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

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,
dedication of the sponsors and the Committee’s efforts, our Section would not be able to hold such a high quality Annual Meeting.

The Legislative Committee is furiously drafting comments for the recently enacted Uniform Acts that we helped introduce which will be published this fall, working on Technical Corrections for the 2018 Short Session and drafting 2019 Long Session legislation. Members of the Committee have written a series of articles included in this publication on the new Power of Attorney Act, effective January 1, 2018. Check out the General Assembly website to review Session Law 2017-212 (S582) signed by the Governor on October 8, 2017, which features a few more Technical Corrections introduced by our Legislative Committee at the beginning of the 2017 Long Session.

The CLE Committee is planning the CLE programs for the upcoming year. The Survey Course was held recently at the NCBA; it was a thorough review of the law applicable to our practice areas, just in time for the upcoming specialization exam. November 3, 2017 will be a full day course on the new North Carolina Uniform Power of Attorney Act. The CLE program is available live at the NCBA and via the web. We will also host a social hour the night before the CLE on November 2, 2017. Details are forthcoming.

Supplementing our CLE efforts, this issue of “The Will and the Way” includes articles on the new Power of Attorney Act, to provide our Section with the education needed to assist our members in learning the new legislation by its January 1, 2018 effective date. Future editions of “The Will and the Way” will be published in January 2018 and Spring 2018. If you are interested in authoring an article, please contact our editor-in-chief, Lucy Siler (LSiler@jahlaw.com).

Be on the lookout for a new publication from the NCBA which covers Fiduciary Litigation and is currently being written by members of the Fiduciary Litigation Committee. The Estate Administration Manual has been updated by dedicated members of our Section, and is scheduled for publication in February 2018 to coincide with the two planned CLE basics courses referenced above. A huge thank you to our committees and their members for these two resources which support our areas of practice.

Our Ethics Committee is drafting a response on behalf of our Section to the State Bar on FEO2, which addresses an attorney’s duties in advising an executor with regard to the handling of estate funds. We are continuing to support the NCBA in its Pro Bono efforts.

I also want to report to our Section on the fall Board of Governors of the NCBA and Board of Directors meeting of the North Carolina Bar Foundation (NCBF) which was held recently in Blowing Rock. A few highlights from the meeting include, but are not limited to, proposals from the Awards and Recognitions Committee on the naming of awards, the impact of moving CLE from the NCBF to the NCBA, a report from the Foundation Development Program Consultants who are assisting the NCBF with new ideas for development, a Legal Aid of North Carolina report covering the challenges they are facing, the Executive Director’s Report, which included the legislative update, and the Membership Committee report, which covered great ideas on increasing member benefits. I enjoy attending these meetings to understand the workings and activities of all parts of the NCBA and NCBF and to see where our Section fits in the big picture.

I encourage all members of our Section to join our committees and become actively involved. After twenty years of service to our Section in many capacities, I wholeheartedly believe that you receive much more than you give as a Section volunteer.

POWER OF ATTORNEY CLE
2018 NC Uniform Power of Attorney Act
Friday, Nov. 3, 2017 | N.C. Bar Center | Cary

Register today using this link

This program provides a comprehensive review and discussion of the North Carolina Uniform Power of Attorney Act in advance of its effective date on January 1, 2018.
Introduction, continued from the front page

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.

Organisation

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 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 guard-
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 more discussion than anticipated by this author. The North Carolina drafters modified the UPOAA here by substituting the words “in accordance with this Chapter” in place of the words “by the court.” This change was made to take into account the power to terminate a power of attorney and the authority of an agent (i) by a guardian of the estate or a general guardian pursuant to N.C.G.S. Section 32C-1-109(a)(7) and (b)(5) which modified Section 110 of the UPOAA in this regard and (ii) by the clerk of superior court who also has the authority to limit or suspend authority of an agent pursuant to 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 32A8. One alternative in N.C.G.S. Section 32A8 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), then 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).

