entity, such as a corporation, governmental subdivision, or agency. G.S. 32C-1-101(8).
- D. **New Forms.**
- i. *New Short Form POA.* The Statutory Short Form of General Power of Attorney set forth in G.S. 32A-1 is repealed by the Act. A new Statutory Short Form Power of Attorney is adopted under Article 3 of G.S Chapter 32C.
 - ii. *New Limited POA for Real Property.* The Act adopts a form Limited Power of Attorney for Real Property under G.S. 32C-3-303. This form may be used to create a limited POA for transactions involving the purchase, sale,

¹ This handout supplements the material covered in the webinar recorded on December 12, 2012 and available at <http://www.nccourts.org/Training/Default.asp>. It is not a comprehensive summary of the Act.

or financing of designated real estate or tangible personal property related to real estate.

- E. **Health Care POAs.** The Act does not apply to a power to make health care decisions. G.S. 32C-1-103(2). The provisions under existing law in G.S. 32A related to health care powers of attorney and consent to health care for a minor are not repealed by the Act. S.L. 2017-153, Sec. 2.8.
- F. **Durability is the Default.** POAs under the Act are durable by default, meaning the incapacity of the principal does not terminate the POA unless the POA expressly states otherwise. G.S. 32C-1-104. This is unlike prior NC law where a POA required express language for it to be durable.
- G. **Original Not Required.** The original POA is not required for an agent to act. An electronically transmitted copy has the same effect as the original. G.S. 32C-1-106(d).
- H. **No Recording Requirement Except for Real Property.** A POA does not have to be recorded to be effective in NC with the exception of recording in connection with real estate transactions under G.S. 47-28. In particular, unlike prior law, a POA does not have to be recorded upon incapacity of the principal for it to be effective after the incapacity of the principal.

II. Three Types of Authority under a POA

The three types of authority that are granted by a principal to an agent under a POA are (i) general authority, (ii) specific authority, and (iii) the general specific authority to make a gift.

A. General Authority.

i. Areas of General Authority under the Act include:

1. Real Property, G.S. 32C-2-204
2. Tangible Personal Property, G.S. 32C-2-205
3. Stocks and Bonds, G.S. 32C-2-206
4. Commodities and Options, G.S. 32C-2-207
5. Banks and Other Financial Institutions, G.S. 32C-2-208
6. Operation of Entity, G.S. 32C-2-209
7. Insurance and Annuities, G.S. 32C-2-210
8. Estates, Trusts, and Other Beneficial Interests, G.S. 32C-2-211
9. Claims and Litigation, G.S. 32C-2-212
10. Personal and Family Maintenance, G.S. 32C-2-213
11. Benefits from Governmental Programs or Civil or Military Service, G.S. 32C-2-214

12. Retirement Plans, G.S. 32C-2-215

13. Taxes, G.S. 32C-2-216

ii. **Methods of Granting General Authority in the POA.**

1. If a POA states that the agent is authorized “to do all acts that a principal could do” or it includes the descriptive terms or statutory references above, then the agent has the general authority as if the entire sections listed above were set out in full in the POA. G.S. 32C-2-201(d); G.S. 32C-2-202.
 - a. Example #1: POA states the agent has the authority “to do all acts of the principal could do.” Then, the agent has the authority set forth in Section II(A)(i)(1-13) above.
 - b. Example #2: POA states the agent has authority over “tangible personal property.” Then, the agent has the authority as described in G.S. 32C-2-205.
 - c. Example #3: POA states the agent has the authority “as set forth in G.S. 32C-2-205.” Then the agent has the authority as described in G.S. 32C-2-205.
2. A principal may modify an authority that is incorporated by reference. G.S. 32C-2-202(c).
3. By granting the agent a general authority, the principal also authorizes the agent to do the other acts set forth in G.S. 32C-2-203 related to that general authority, such as sign and rescind contracts, engage and compensate an attorney, and communicate on behalf of the principal.

