Welcome fall! This season brings many changes to our lives, including a palette of amazing colors for our viewing pleasure, cooler temperatures (some days), and the harvest of the crops. Our Section members, through the various committees, are as busy as the farmers bringing in their crops for the fall harvest ahead of the rain.

Our fall Section Council meeting was held at the North Carolina Bar Association (NCBA) in Cary on September 20, 2017. Our Section authorized two additional scholarships for Continuing Legal Education (CLE) to be held in February 2018 for the Basics of Will Drafting and Estate Administration classes. Members, look out for details on how to apply for the scholarships. These scholarships are new and in addition to the scholarships that will be offered for our Annual Meeting to be held in July 2018.

The Ad Hoc Committee is busy contacting and securing sponsors for our Annual Meeting at Kiawah. The Ad Hoc Committee is tasked with fundraising to offset the costs of the Annual Meeting for our membership. The Committee’s efforts subsidize the cost of the CLE, resulting in lower program costs per member while also funding the Wednesday night Speakers’ Dinner and the Thursday night cocktail party for over 450 guests. The sponsorship funds are also used to offset costs involved with breakfast and junk food breaks over the three days for the conference for our 300-plus attendees. Without the

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Introduction to the North Carolina Uniform Power of Attorney Act

By Janice L. Davies


History

A historical perspective provides an intellectual setting that shaped actions in the past. History is always informative, but historical significance is a process often left to each of us to evaluate for ourselves. For a historical perspective regarding the NCUPOAA, the Legislative Committee of the Estate Planning and Fiduciary Law Section formed a sub-committee in 2013 to address concerns related to powers of attorney. The sub-committee had its first meeting in Jan. 2014. In the incipient stage of the project, the concern was the inability to record a power of attorney for durability in North Carolina and other jurisdictions because the power of attorney document did not have witnesses, a notarial certificate, or a notary seal necessary to record the document in the applicable jurisdiction for durability. With a review of the North Carolina law and the rumbling of authors and commentators on durable general powers of attorney, the sub-committee was quickly thrown into the depths of the Uniform Power of Attorney Act ("UPOAA") completed by the Uniform Law Commission in 2006 and amended in 2008.

The 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. Effectiveness is particularly important because the aging population is large and growing rapidly, and the 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 or misuse of powers of attorney has been recognized as a serious problem. The UPOAA intends to strike a balance by preserving the durable power of attorney as a private form of surrogate decision making while deterring use of the durable power of attorney as a tool for financial abuse of an incapacitated principal.

The 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. For multiple reasons, such as amendments prepared at a very late (or very early) hour for adoption the next (or same) day and the simple fact of the size of this Bill and it being subject to various drafters, some technical corrections are required to the NCUPOAA.

Session Law 2017-153 authorizes annotations to be printed in Chapter 32C for the NCUPOAA. As deemed appropriate by the Revisor of Statutes, these annotations will include most of the Official Comments for the UPOAA and all explanatory comments of the drafters of the NCUPOAA. The NC Comments were delivered to the Revisor of Statutes (billing drafting) on Sept. 14, 2017 in anticipation of a print date on or about Jan. 1, 2018. NC Comments are important for the practitioner to identify references in, and portions of, the Official Comments that require a different reading for the NCUPOAA, identify changes to North Carolina law as a result of the NCUPOAA, and identify modifications to the UPOAA by the North Carolina drafters for the NCUPOAA.

Organization

Chapter 32C of the North Carolina General Statutes consists of four Articles, as follows:

- Article 2. Authority
- Article 3. Statutory Forms

Article 1 contains the 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 their heightened risk to the estate plan of the principal.

Article 3 provides the following optional statutory forms:

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

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

Applicability and Effect on Existing Powers of Attorney

Chapter 32C applies to all powers of attorney, except for those specifically excluded in (1)-(4) of N.C.G.S. Section 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 Minor 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.

The relationship of other laws deserves mention when applying and construing Chapter 32C. N.C.G.S. Section 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.