**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(b). 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 invitam." Also, in Holleman v. Aiiken, 193 N.C. App. 484, 504-505, 668 S.E.2d 579, 592 (2008), the court provides that "[i]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 of the trust or interests of the beneficiaries. For North Carolina power of attorney law, the North Carolina drafters changed the standard in Section 115 of the UPOAA under which an exculpatory provision would not apply to bad faith (rather than 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)
are substantially similar to those the clerk of superior court is required to consider in authorizing a gift by court order pursuant to Article 2B of Chapter 32A; the factors are the value and nature of the property of the principal; the foreseeable obligations and need for maintenance of the principal; minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; eligibility for a benefit, a program, or assistance under a statute or regulation; the personal history of the principal of making or joining in making gifts; and the existing estate plan of the principal.

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

Certain acts authorized by the court are provided for in N.C.G.S. Section 32C-2-219. This section is not in the UPOAA and, therefore, is unique to North Carolina law. If an agent under a power of attorney that does not expressly grant the agent the authority to do an act or a specific authority described in N.C.G.S. Section 32C-2-201(a), the agent may petition the court for authority to do the act described therein that is reasonable under the circumstances. N.C.G.S. Section 32C-2-219 does not apply to the authority of an agent to make gifts pursuant to N.C.G.S. Section 32C-2-218 discussed below.

Gifts

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, to or for the benefit of an individual in an amount not to exceed the greater of (i) the amount determined to be in accordance with the history of making or joining in the making of gifts by the principal or (ii) the annual dollar limitation of the federal gift tax exclusion under section 2503(b) of the Internal Revenue Code (without regard to whether the federal gift tax exclusion applies to the gift) or an amount per donee not to exceed twice the annual federal gift tax exclusion limit if the principal’s spouse agrees to consent to the split gifts pursuant to section 2503. Also, an agent with the general authority to make gifts may consent, pursuant to section 2503, to splitting of a gift made by the principal’s spouse with respect to gifts described in (i) and (ii) herein. 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.

A very special thanks to Graham D. Holding for his unwavering commitment to the legislative efforts of our Section, his willingness to share his knowledge and experience with the drafters of legislation for our Section, and his extraordinary contribution to the drafting of North Carolina comments for the NCUPOAA, which significantly contributed to this author’s effort for this article. I am sincerely grateful to Senator Warren Daniel and Senator Paul Newton for their sponsorship of Senate Bill 569 for the NCBA Estate Planning and Fiduciary Law Section and to the members of the sub-committee of our Section’s Legislative Committee, S. Kyle Agee, James E. Hickmon, Brooks F Jaffa, E. Knox Proctor, Larry H. Rocamora, and Brent Stephens, along with other members of our Section’s Legislative Committee for their tireless efforts and commitment to service.

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The interplay between the principal, the agent and third persons asked to accept the agent's authority under a power of attorney is at the core of one of the fundamental goals of the newly adopted North Carolina Uniform Power of Attorney Act ("NCUPOAA"). Under the NCUPOAA, a multi-tier approach to solving the problem of arbitrary refusals of powers of attorney is implemented in furtherance of the overarching goal of enhancing the effectiveness of powers of attorney, this goal being discussed in Ms. Davies' article in this newsletter. N.C.G.S. Section 32C-1-102(8) defines a person as "[a]n individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity." For the purposes of this article, "person" shall generally mean and refer to a bank or other financial institution. Also, it is worth noting the drafters of the Uniform Power of Attorney Act ("UPOAA") recognized that statutory liability for unreasonable refusal of a power of attorney was a growing state legislative trend, specifically citing applicable North Carolina statutes (i.e. N.C.G.S. §§ 32A-40 to 3 in the official comments). To this point, many of the provisions of the NCUPOAA will be familiar to those accustomed to Article 5 of Chapter 32A.

Protection Against Liability for Accepting a Power of Attorney

From the perspective of a third person asked to accept a power of attorney, liability may exist if a power of attorney is accepted for a transaction that exceeds the scope of authority conveyed in the power of attorney, if the power of attorney is invalid or a forgery, or if the power of attorney has been terminated or revoked. The NCUPOAA provides significant protection for third persons against such liability.