B. **Specific Authority.** Specific authority is authority that must be expressly granted in the POA for the agent to act and may not be inferred from a general grant of authority. G.S. 32C-2-201(a). For example, if the POA states that the agent has the authority to do all acts of the principal, it does not include areas requiring specific authority. These are areas that are ripe for abuse by an agent and thus require express language in the POA.

i. **Areas of Specific Authority.**

1. Areas that require specific grants of authority in the POA are the authority to:
 - a. Create or change rights of survivorship.
 - b. Create or change a beneficiary designation.
 - c. Delegate authority granted under the POA.
 - d. Waive the principal’s right to be a beneficiary of a joint and survivor annuity.

- e. Exercise fiduciary powers that the principal has authority to delegate.
 - f. Renounce or disclaim property, including a power of appointment.
 - g. Exercise authority over the content of electronic communication, as defined in 18 U.S.C. § 2510(12), sent or received by the principal.
2. Areas that require specific grants of authority in the POA or a trust are the authority to:
- a. Exercise the powers of the principal as settlor of a revocable trust in accordance with G.S. 36C-6-602.1, and
 - b. Exercise the powers of the principal as a settlor of an irrevocable trust to consent to the trust's modification or termination in accordance with G.S. 36C-4-411(a).

These two areas of specific authority are considered so ripe for abuse that they are not included in the Statutory Short Form POA.

- ii. **Limitations on the Exercise of Specific Authority.** If a POA grants an agent the authority to exercise specific authority, the agent's actions are limited. G.S. 32C-2-201(b). The agent may only exercise such authority provided it is consistent with the principal's objectives, if known, and if unknown as the agent determines is consistent with the principal's best interests, considering all relevant factors, including:
 - 1. The value and nature of the principal's property.
 - 2. The principal's foreseeable obligations and need for maintenance.
 - 3. Minimization of taxes.
 - 4. Eligibility for a benefit, a program, or assistance under a statute or regulation.
 - 5. The principal's personal history of making or joining in the making of gifts.
 - 6. The principal's existing estate plan.

- C. **General Specific Authority to Make a Gift.** For a description of the agent's authority to make a gift under a POA, refer to the attached blog post.

III. Rules of Construction

When construing the terms of a POA and an agent's authority under a POA, certain rules apply regardless of whether the authority is general, specific, or the authority to make a gift, including:

1. **Broadest Authority Controls.** If there are subjects over which authority is granted in a POA that are similar or overlap, the broadest authority controls. G.S. 32C-2-201(f).
2. **Applies to Later Acquired Property.** If authority is granted in a POA with respect to property and after execution of the POA the principal later acquires new property, the authority granted in the POA is exercisable with respect to the after acquired property. G.S. 32C-2-201(g).
3. **Agent's Acts Bind Successors and Assigns.** The acts of an agent bind the successors and assigns of the principal as if the principal had performed the act. G.S. 32C-2-201(h).

IV. Execution Requirements and Interpreting a POA.

A. Validity of a Non-Military² POA in NC.

- i. If a POA was **executed in NC on or after January 1, 2018**, it is valid if it is signed by the principal or in the principal's conscious presence and acknowledged. G.S. 32C-1-105; G.S. 32C-1-106(a). A signature on the POA presumed genuine if the POA is acknowledged. *Id.*
- ii. If the POA was **executed in NC prior to January 1, 2018**, it is valid as long as it complied with NC law at the time of its execution. G.S. 32C-1-106(b).
- iii. If the POA was **executed outside of NC**, it is valid in NC as long as when it was executed, the execution of the POA complied with the law governing the POA and if no choice of law provision appears in the POA, the law where the POA was executed. G.S. 32C-1-106(c).

Executed	When	Valid if complies with
In North Carolina	On or after January 1, 2018	G.S. 32C-1-105
In North Carolina	Before January 1, 2018	N.C. law at time of execution
Outside North Carolina		Jurisdiction that determines meaning and effect

B. Governing Law.

² If the POA meets the requirements for a military POA pursuant to 10 U.S.C. §1044b, as amended, then it is valid in NC.