The effect on existing powers of attorney is provided for in N.C.G.S. Section 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 Jan. 1, 2018 and to rules of construction and presumptions regarding a power of attorney before Jan. 1, 2018.

With regard to a Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 before Jan. 1, 2018, N.C.G.S. Section 32C-4-403(d) provides that the powers conferred by former N.C.G.S. Section 32A-2 shall apply. The intent of this provision is to clarify that the powers so conferred by N.C.G.S. Section 32A-2 survive repeal for application to and for a Statutory Short Form Power of Attorney and that the Statutory Short Form Power of Attorney is not to be construed as applying the authorities described in N.C.G.S. Section 32C-2-204 through N.C.G.S. Section 32C-2-217.

A Statutory Short Form Power of Attorney should not be created in accordance with N.C.G.S. Section 32A-1 on or after Jan. 1, 2018. (emphasis added) The North Carolina Statutory Short Form Power of Attorney in N.C.G.S. Section 32C-3-301 or another power of attorney created in accordance with the NCUPOAA should be used on or after Jan. 1, 2018.
Some Comparison and Changes to North Carolina Law

Any comparison of a former statute to a new statute should begin with the reading of the former statute and the new statute. Stating the obvious may seem of little worth to you. Many discussions regarding the NCUPOAA, however, have brought to this author’s attention that the readers of the NCUPOAA often believe that there is a change in North Carolina power of attorney law when there is not.

The most common question about the NCUPOAA is an open-ended one. What are the changes to North Carolina power of attorney law that I need to know? After qualifying the response with the effective date of Jan. 1, 2018, the response is to mention just a few of the changes. This article will discuss more than those few changes.

This article does not discuss an important addition to North Carolina law, judicial relief, because another article in this newsletter reviews judicial relief provided for in the NCUPOAA. That article will also address other proceedings related to agent’s liabilities, gifts authorized by court order, and certain acts authorized by the court. Also, this article does not discuss the acceptance of and reliance upon a power of attorney by a third-party or person and the liability for refusal by a third-party or person to accept an acknowledged power of attorney because another article in this newsletter reviews matters related to banking and the NCUPOAA.

Terminology. 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 N.C.G.S. § 32C-1-102(1). The term “in-capacity” 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 N.C.G.S. § 32C-1-102(6).

Durability. N.C.G.S. Section 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 expressed 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 in a jurisdiction that has not yet enacted the UPOAA.

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 Statutory Short Form Power of Attorney in Article 1 of Chapter 32A provides for acknowledgement. As in the UPOAA, N.C.G.S. Section 32C-1-105 provides that a signature on a power of attorney is presumed genuine when acknowledged. The UPOAA does not require acknowledgement.

A power attorney may be signed by another person who is directed by the principal to sign in the principal’s name on the power of attorney in the principal’s “conscious presence.” This provision in N.C.G.S. Section 32C-1-105 is new to North Carolina law. Most of us are familiar with the conscious presence test from the Uniform Probate Code, which codified it for wills. 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.

N.C.G.S. Section 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 N.C.G.S. Section 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 N.C.G.S. Section 32C-3-301.

Validity. N.C.G.S. Section 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.

For a power of attorney executed in North Carolina on or after Jan. 1, 2018, it is valid if the execution of the power of attorney complies with N.C.G.S. Section 32C-1-105. A power of attorney executed in North Carolina before Jan. 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 (i) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to N.C.G.S. Section 32C-1-107, or (ii) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, as amended.

N.C.G.S. Section 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.

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. N.C.G.S. § 32C-1-107. 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. Id.

North Carolina is the jurisdiction expressed, for meaning and effect, in the North Carolina Statutory Short Form Power of Attorney provided for in N.C.G.S. Section 32C-3-301. Therefore, as provided for in N.C.G.S. Section 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 N.C.G.S. Section 32C-1-105.