The first prong in the NCUPOAA's multi-tier approach to the promotion of enhanced effectiveness of powers of attorney is the grant of broad protection to third persons that accept powers of attorney without imposing any contemporaneous duty to confirm the validity of the power of attorney or the scope of authority of the agent acting thereunder. Under N.C.G.S. Section 32C-1-119, a third person's acceptance of a power of attorney is protected so long as such person did not possess actual knowledge that the power of attorney is void, invalid or terminated or that the agent is exceeding his or her scope of authority or otherwise improperly exercising his or her authority thereunder.

In analyzing N.C.G.S. Section 32C-1-119, it is important to appreciate the difference between "acknowledged" and "unacknowledged" powers of attorney and to be cognizant of the importance of such distinction to a third person asked to accept a power of attorney. N.C.G.S. Section 32C-1-119(a) provides that "[f]or the purposes of this section and N.C.G.S. 32C-1-120, 'acknowledged' means purportedly verified before a notary public or other individual authorized to take acknowledgements." Further, N.C.G.S. Section 32C-1-119(b) provides "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption in N.C.G.S. Section 32C-1-105 that the signature is genuine." As such, one can see how the NCUPOAA provides a statutory framework which provides assurance to third persons limiting potential liability resulting from such third person's acceptance of a power of attorney.

In a break from the UPOAA, which only applied in this context to acknowledged powers of attorney, N.C.G.S. Section 32C-1-119(c) provides a good faith acceptance exception from liability of third persons to include both acknowledged powers of attorney and unacknowledged powers of attorney. The NC drafters felt that while N.C.G.S. Section 32A-8 does not require acknowledgement of a durable power of attorney, that expansion of liability protection to third persons was warranted. However, it is anticipated that powers of attorney executed under the NCUPOAA going forward will be acknowledged and that the acceptance of unacknowledged powers of attorney by third persons may be limited as determined on a case-by-case basis.

The grant of protection to third persons from liability for the acceptance of both acknowledged and unacknowledged powers of attorney is set forth in N.C.G.S. Section 32C-1-119(c) as follows:

A person that in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority (i) may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority; and (ii) shall not be held responsible for any breach of fiduciary duty by the agent, including any breach of loyalty, any act of self-dealing, or any misapplication of money or other property paid or transferred as directed by the agent.

As is apparent from the broad general release from liability under this subsection, the risk of acceptance of a power of attorney rests squarely upon the principal and the agent and not the third person under the NCUPOAA. This approach is intended
to promote acceptance of powers of attorney, which is essential to their usefulness as an alternative to guardianship.

While the broad grant of limited liability in itself should promote greater acceptance of powers of attorney, a third person may, in its discretion, request a certification to the “effect that the agent did not have actual knowledge at the time of the presentation of the power of attorney to the [third person] (i) that the power of attorney is void, invalid, or terminated, (ii) that the agent’s authority is void, invalid, or terminated, or (iii) of facts that would cause the agent to question the authenticity or validity of the power of attorney.” See N.C.G.S. § 32C-1-119(d). A certification meeting the requirements of N.C.G.S. Section 32C-3-302 is deemed sufficient proof to the requesting third person that (i) the power of attorney is authentic and valid and has not been terminated, (ii) the agent’s authority is valid and has not been terminated, and (iii) other factual matters stated in the certification regarding the principal, agent, or power of attorney are true. Thus, where a third person wishes to enhance its “good faith acceptance” protection provided by N.C.G.S. Section 32C-1-119(c), it may request such a certification by the agent. To reiterate, however, although a third person has the option of requesting an agent’s certification as to a matter of fact, an English translation, or an opinion of counsel as to a matter of law, these precautions are not required for the acceptance of the power of attorney to be protected.

A further layer of protection to third persons is found in N.C.G.S. Section 32C-1-119(f) whereby institutions that conduct activities through employees are deemed to be without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction is without actual knowledge of the act. In light of the fact that financial institutions often conduct business in multiple offices in various cities and states, an imputed knowledge standard is not appropriate in the context of conducting transactions under powers of attorney. Thus, the NCUPOAA’s broad protections under N.C.G.S. Sections 32C-1-119 and 120, coupled with the statutory rejection of any imputed knowledge standard, substantially limits financial institution liability.