- i. The law of the jurisdiction indicated in the POA gives meaning and effect to the POA. G.S. 32C-1-107.
- ii. If no jurisdiction is indicated in the POA, then the law where the POA was executed applies. *Id.*

C. Effect on Existing POAs.

- i. Act does not invalidate existing POAs executed before January 1, 2018 and a principal that signed a POA prior to that date does not need to get a new POA for it to be valid in NC.
- ii. As of January 1, 2018, the provisions of the Act apply to all POAs with certain exceptions, including if the terms of the POA expressly state the Act does not apply or if the application of a provision from the Act would substantially impair the rights of a party.
 - 1. Drafters of POAs executed on or after January 1, 2018 should use the new form in Chapter 32C.
 - 2. A POA executed in the old form under Chapter 32A is not invalid. If the old G.S. 32A-1 form is used, then the powers conferred by former G.S. 32A-2 shall apply if the POA was created prior to January 1, 2018.

D. When the POA is Effective.

- i. **Default Rule, Effective When Signed.** The default rule is that a POA is effective when it is signed unless the principal provides in the POA that it becomes effective at a future date or upon the occurrence of a future event or contingency, such as the principal's incapacity. G.S. 32C-1-109(a).
- ii. **"Springing" POA.** The POA may be effective upon a future event or contingency (commonly referred to as a "springing POA") and the principal may designate one or more people to determine in a writing or other record that the event or contingency has occurred. G.S. 32C-1-109(b). The writing alone is sufficient to entitle the agent to act; it does not have to be under oath or in the form of an affidavit. The POA does not have to be recorded upon incapacity of the principal. Commonly, the future event that makes the POA effective is the principal's incapacity.

- a. **Incapacity under the Act.** Incapacity under the Act is defined as the inability to manage property or business affairs because the individual:
 - i. has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance, or
 - ii. is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return. G.S. 32C-1-102(6).
- b. The Act applies a different standard and definition of incapacity than is found in G.S. Chapter 35A related to incompetency and adult guardianship proceedings.

- 2. **POA Effective Upon Incapacity.** G.S. 32C-1-109. If the POA is drafted only to become effective upon the principal's incapacity and the POA *does not identify a person* authorized to determine whether the principal is incapacitated or if the person authorized is unwilling or unable to act, the principal's incapacity and the effectiveness of the POA may be determined by either:
 - a. Two individuals who are either a physician or licensed psychologist or both after a personal examination that the principal is unable to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance, or
 - b. An attorney-at-law, a judge, or appropriate governmental official that the principal is unable to manage property or business affairs because the individual is missing, detained, including incarcerated in the penal system, or outside the United States and unable to return.

V. **Guardianship.**

- A. **Nomination of a Guardian in the POA.** A principal under any POA may nominate a person to serve as the principal's guardian of the estate, guardian of the person, or general guardian in the POA. G.S. 32C-1-108(a). Similar to the standard under prior law set forth in the now repealed GS 32A-10(b), the clerk shall appoint the principal's most recent nominee in a POA as guardian unless:
 - i. good cause is shown, or

- ii. the nominee is disqualified from serving, such as the nominee is unable to get bonded before receiving property. G.S. 32C-1-108(a).

If a principal nominates a guardian of the person in both the POA and a health care POA, the nomination in the health care POA controls. *Id.*

- B. **Agent Accountable to the Guardian.** If after a POA is executed, the clerk appoints a guardian of the estate or general guardian for the principal, then the agent is accountable to the guardian as well as the principal. G.S. 32C-1-108(b).
- C. **Clerk has the Authority to Limit, Suspend, or Terminate Agent's Authority and terminate the POA upon Appointment of a Guardian.**
 - i. If the clerk appoints a guardian of the estate or general guardian or other fiduciary, the POA and the agent's authority continues unless it is limited, suspended, or terminated by the court. G.S. 32C-1-108(b).
 - ii. Any interested person may bring an estate proceeding to request the court enter an order limiting, suspending, or terminating the agent's authority or terminating the POA after the appointment of a guardian. G.S. 32C-1-116(a)(2).
 - iii. The clerk has no jurisdiction to modify or amend a POA. G.S. 32C-1-116(b)(1).

