North Carolina Uniform Power of Attorney Act
Judicial Relief and Procedure

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The inclusion of a judicial relief mechanism under the newly enacted North Carolina Uniform Power of Attorney Act (the "NCUPOAA" or "the Act") is a departure from North Carolina’s prior power of attorney statute. Until now, if agent misconduct was suspected regarding an elderly, incapacitated or deceased principal, it was often challenging to extract proper accountings or other information from the agent. N.C.G.S. Section 32C-1-116, and the related judicial proceedings under the Act, are effective Jan. 1, 2018 and applicable to all power of attorney instruments, including those executed prior to the Act’s effective date. See N.C.G.S. § 32C-4-403. Under current law, removal of an abusive agent could be difficult, often requiring the initiation of a guardianship proceeding and appointment of a guardian of the principal’s estate or general guardian to terminate the agent’s authority. Under the Act, judicial relief is available both in terms of protecting the principal from abuse but also regarding proceedings to obtain court approval to make gifts or other transfers of an agent’s property for legitimate estate and elder law planning purposes.

Powers of attorney have become a popular estate planning tool due to their low cost, ease of execution, privacy, and scope of authority. These qualities also afford opportunities for abuse and raise concerns about the ease with which an agent could secure a power of attorney through undue influence, duress or fraud and then conduct transactions involving a principal’s property with little or no oversight. A primary purpose of N.C.G.S. Section 32C-1-116 is to protect vulnerable or incapacitated principals against financial abuse. North Carolina has taken the step to reduce the potential for abuse and increase the likelihood that such abuse will be identified and remedied effectively.

The Act generally governs all power of attorney instruments, including those executed prior to the Act’s Jan. 1, 2018 effective date. See N.C.G.S. § 32C-4-403(a)(2). An exception to this general rule exists if the provisions of the Act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case the procedures under the superseded statute would control. Presumably those procedures would require a party to pursue a guardianship proceeding to find any relief.

Who Has Standing to Bring an Action?

The first issue is a determination of who has standing to pursue an action against an agent under a power of attorney. North Carolina has adopted a modified version of the Uniform Power of Attorney Act (the “UPOAA” or the “Uniform Act”) spelling out the categories of parties who can seek judicial relief against an agent. The parties include:

- The principal or the agent (i.e., in the case of agents, actions to approve compensation);
- A general guardian, guardian of the principal’s estate, or guardian of the principal’s person;
- The personal representative of the estate of a deceased principal;
- A person authorized to make health care decisions for the principal; and
- Any other interested person, including a person asked to accept the power of attorney.

The standing provision under N.C.G.S. Section 32C-1-116(c) is a modified form of the Uniform Act promulgated by the National Conference of Commissioners on Uniform State Laws. The list of parties with standing under the Uniform Act includes “the principal’s caregiver or another person that demonstrates sufficient interest in the principal’s welfare.” The North Carolina Act attempts to capture the breadth of the Uniform Act’s net by including within its provisions that “any other interested person…” may initiate a proceeding. See N.C.G.S. § 32C-1-116(c)(5). The term “interested person” is not specifically defined, but presumably the standing threshold is low enough to grant standing to any party that can sufficiently demonstrate an interest in the principal’s best interest of property.

Available Remedies

The NCUPOAA affords numerous remedies against an agent that is suspected of engaging in misconduct. An interested party can petition the clerk of superior court to order the agent to provide an accounting of all transactions that the agent has made, including the production of evidence substantiating transactions involving the principal’s property. N.C.G.S. § 32C-1-116(a)(1). In addition to compelling an accounting, a party can petition the clerk to terminate, suspend, or limit the authority of the agent under a power of attorney (or terminate the power of attorney in its entirety) if a guardian of the principal’s estate or a general guardian has been appointed. See N.C.G.S. § 32C-1-116(a)(2). If an agent’s authority is limited, suspended or terminated by the clerk, the successor agent named in the instrument will usually serve in the place of the former agent if the power of attorney instrument so provides. Otherwise, for example, the death of a co-agent generally does not terminate the surviving agent’s authority to continue to act. N.C.G.S. § 32C-1-111(a). This is a departure from the current statute that provides a surviving agent’s authority terminates at the death or resignation of the co-agent absent some permissive language in the document to the contrary. If there is no successor named, or if the successor agents are too closely tied to the acting agent, such that a request will be made to the clerk to also prevent a successor agent from serving, the petition will likely be made in conjunction with a request for the appointment of a guardian for the principal.
Agent Liability