Nomination of Guardian. N.C.G.S. Section 32C-1-108(a) is similar to N.C.G.S. Section 32A-10(b) in that a principal may nominate a guardian of the estate, guardian of the person, or general guar-
ian 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. N.C.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 N.C.G.S. Section 32A-10(a), the first sentence of N.C.G.S. Section 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 a guardian or fiduciary as well as to the principal.

Last, but certainly not least for this section, is the last sentence of N.C.G.S. Section 32C-1-108(b). With all of the similarities of N.C.G.S. Section 32C-1-108 to N.C.G.S. Section 32A-10, the last sentence of this section gave rise to much more discussion than anticipated by this author. The North Carolina drafters added that the nomination of a guardian of the estate or general guardian pursuant to N.C.G.S. Section 32C-1-108(a)(7) and (b)(5) which modified Section 110 of 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 N.C.G.S. Section 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, this is one of the pending corrections to be addressed by technical corrections to the NCUPOAA.

When power of attorney is effective. N.C.G.S. Section 32C-1-109(a) provides that a power of attorney is effective when executed. Further, it provides that the principal may provide 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. N.C.G.S. Section 32C-1-109 is more comprehensive than N.C.G.S. Section 32C-109 is more comprehensive than N.C.G.S. Section 32A-8. One alternative in N.C.G.S. Section 32A-8 is that the power of attorney shall become effective after the principal becomes incapacitated or mentally incompetent.

Subsection (b) of N.C.G.S. Section 32C-1-109 is new to North Carolina law; 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.

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), the power of attorney becomes effective upon a determination in a writing or other record in one of two manners pursuant to N.C.G.S. Section 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 N.C.G.S. Section 32C-1-102(6a). N.C.G.S. Section 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, N.C.G.S. Section 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 N.C.G.S. Section 32C-1-102(6)b. N.C.G.S. Section 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 NCUPOAA. Incapacity is defined in N.C.G.S. Section 32C-1-102(6)a. and b, not in N.C.G.S. Section 32C-1-102(5)a. and b. as incorrectly referred to in N.C.G.S. Section 32C-1-109(c) (and in N.C.G.S. Section 32C-1-116(f)).

The North Carolina drafters added a sentence to the end of N.C.G.S. Section 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 N.C.G.S. Section 32C-1-110(a) or (b).

Termination. N.C.G.S. Section 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, in the opinion of this author, causes confusion when discussing this section because subsection (a) of N.C.G.S. Section 32C-1-110 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.

N.C.G.S. Section 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 guard-
ian of the estate of the principal or general guardian terminates the power of attorney.

N.C.G.S. Section 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 N.C.G.S. Section 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 N.C.G.S. Section 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. N.C.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 N.C.G.S. Section 32C-1-110(b)(2), which is not provided for in the UPOAA.

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

Subsection (g) of N.C.G.S. Section 32C-1-110 is not part of the UPOAA. It is familiar, however, because it is similar to N.C.G.S. Section 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. N.C.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. N.C.G.S. § 32C-1-110(g)(2).

Co-agents and successor agents. N.C.G.S. Section 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 N.C.G.S. Section 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 N.C.G.S. Section 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 N.C.G.S. Section 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. N.C.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. Unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. N.C.G.S. § 32C-1-111(b). 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 N.C.G.S. Section 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 principal'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. N.C.G.S. Section 32C-1-112 is generally consistent with North Carolina law and does not specifically follow Section 112 of the UPOAA. N.C.G.S. Section 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 N.C.G.S. Section 32A-11(c) so 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 N.C.G.S. Section 32-59 after considering the factors set forth in N.C.G.S. Section 32-54(b). 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. N.C.G.S. Section 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 critical reference point for commencement of the agency relationship and the imposition of the agent's duties in N.C.G.S. Section 32C-1-114.

An agent's acceptance is not specifically addressed in Chapter 32A, but N.C.G.S. Section 32C-1-112 is similar to existing 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. Aiiken, 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. N.C.G.S. Section 32C-1-114(a) provides mandatory duties of an agent when exercising a power under the power of attorney. N.C.G.S. Section 32C-1-114(b) provides 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 mandatory duties of an agent when exercising a power under a power of attorney require an agent 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; to act in good faith; and to act only within the scope of authority granted in the power of attorney. N.C.G.S. § 32C-1-114(a).