VI. **The Agent.**

- A. **The Agent's Duties.** The Act imposes two categories of duties on an agent's acting under a POA. They include mandatory duties and waivable duties. The POA itself may also impose duties on the agent beyond what is set forth in the Act. A violation of G.S Chapter 32C by the agent constitutes a breach of fiduciary duty. G.S. 32C-1-117(a). Remedies for a breach of fiduciary duty include removal or suspension of the agent, reduction or denial of compensation to the agent, ordering the agent to account, and other remedies set forth in G.S. 32C-1-117(b).
 - i. **Mandatory Duties.** G.S. 32C-1-114(a). There are three duties imposed by the Act upon agents that may not be waived or modified in the POA. They are the duty to:
 1. Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest.
 2. Act in good faith.

3. Act only within the scope of authority granted in the power of attorney.
- ii. **Waivable Duties.** G.S. 32C-1-114(b). There are other duties imposed by the Act on an agent acting under a POA but may be waived by the terms of the POA. They are the duty to:
1. Act loyally for the principal's benefit.
 2. Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
 3. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances.
 4. Keep a record of all receipts, disbursements, and transactions made on behalf of the principal.
 5. Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest
 6. Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including the following:
 - a. The value and nature of the principal's property.
 - b. The principal's foreseeable obligations and need for maintenance.
 - c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.
 - d. Eligibility for a benefit, a program, or assistance under a statute or regulation.
 7. Account to the principal or a person designated by the principal in the POA.

B. Co-Agents. G.S. 32C-1-111(a).

- i. **The Act Allows Co-Agents.** The Act provides that a principal may designate two or more persons to serve as co-agents under a POA.
- ii. **Exercise of Authority by Co-Agents.**
 1. **POA is Silent.** If the POA is silent as to how the co-agents may exercise their authority, then they are authorized to exercise their authority independently of one another and do not need the

knowledge, consent, or joinder of any other co-agent to bind the principal or the principal's successors in interest.

2. **POA Expressly Provides How Co-Agents Exercise Authority.** The principal may expressly provide in the POA that the co-agents act jointly, for example, by majority or unanimous consent. In those situations, the consent of one co-agent is not sufficient to bind the principal or the principal's successors in interest.

iii. **Death, Resignation, Incapacity, or Failure to Act by Co-Agent.** If there are co-agents and a co-agent dies, resigns, becomes incapacitated, or otherwise fails to act, then the remaining agent or co-agents may continue to act unless the POA provides otherwise.

C. **Successor Agents.** G.S. 32C-1-111(b).

i. **Principal May Designate Successor Agents.** The principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. The principal may also grant the authority to designate successor agents to the agent under the POA or to a person designated by name, office, or function.

ii. **Authority of Successor Agent.** A successor agent has the same authority as the original agent unless the POA provides otherwise.

iii. **When Successor Agent May Act.** If there are co-agents or multiple successor agents, the successor agent may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

VII. **Judicial Relief.** Refer to the attached blog post on judicial proceedings related to the Act.

Judicial Relief under the New GS Chapter 32C, the North Carolina Uniform Power of Attorney Act

Author : Meredith Smith

Categories : [Clerks of Superior Court](#), [Estates](#), [Guardianship](#)

Tagged as : [Clerk of Superior Court](#), [estates](#), [guardianship](#), [Incompetency power of attorney](#)

Date : September 1, 2017

On July 20, 2017, Governor Cooper signed [Session Law 2017-153](#) (S569) known as the North Carolina Uniform Power of Attorney Act (NCPOAA). **This new law goes into effect on January 1, 2018** and applies to powers of attorney (POA) in North Carolina. It repeals provisions in [GS Chapter 32A](#) that pertain primarily to financial POAs, including the statutory short form POA in Article 1 and the enforcement provisions in Article 5. It creates a new GS Chapter 32C. It does not apply to POAs that grant authority to a person to make health care decisions for another person. Article 3, health care POAs, and Article 4, consent to health care for a minor, under [GS Chapter 32A](#) continue to apply and are mostly unaffected by the NCPOAA.