A party may petition the court to hold an agent liable for breach of fiduciary duty, which can take the form of seeking a judgment against the agent for monetary relief, restoring property, or other means. N.C.G.S. § 32C-1-117(b)(2). An agent’s violation of the NCUPOAA is, per se, a “breach of fiduciary duty.” N.C.G.S. § 32C-1-117(a). An agent who commits a breach of fiduciary duty is liable for the amount required to restore the value of the property subject to the power of attorney and distributions from that property to what they would have been had the breach not occurred, and the profit made by the agent in connection with the breach. N.C.G.S. § 32A-1-117(d)(1)-(2) (emphasis added). This language is distinguishable from similar damages language under North Carolina’s Uniform Trust Code (the “UTC”). N.C.G.S. Section 36C-10-1008 limits the amount recoverable from a trustee guilty of a breach of trust to the greater of (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach. The drafters of the NCUPOAA replaced the word “or” as reads under the UTC and substituted it in the NCUPOAA with the word “and.” N.C.G.S. § 32A-1-117(d)(1)-(2).

A violation by an agent of the NCUPOAA is a breach of fiduciary duty. N.C.G.S. § 32C-1-117(a). If a court determines that an agent has breached a fiduciary duty, the court can order several remedies, including: (1) enjoining an agent from committing a breach of fiduciary duty; (2) compelling an agent to redress a breach of fiduciary duty by making the principal whole, whether that be through the payment of money, restoration of property or otherwise; (3) ordering an agent to produce an accounting; (4) appointing a special fiduciary to take possession of the principal’s property subject to the power of attorney and administer that property; (5) suspending an agent; (6) removing an agent; (7) ordering a reduction or denial of compensation to or reimbursement of an agent; (8) subject to the provisions of N.C.G.S. Section 32C-1-119, void an act of an agent, impose a lien or a constructive trust on property subject to the power of attorney, or trace property wrongfully disposed of by an agent and recover the property or proceeds; and (9) ordering any other appropriate relief. N.C.G.S. § 32C-1-117(b).

In addition to the remedies and agent liability provisions under Chapter 32C, a principal harmed by a breach of fiduciary duty by an agent may have a claim for constructive fraud. The issue presented to the jury in a constructive fraud case is a question of whether the agent took advantage of a position of trust and confidence to bring about a transaction rising to the level of constructive fraud. Terry v. Terry, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting Rhodes v. Jones, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950): “It is necessary for plaintiff to allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.”). For a principal or interested party to prevail on a constructive fraud claim, there must first have existed a relationship of trust and confidence between the agent and principal. Such a relationship exists where one person places special confidence in someone else who, in equity and good conscience, must act in good faith and with due regard for such person’s interests. Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E.2d. 896, 906 (1931). In the case of an agent serving a principal under a power of attorney, the fiduciary relationship between the parties inherently exists. Second, the principal or interested party must demonstrate to the satisfaction of the jury that the defendant used his position of trust and confidence to bring about the transaction that was detrimental to the principal and beneficial to the agent.