The default duties of an agent require an agent to act loyally for the benefit of the principal; 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; to act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; to keep a record of all receipts, disbursements, and transactions made on behalf of the principal; 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; 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 those listed in this section); and to account to the principal or a person designated by the principal in the power of attorney. As a default duty, the principal may exclude one or more or all of these default duties in the power of attorney. N.C.G.S. § 32C-1-114(b).

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. N.C.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. N.C.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. N.C.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. N.C.G.S. § 32C-1-114(g).

N.C.G.S. Section 32C-1-114(h) addresses disclosure of receipts, disbursements, and transactions conducted on behalf of 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 N.C.G.S. Section 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 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 or general guardian. Therefore, unless the principal provides otherwise in the power of attorney, an agent must account to the principal in accordance with N.C.G.S. Section 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 N.C.G.S. Section 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, and by way of example, if the principal does not wish to require the agent to account to the principal, but to simply allow the agent to disclose to the principal upon the principal's request,
then the principal must provide in the terms of the power of attorney that N.C.G.S. Section 32C-1-114(b)(7) does not apply.

Exoneration of Agent. N.C.G.S. Section 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 N.C.G.S. Section 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 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 dishonestly, with an improper motive) so that it was consistent with N.C.G.S. Section 36C-10-1008.

Further, consistent with the exculpatory provision in N.C.G.S. Section 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. Also, 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.

Agent's resignation; notice. N.C.G.S. Section 32C-1-118 provides that unless the power of attorney provides 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, (a) to the guardian of the principal's estate, the guardian of the principal's person, or general guardian if one has been appointed, and (b) 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 this section of the UPOAA by the North Carolina drafters. Section 118(2) of the UPOAA is not included in N.C.G.S. Section 32C-1-118. It provides that notice could 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.

Principles of law and equity. N.C.G.S. Section 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 General Statutes. This section does not have a counterpart in Chapter 32A.

Authorities

A principal grants authorities to an agent in a power of attorney. The authorities, referred to as general authorities, are defined in N.C.G.S. Section 32C-2-204 through Section 32C-2-217, and the descriptive terms for the general authorities are real property; tangible personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of entity; 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; and gifts authorized by general authority. 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. N.C.G.S. § 32C-2-202. Further, N.C.G.S. Section 32C-2-203 describes authorities, incidental to the general authorities, that 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 N.C.G.S. Section 32C-2-201(a)(1), the specific authorities that a principal may expressly grant an agent in a power of attorney include the authority 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. Section 2510(12), sent or received by the principal. N.C.G.S. Section 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 N.C.G.S. Section 36C-6-602.1 and N.C.G.S. Section 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 N.C.G.S. Section 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 N.C.G.S. Section 36C-4-411(a)(1).

The drafters of the NCUPOAA moved a provision from Section 217 (Gifts) of the UPOAA to N.C.G.S. Section 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 N.C.G.S. Section 32C-2-201(a). N.C.G.S. Section 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 N.C.G.S. Section 32C-2-201(b)(1) through (6)
Gifts authorized by general authority in N.C.G.S. Section 32C-2-217(b) apply when the power of attorney grants general authority with respect to gifts. Authorization 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, 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. N.C.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. N.C.G.S. § 32C-2-217(b)(1)(b).

In accordance with N.C.G.S. Section 32C-2-201(e), a grant of authority to make a gift is subject to (b) and (c) of N.C.G.S. Section 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 N.C.G.S. Section 32C-2-218. This section is not in the UPOAA and, therefore, is unique to North Carolina law. Article 2B of Chapter 32A provides 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. N.C.G.S. Section 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.

Conclusion

An appropriate conclusion to this article is to conclude the same as it began. The North Carolina Uniform Power of Attorney Act is effective on Jan. 1, 2018.

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