The NCPOAA adopts, in large part, the [Uniform Power of Attorney Act](#) published by the Uniform Law Commission (ULC). In both the uniform law and the NCPOAA, there are sections on judicial relief. As noted by the ULC, the purpose of this judicial relief is two-fold: (i) to protect vulnerable or incapacitated persons who grant authority to another under a POA against financial abuse, and (ii) to protect the self-determination rights of the principal. [Uniform Power of Attorney Act, Comment, Sec. 116](#).

The judicial relief provisions as adopted in NC are heavily modified from the uniform law. This is due in part to the fact that the judicial relief provisions under the NCPOAA specifically list proceedings that may be brought under the act and allocate jurisdiction over those proceedings between the clerk, who serves as [the ex officio judge of probate in NC](#), and the superior or district court. The distribution of jurisdiction under the NCPOAA among these judicial officials mirrors estate proceedings under [GS 28A-2-4](#). There are proceedings that are exclusively within the clerk's jurisdiction, ones that are initiated before the clerk but may be transferred by a party to superior court, and then finally proceedings that are excluded from the clerk's jurisdiction. The NCPOAA also sets forth the procedures, standing, venue, and appeal rights for these proceedings.

1. Jurisdiction

a. Clerk's Exclusive Jurisdiction

The clerk has original jurisdiction over proceedings under G.S. Chapter 32C. Original jurisdiction before the clerk means that if a proceeding is filed, the proceeding must be filed before the clerk of superior court. The clerk's jurisdiction is exclusive except as specifically provided otherwise in the statute. Exclusive jurisdiction means that once it is filed before the clerk it may not be transferred to another court – the clerk decides all issues of fact and law and enters the order. [GS 1-301.3\(b\)](#). One exception to this rule is if a clerk has a conflict of interest. See [GS 7A-104\(a\), \(a1\)](#). The following proceedings are included in the clerk's original, exclusive jurisdiction under GS 32C-1-116(a):

- To compel an accounting by an agent, including the power to compel production of evidence substantiating any expenditure by the agent of the principal's assets. Note, as of July 21, 2017, the clerk has expanded contempt authority. [SL 2017-158 \(H236\)](#). Once the NCPOAA is effective on January 1st, the clerk will have the authority to hold an agent in contempt for failure to comply with an order compelling an accounting or an order to produce evidence substantiating an expenditure.

- To terminate a POA or limit, suspend, or terminate the authority of an agent when a guardian of the estate or general guardian is appointed by the clerk. Under [GS 32C-1-108\(b\)](#), if the clerk appoints a guardian of the estate or general guardian or other fiduciary, the POA and the agent's authority continues unless it is limited, suspended, or terminated by the court.
- To determine compensation of an agent. The clerk has the authority to determine reasonable compensation for an agent under a POA where the POA does not specify the manner or amount of compensation and the principal becomes incapacitated. [GS 32C-1-112](#).

b. Clerk's Non-Exclusive Jurisdiction

There are some proceedings under the NCPOAA where the clerk has original, but not exclusive jurisdiction. This means the proceeding must be initiated before the clerk but then may be transferred to superior court upon the filing of a notice of transfer by any party. Notably, the NCPOAA does not provide that the clerk may file a notice of transfer on the court's own motion. See [GS 32C-1-116\(a\)\(4\)](#). This is unlike estate proceedings where the clerk expressly has that authority. See [GS 28A-2-4\(a\)\(4\)](#).

The proceedings under the NCPOAA that fall within the clerk's original, but not exclusive jurisdiction include:

- To determine an agent's authority and powers.
- To construe terms of the power of attorney under GS Chapter 32C.
- To determine any question arising in the performance by an agent of the agent's powers and authority, which includes but is not limited to the authority:
 - To determine whether and to what extent an agent holds a specific grant of authority under GS 32C-2-201.
 - To approve an agent's ability to make certain gifts under GS 32C-2-217 because the power of attorney grants the agent only a general authority with respect to gifts.
 - To authorize the agent to make a gift of principal's property under GS 32C-2-218.
 - To authorize the agent to do to do certain acts (except make a gift) that require a specific grant of authority.
 - To determine whether and to what extent acceptance of a power of attorney is mandated. GS 32C-1-116(a)(1)-(4).