Gifts Authorized by General Authority

The NCUPOAA contains provisions permitting an agent to make gifts on behalf of the principal. N.C.G.S. § 32C-2-217. A power of attorney instrument may contain language authorizing an agent to make gifts “for the benefit of” individuals. N.C.G.S. § 32C-2-217(a). A gift for the benefit of individuals includes a gift 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 Internal Revenue Code, and (4) an ABLE account as defined by section 529A of the Code. Practitioners should be aware that unless a power of attorney otherwise provides, language in a power of attorney granting authority to make gifts limits the agent to gifts for the benefit of an individual so long as the value of the gift does not exceed the greater of (1) the amount determined to be in accordance with the principal’s history of making or joining in the making of gifts, or (2) the annual dollar limit of the federal gift tax exclusion under section 2503(b) of the Code without regard to whether the federal gift tax exclusion applies to the gift, or if the principal’s spouse agrees to consent to a split gift pursuant to section 2513 of the Code, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit. N.C.G.S. § 32C-2-217(b)(1). In addition, if authorized by the instrument, the agent may make charitable gifts on behalf of the principal to any organization described in sections 170(c) and 2522(a) of the Code provided the charitable gifts are made in accordance with the principal’s history of making or joining in the making of gifts. N.C.G.S. § 32C-2-217(b)(2).

Gifting authorized by a grant of authority pursuant to N.C.G.S. Section 32C-2-217 does not require a court order unless the agent wants to take a belt and suspenders approach and mitigate the agent’s own potential fiduciary liability. In that instance, or in a case where it would be in the principal’s best interest to make gifts in excess of those permitted under the Act’s general gifting provisions, an agent may petition the court for an order authorizing the agent to make a gift of the principal’s property that is reasonable under the circumstances. A court order may also be sought by an agent to perform any other act not expressly authorized by a power of attorney instrument. See N.C.G.S. § 32C-2-218.


N.C.G.S. Section 32C-1-116 sets out the rules and procedures by which a proceeding may be brought under Chapter 32C seeking relief involving actions related to a power of attorney. The rules and procedures for bringing an action under Chapter 32C are largely the same as those set forth for bringing an action involving an estate under Article 2 of Chapter 28A or an action involving a trust under Article 2 of Chapter 36C of the North Carolina General Statutes.
Personal Jurisdiction. General North Carolina law on personal jurisdiction will govern whether the courts have jurisdiction over the agent (and any other defendant/respondent) who may be named in the proceeding. Generally, if the agent does not live in North Carolina, the case will have to be made as to why/how the courts have jurisdiction over the person of the attorney-in-fact. If the attorney-in-fact is engaging in business in North Carolina, perhaps as a result of transacting business on behalf of the principal in North Carolina, it should be possible to obtain personal jurisdiction over the agent.

Subject Matter Jurisdiction. N.C.G.S. Section 32C-1-116(a) vests original and exclusive jurisdiction over certain matters involving powers of attorney with the clerk of court. (This concept of vesting original and exclusive jurisdiction over certain matters with the clerk of court is relatively new to North Carolina law, making its appearance for the first time with the enactment of the Trust Administration Act (former Article 3 of Chapter 36A), effective Jan. 1, 2002.) Previously, such matters would have been required to be filed in superior court. The statute also gives the clerks of court and the superior courts concurrent jurisdiction over other matters. Thus, an interested party who wants to bring a court proceeding involving a power of attorney must carefully review the provisions of N.C.G.S. Section 32C-1-116(a) to determine whether the proceeding should be filed before the clerk or in superior court. (Note that N.C.G.S. Section 32C-1-116(c) states who is an interested party with standing to bring an action under Chapter 32C. Those persons are (i) the principal or the agent, (ii) a general guardian, guardian of the principal’s estate, or guardian of the principal’s person, (iii) the personal representative of the estate of a deceased principal, (iv) a person authorized to make health care decisions for the principal and (v) any other interested person, including a person asked to accept a power of attorney. This last category is the most expansive—any person who can prove an interest in the matter can have standing. That could include children, spouses and other family members.)

Matters Over Which the Clerk Has Exclusive Jurisdiction. N.C.G.S. Section 32C-1-116(a) states that the clerks of superior court in this State have original jurisdiction over all “proceedings under this Chapter.” The statute then states that “[e]xcept as provided in subdivision (4) of this subsection, the clerk of superior court’s jurisdiction is exclusive” (emphasis added). The following proceedings are specifically included as matters over which the clerk has original and exclusive jurisdiction: (i) proceedings to compel an accounting by the agent, including the power to compel the production of evidence substantiating any expenditure made by the agent from the principal’s assets, (ii) proceedings to terminate a power of attorney or to limit, suspend, or terminate the authority of an agent where a guardian of the estate or a general guardian has been appointed, and (iii) proceedings to determine compensation for an agent under N.C.G.S. 32C-1-112(b).

Proceedings brought under Chapter 32C, including those specifically listed above, are required to be brought before the clerk of court and would be subject to dismissal for lack of subject matter jurisdiction if filed in superior court unless the matter could be styled as a declaratory judgment action.

Matters Over Which the Clerk Has Concurrent Jurisdiction. The clerks of court have original and exclusive jurisdiction over all proceedings brought under Chapter 32C except proceedings identified in subdivision (4) of N.C.G.S. Section 32C-1-116(a). This fourth category of proceedings consists of proceedings to “determine an agent’s authority and powers, to construe the terms of a power of attorney created or governed by this Chapter, and to determine any question arising in the performance by an agent of the agent’s powers and authority under a power of attorney governed by this Chapter.” Proceedings falling within this fourth category may automatically be transferred to superior court by any party upon the filing of a written notice of transfer as provided in N.C.G.S. Section 28A-2-26(h). Thus, the superior court has concurrent jurisdiction with the clerk of court over N.C.G.S. Section 32C-1-116(a)(4) proceedings.

Subdivision (4) sets forth a non-exclusive list of proceedings which are covered by the language of subdivision (4). Those consist of the following proceedings:

(i) To determine whether and to what extent an agent holds a specific grant of authority under N.C.G.S. Section 32C-2-201.
(ii) To approve an agent’s ability to make a gift on behalf of the principal where the gift is governed by N.C.G.S. Section 32C-2-217 because the power of attorney grants the agent only general authority with respect to gifts.
(iii) To authorize the agent to make a gift of the principal’s property under N.C.G.S. Section 32C-2-218.
(iv) To authorize the agent to do an act described in N.C.G.S. Section 32C-2-201(a), other than the act to make a gift, under N.C.G.S. Section 32C-2-219.
(v) To determine whether and to what extent acceptance of a power of attorney shall be mandated under N.C.G.S. Section 32C-1-120(f).

Note that the proceedings covered by subdivision (4) potentially consist of an extremely broad array of proceedings. Many practitioners do not realize that clerks of court can entertain petitions to construe documents or determine whether a specific power is granted to an agent. The ability of the clerks of court to hear such proceedings is governed by the desire of the parties. If all of the parties desire for the clerk to hear the matter, then it can proceed before the clerk and the rules governing declaratory judgment actions shall apply to the matter to the extent consistent with N.C.G.S. Section 32C-1-116. If, however, even one party does not want the clerk to have subject matter jurisdiction over the proceeding, that party can force a transfer of the proceeding to superior court.

Note that the superior court shares jurisdiction with the clerk of court only as to proceedings falling within subdivision (4). Any other proceedings involving Chapter 32C must be heard by the clerk of court. Thus, for example, a proceeding for removal of an agent or a proceeding to limit the ability of an agent to act can be brought and litigated in front of the clerk of court.
**Matters Over Which Superior Court Has Exclusive Jurisdiction.** The superior court has original and exclusive jurisdiction over two primary types of proceedings involving powers of attorney. First, under N.C.G.S. Section 32C-1-116(e), the superior court retains exclusive jurisdiction over declaratory judgment actions. Subsection (e) directs that nothing in the grant of subject matter jurisdiction to the clerk of court is intended to affect “the right of a person to file an action in the Superior Court Division of the General Court of Justice for declaratory relief under Article 26 of Chapter 1 of the General Statutes.” Second, under N.C.G.S. Section 32C-1-116(b), the superior court retains exclusive jurisdiction over the following actions:

1. Actions to modify or amend a power of attorney instrument.
2. Actions by or against creditors or debtors of a trust.
3. Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence.
4. Actions to set aside a power of attorney based on undue influence or lack of capacity.
5. Actions for the recovery of property transferred or conveyed by an agent on behalf of a principal with intent to hinder, delay, or defraud the principal’s creditors.