If the proceeding remains before the clerk and is not transferred to superior court, the clerk has the authority to enter declaratory relief under [GS Chapter 1, Article 26](#), to the extent it is not inconsistent with the NCPOAA. GS 32C-1-116(a)(4).

c. No Clerk Jurisdiction

The NCPOAA excludes certain actions related to POAs from the clerk's jurisdiction. The clerk does not have jurisdiction over the following actions:

- **To modify or amend a POA.**
- By or against creditors or debtors of an agent or principal.
- Involving claims for monetary damages, including breach of fiduciary duty, fraud, and negligence.
- To set aside a power of attorney based on undue influence or lack of capacity.
- To recover property transferred or conveyed by an agent on behalf of a principal with the intent to hinder, delay, or defraud the principal's creditors.

These mirror the actions excluded from the clerk's jurisdiction related to estates under GS 28A-2-4.

2. Actions before the Clerk Filed as an Estate Proceeding

If a proceeding is filed under the NCPOAA before the clerk, it is filed as an estate proceeding under [GS 28A-2-6](#). This statute includes procedures for commencing an estate proceeding, including the requirement to issue an estate proceedings summons, the standard for pleadings, the method for obtaining an extension of time to file, and the applicability of the rules of civil procedure. My colleague, Ann Anderson, published a bulletin on estate proceedings under GS 28A-2-6, which may be found [here](#).

The NC Administrative Office of the Courts is in the process of examining the applicable filing fees associated with the costs of filing these proceedings. The cost of an estate proceeding filed in connection with a decedent's estate is \$120.00. See [GS 7A-307](#).

3. Standing to File

The section on judicial relief under the NCPOAA also identifies who has standing to file one of these proceedings before the clerk. [GS 32C-1-116\(c\)](#). This includes:

- The principal
- The agent
- A general guardian, guardian of the estate, or guardian of the person
- The personal representative of the estate of a deceased principal
- A person authorized to make health care decisions for the principal
- Any other interested person, including a person asked to accept a power of attorney

Id.

4. Venue

Venue for a proceeding brought under the NCPOAA is proper (i) in the county where the principal resides or is domiciled, (ii) any county where an agent resides, or (iii) any county in which property of the principal is located. [GS 32C-1-116\(d\)](#).

5. Mandatory Dismissal

If a proceeding is filed before the clerk, the clerk is required to dismiss the petition if the principal (the individual who grants authority to an agent in a POA) files a motion requesting a dismissal. [GS 32C-1-116\(f\)](#). The one exception to this mandatory dismissal rule is if the clerk determines the principal is incapacitated. *Id.* For purposes of GS Chapter 32C, incapacity is defined as the inability to manage property or business affairs because the individual: (i) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance, or (ii) is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return. [GS 32C-1-102\(6\)](#).

Note, there appears to be an error in the NCPOAA regarding references to the definition of incapacity. References are made throughout GS Chapter 32C, including the subsection on mandatory dismissal, to [GS 32C-1-102\(5\)](#) which is the definition of good faith, when it appears the intent was to reference the definition of incapacity under [GS 32C-1-102\(6\)](#).

6. Appeal of the Clerk's Order

Appeal of the clerk's order entered under GS Chapter 32C is pursuant to [GS 1-301.3](#). [GS 32C-1-116\(g\)](#). This means a party aggrieved by an order of the clerk may appeal to superior court by filing a written notice of appeal with the clerk within 10 days of entry of the order after service of the order on the other party. [GS 1-301.3\(c\)](#). On appeal, the superior court does not conduct a new trial but rather reviews the clerk's order "on the record." The judge of the superior court reviews the clerk's order to determine only the following:

- Whether the findings are supported by the evidence.
- Whether the conclusions of law are supported by the findings of facts.
- Whether the order or judgment is consistent with the conclusions of law and applicable law.