The actions listed above are statutorily defined as not constituting proceedings brought under Chapter 32C, and, as such, the clerk of superior court has no subject matter jurisdiction over them.

**Venue.** Venue for a proceeding under N.C.G.S. Section 32C-1-116 is appropriate in any of the following counties: (i) the county in which the principal resides or is domiciled, (ii) any county in which an agent resides, or (iii) any county in which property of the principal is located.

**Commencement of Power of Attorney Proceedings Before the Clerk of Court**

N.C.G.S. Section 32C-1-116(c) states that proceedings brought under Chapter 32C shall be commenced as prescribed in estate proceedings under N.C.G.S. Section 28A-2-6, which sets forth the rules governing how proceedings, both contested and uncontested, are commenced and heard before the clerk of court. Proceedings over which the superior court has original and exclusive jurisdiction are filed as civil actions and are governed by North Carolina Rules of Civil Procedure and general North Carolina law applicable to civil superior actions. Prior to enactment of the Uniform Trust Code in 2005, no statutory rules existed governing how matters brought before the clerk of court were to be handled. As a result, questions arose over the years with respect to whether a proceeding before the clerk of court should be docketed as a special proceeding or filed in the estate file. In addition, questions arose with respect to whether the clerk of court could apply the Rules of Civil Procedure to such a proceeding, including the rules of discovery. The addition of N.C.G.S. Sections 36C-2-205 and 28A-2-6 brought much needed clarity to this area of the law (and those two statutes contain largely identical provisions).

**Contested Proceedings.** Chapter 32C proceedings before the clerk of superior court brought against adverse parties are commenced as is prescribed for civil actions. Once filed, the petition or complaint is docketed as an estate proceeding (i.e., an “E” file), not as a special proceeding. This distinction is important because the role of the superior court upon appeal from an order entered by a clerk of court is different depending on whether the underlying matter appealed from is a special proceeding or an estate matter. N.C.G.S. §§ 1-301.2 and 1-301.3.

**Uncontested Proceedings.** If all parties to a proceeding are in agreement and a matter is uncontested, then such matter can be decided without hearing according to practice and procedure provided by law. An uncontested matter can be commenced by the filing of a petition setting forth the facts entitling the petitioners to relief and the nature of the relief demanded. In such a proceeding, the clerk of court can hear and decide the petition summarily. N.C.G.S. § 28A-2-6(b).

**Required Parties.** N.C.G.S. Section 28A-2-6 does not define who are the required parties to a Chapter 32C proceeding. Because required parties is not defined, the North Carolina Rules of Civil Procedure will govern the determination of necessary and proper parties in each contested proceeding.

**Service.** N.C.G.S. Section 28A-2-6 requires all parties not named as petitioners in the petition or complaint to be joined as respondents. The clerk of court may order that additional persons be joined as respondents. Once identified, the clerk of court is required to issue an estate summons to each respondent. The estate summons is required to comply with the requirements set forth in N.C.G.S. Section 1-394 for a special proceedings summons except that the clerk shall indicated on the summons by appropriate words that the summons is an ESTATE PROCEEDING SUMMONS. The Administrative Office of the Courts has developed an Estate Summons for use in contested estate and trust proceedings filed before the clerk of court. The summons must be served in accordance with Rule 4 of the Rules of Civil Procedure.

**Time to Answer or File Responsive Pleading.** Respondents have twenty (20) days after service of the petition upon them to respond to the petition. See N.C.G.S. § 28A-2-6(a). The clerk of court may grant an extension of time to respond the petition. The extension of time may be granted only once and may not exceed ten days, provided that the clerk can enlarge the time for a period of more than ten days for good cause shown, but only to the extent that the clerk, in the clerk’s discretion, determines that justice requires. Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect. Notwithstanding any other applicable provision of the Act and Article 2 of Chapter 28A, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted to be performed by any applicable Rules of Civil Procedure or by order of the court, not to exceed thirty days.
Scheduling of Hearing. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

Rules of Civil Procedure and Discovery. The Rules of Civil Procedure are not automatically applicable to a proceeding brought in front of the clerk of court. Under N.C.G.S. Section 28A-2-6(e), Rules 4, 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, 45, 56 and 65 of the Rules of Civil Procedure automatically apply to every proceeding. Upon motion of a party or the clerk of court, the clerk may further direct that any or all of the remaining Rules of Civil Procedure shall apply, including, without limitation, discovery rules. The addition of this language allows a proceeding, in those cases where it is appropriate to do so, to proceed before the clerk much the same way that a civil action proceeds in superior court.

Consolidation, Joinder and Notices of Transfer. Subsections (f) through (i) of N.C.G.S. Section 28A-2-6 contain rules (i) allowing for consolidation of matters pending before the clerk of court and the superior court where a common question of law or fact exists, (ii) allowing for joinder in a civil action of a claim that if filed independently, would have to be filed before the clerk of court, (iii) setting forth the requirements for a notice of transfer of a N.C.G.S. Section 32C-1-116(a)(4) matter to superior court and (iv) setting forth rules allowing the clerk of court and superior court to enter orders as necessary to allow matters to be consolidated, joined or transferred.

Safety Valve for Principal. Under N.C.G.S. Section 32C-1-116(f), if a proceeding is brought under Chapter 32C by someone other than the principal, the clerk of court is required to dismiss the proceeding upon motion by the principal unless the clerk determines that the principal is incapacitated within the meaning of N.C.G.S. Section 32C-1-102(5).

Apell. N.C.G.S. Section 28A-2-9 states that any party to a proceeding before the clerk of court may appeal from the decision of the clerk to a superior court judge in the manner provided for appeal of estate matters in N.C.G.S. Section 1-301.3. De novo review is not permitted. Instead, the superior court sits as an appellate court and is entitled to review the order of the clerk of court for the purpose of determining only the following:

1. Whether the findings of fact are supported by the evidence.
2. Whether the conclusions of law are supported by the findings of fact.
3. Whether the order or judgment is consistent with the conclusions of law and applicable law.

Note that a superior court judge cannot review an order of the clerk of court in accordance with the standard set out above unless the order contains findings of fact and conclusions of law. Indeed, N.C.G.S. Section 1-301.3(b) requires the clerk to enter orders in estate matters that contain findings of fact and conclusions of law. Yet clerks of court often do not issue orders complying with this requirement. If you have a matter before the clerk of court, it is recommended that you draft the order for the clerk so that it can be prepared appropriately.

Note further that the role of the superior court in a subdivision (4) proceeding can either be as the trier of fact or as an appellate court reviewing for abuse of discretion only. If a proceeding falls under the fourth category of proceedings identified in N.C.G.S. Section 32C-1-116(a), the proceeding can be originally heard by the clerk of court or, upon the motion of a party, can be transferred to superior court to be originally heard. If the clerk decides to hear the proceeding, then on appeal, the superior court judge is limited to an abuse-of-discretion review. However, if the proceeding is transferred to superior court, the judge will be able to hear the entire matter and review all the facts. Consideration should be given by parties to a proceeding which falls within subdivision (4) as to whether they would prefer the clerk of court or a superior court judge to originally hear the matter.

Conclusion & Recommendations

The drafters of the NCUPOAA focused extensively on the judicial relief provided under N.C.G.S. Section 32C-1-116. It is recommended that the practitioner be familiar with the procedure governing estate proceedings under Article 2 of Chapter 28A, as the procedures thereunder are incorporated into Chapter 32C. Whether to initiate a proceeding before the clerk of superior court or in the trial court division of the superior court should be given consideration based upon the facts and issues in dispute. A practitioner familiar with the judicial relief afforded under Chapters 28A and 36C should be comfortable navigating the judicial proceedings under the NCUPOAA.

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