[G.S. 301.3\(d\)](#). Therefore, it is important for a clerk who enters an order in a proceeding under the NCPOAA to make findings of fact and conclusions of law in a written order. In the absence of a written order with findings and conclusions, the superior court will likely remand the matter for the clerk to make such findings and conclusions in a written order.



The Authority to Make Gifts under the New North Carolina Uniform Power of Attorney Act

Author : Meredith Smith

Categories : [Guardianship](#)

Tagged as : [Clerk of Superior Court](#), [guardianship](#), [Incompetency power of attorney](#)

Date : December 8, 2017

The new [North Carolina Uniform Power of Attorney Act](#) (the Act) goes into effect on January 1, 2018. I recently blogged about the judicial relief provisions under the Act [here](#). Next Tuesday, December 12th from noon to 1:15 pm, the School of Government in partnership with the N.C. Administrative Office of the Courts will be offering a free webinar on this new law. The Honorable James Stanford, Clerk of Superior Court, Orange County, Allison Smith, NCAOC assistant legal counsel, Janice Davies, an attorney with Davies Law, PLLC, and I will be presenting. Anyone can register for the webinar [here](#). Note, registration closes tomorrow at noon.

One of the things we'll be discussing during the webinar are the provisions in the Act related to the authority of the agent (under prior law, the "attorney-in-fact") under a power of attorney (POA) to make a gift. The court has an interest in the agent's gift authority for two primary reasons:

1. A proceeding may be filed before the clerk seeking a remedy for the breach by the agent of the agent's gifting authority under the POA. [G.S. 32C-1-117](#).
2. A proceeding may be filed requesting the clerk enter an order authorizing a gift. [G.S. 32C-1-116\(a\)\(4\)](#).

The purpose of this post to give you preview of Tuesday's webinar and to discuss the gift provisions under this new law. They can be a bit tricky to put together if you just read the Act straight through.

Types of Authority under the Act

The Act sets forth two clear categories of authority that may be granted to the agent by a principal under a POA:

1. Specific authority
2. General authority

Specific authority is authority that must be expressly granted in the POA for the agent to act and may not be inferred from a general grant of authority. [G.S. 32C-2-201\(a\)](#) identifies actions by the agent under the POA that require an express grant of authority in the POA, including the authority to make a gift, change rights of survivorship, change beneficiary designations, and renounce or disclaim property. These actions require a specific grant of authority because of the risk these acts pose to the principal's property and estate plan.

By contrast, **general authority** may be granted in a POA by including language in the POA that states the agent has the authority to "do all acts that a principal could do." Such language incorporates all of the categories of general authority set forth in G.S. 32C-2-204 through G.S. 32C-2-216, including the provisions related to real property, tangible personal property, insurance and annuities, estates, trusts and beneficial interests, claims and litigation, and taxes. The drafter of a POA may incorporate by reference all or some these provisions of general authority when describing the agent's authority in the POA. A drafter may choose to grant the general authority to the agent by listing the

descriptive term, such as “real property,” or the related statutory citation, such as “G.S. 32C-2-204.” [G.S. 32C-2-201\(d\)](#)

The **authority to make a gift** under a POA does not fit squarely in either of these two categories. It is referred to as both general and specific authority under the Act. [G.S. 32C-2-201\(a\)\(1\)\(a\)](#) (specific authority to make a gift); [G.S. 32C-2-217](#) (general authority to make a gift). It is most helpful to treat the authority to make a gift under a POA as something different, a third category that breaks down as set forth below. These gifting provisions apply to a POA executed on or after January 1, 2018. They also apply to a POA executed prior to that date provided that the application of a provision does not impair a substantial right of a party and the POA does not expressly state otherwise. [G.S. 32C-4-403\(a\)\(1\)](#).

The Agent’s Authority to Make a Gift

a. No Authority if the POA is Silent Regarding Gifts

The first thing to note about gifts under the Act is that if the POA is silent regarding gifts then the agent does not have the authority to make gifts without a court order, as discussed in (d) below. This includes if the POA states that the agent has the general authority to “do all acts that a principal could do” or otherwise states that the agent has the authority to manage the principal’s property. **This broad language does not confer gifting authority on the agent.**

b. General Authority to Make a Gift

If the POA specifically states that the agent is authorized to make gifts or grants general authority to the agent with respect to gifts or grants the agent the authority only as set forth in G.S. 32C-2-217, then the agent’s gifting authority is limited under the terms of the POA. The agent is authorized under the Act to make a gift of the principal’s property or to consent to the splitting of a gift made by the principal’s spouse, subject to the Internal Revenue Code (IRC), for the following limited purposes:

1. To or for the benefit of an **individual** up to certain amounts set forth in G.S. 32C-2-217(b)(1)(a), including gifts to:
 1. A trust
 2. An account under the Uniform Transfers to Minors Act
 3. A tuition savings account or prepaid tuition plan as defined under section 529 of the IRC
 4. An ABLE account as defined under section 529A of the IRC
2. To certain **charitable organizations** set forth in the IRC in accordance with the principal’s history of making or joining in the making of gifts.

[G.S. 32C-2-217\(a\) and \(b\)](#). This authority is similar to the authority of the agent to make gifts under prior law in accordance with the principal’s history of gift giving. G.S. 32A-2(14) (repealed).

c. Gifts Requiring Additional Specific Authority

Any authority that enlarges or modifies the agent’s general authority to make a gift requires specific, express language in the POA. For example, if the principal wants the agent to be able to make unlimited gifts to a trust and the principal does not have a history of making such gifts, then it is advisable for the principal to expressly state such authority in the POA.

d. Gifts Authorized by Court Order

If the POA is silent or limited as to the agent’s gift making authority or the agent wants to make a gift that is different from a gift authorized by the POA, the agent may always petition the court for an order authorizing the agent to make a

gift of the principal's property that is reasonable under the circumstances. G.S. 32C-2-218. This is similar to prior NC law, which authorized the agent to file a special proceeding to obtain the authority to make a gift. G.S. 32A-14.10 (repealed).

The petition to make a gift is filed as an estate proceeding before the clerk. [G.S. 32C-1-116\(a\)\(4\)](#); [G.S. 32C-1-116\(c\)](#); [G.S. 32C-2-218](#). Any party may file a notice of transfer of the proceeding to superior court within 30 days after being served with a copy of the pleading requesting relief. [G.S. 32C-1-116\(a\)\(4\)](#); [G.S. 28A-2-6\(h\)](#).

Other Rules Generally Applicable to Gifts under the Act

- 1. Gifts in Accordance with Principal's Objectives if Known.** Unless the POA states otherwise, the agent has a duty to make gifts in accordance with the principal's objectives if actually known by the agent and if unknown then consistent with the principal's best interest based on all relevant factors, including certain factors specified in the Act such as the principal's foreseeable obligations and future need for maintenance. [S. 32C-2-201\(b\) and \(e\)](#). Note, these factors may be helpful for the court to refer to for guidance when determining whether to enter an order authorizing a gift by the agent under G.S. 32C-2-218.
- 2. No Gifts to Agent or to People the Agent Owes Legal Obligation of Support.** An agent may not exercise authority to make a gift under a POA to create in the agent or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property unless the POA states otherwise. [S. 32C-2-201\(c\) and \(e\)](#).

The figure below summarizes the authority to make a gift under the Act. I hope you'll tune in for more on Tuesday. Don't forget to register by noon tomorrow.

Figure 1. The Agent's Authority to Make a Gift under the Act

Language in the POA	Agent's Gift Authority
POA silent or says agent has all powers of the principal	No authority to make a gift
POA only says the agent has the authority to make a gift or references G.S. 32C-2-217	Agent ONLY has the authority to make gifts as set forth in G.S. 32C-2-217, subject to G.S. 32C-2-201(b) and (c)
Any other authority to make gifts	Must be specifically set forth in the POA, subject to G.S. 32C-2-201(b) and (c) unless POA says otherwise

^a Note the court may authorize any gift that is reasonable under the circumstances, including a gift that is in addition to or differs from a gift authorized by the POA. G.S. 32C-2-218.