Of equal importance to the concern that a power of attorney will be unreasonably refused is the concern that the power of attorney will be abused by the agent. To mitigate this concern, the NCUPOAA contains express language to address common types of abusive transactions perpetrated by agents under powers of attorney. The grants of general and specific authority are detailed in another article in this newsletter.

As it relates to third persons, the grants of general and specific authority provide a statutory framework that further promotes the goal of enhancing the effectiveness of powers of attorney. In addition to potential liability for an unreasonable refusal to accept or a rejection not conducted in good faith, third persons are concerned with liability for allowing an agent to conduct a transaction exceeding his or her scope of authority. With respect to liability for transactions that exceed the agent’s scope of authority, the NCUPOAA lessens the likelihood of liability for such transactions by providing statutory construction language for most common subject areas that might be included under a general grant of authority. While this language can be modified in the power of attorney, third persons accepting a power of attorney now have a clearly defined statutory framework for the meaning of authority over subject areas such as “banks and financial institutions” (N.C.G.S. § 32C-2-208), “insurance and annuities” (N.C.G.S. § 32C-2-210), and “retirement plans” (N.C.G.S. § 32C-2-215). The NCUPOAA also provides that express authority is required for certain activities that involve common abuses perpetrated with powers of attorney such as self-dealing transactions and transactions that violate the principal’s expectations. The clarity provided by the NCUPOAA with respect to delegation of authority lessens the likelihood that a principal or the third person who accepts the power of attorney will misunderstand the authority granted.

Protection Against Liability for Rejecting a Power of Attorney

The second prong in the NCUPOAA’s multi-tier approach to the promotion of enhanced effectiveness of powers of attorney provides clear safe harbors for legitimate refusals of powers of attorney. Under the NCUPOAA, a third person is not required to accept an acknowledged power of attorney if one of several safe harbors applies. Additionally, and notwithstanding the broad protection from liability under N.C.G.S. Section 32C-1-119(c), a third person may reject an unacknowledged power of attorney with impunity and without fear of liability. While the NC drafters felt it was prudent to widen the breadth of protection to third persons for accepting powers of attorney under N.C.G.S. Section 32C-1-119, the mandate to accept a power of attorney under N.C.G.S. Section 32C-1-120, absent a legitimate safe harbor, was determined to be appropriate to apply only to acknowledged powers of attorney.

When presented with an acknowledged power of attorney, absent a legitimate reason for refusal, N.C.G.S. Section 32C-1-120(b) provides several timelines that must be adhered to in order to avoid the imposition of a court mandate or award of costs, attorneys’ fees or other remedies available under NC law. No later than seven business days after presentation of an acknowledged power of attorney for acceptance, a person shall (i) accept the power of attorney, (ii) refuse to accept the power of attorney, or (iii) request a certification, a translation, or an opinion of counsel under N.C.G.S. Section 32C-1-119(d). Additionally, if a person requests a certification, a translation, or an opinion of counsel, then within five business days after receipt of the requested item(s) in reasonably satisfactory form, the person shall either (i) accept the power of attorney, or (ii) refuse to accept the power of attorney. It is noteworthy that under N.C.G.S. Section 32C-1-120(b)(3), a third person may not require an additional or different form of power of attorney if the power of attorney presented reasonably appears to authorize the agent to conduct the business the agent desires to conduct.

Under N.C.G.S. Section 32C-1-120(c), a third person may refuse to accept a power of attorney without liability if any of the following exist:

1. The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
2. Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with applicable law;
3. The third person has actual knowledge of the termination of the agent’s authority or of the power...
of attorney before exercise of the power;
4. A request for certification, a translation, or an opinion of counsel pursuant to N.C.G.S Section 32C-1-119(d) is refused;
5. The third person requesting the certification, a translation, or an opinion of counsel pursuant to N.C.G.S. Section 32C-1-119(d) does not receive the requested item(s) in reasonably satisfactory form within a reasonable time;
6. The third person in good faith believes that the power of attorney is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel pursuant to N.C.G.S. Section 32C-1-119(d) has been requested or provided;
7. The third person has reasonable cause to question the authenticity or validity of the power of attorney or the appropriateness of its exercise by the agent;
8. The agent or principal has previously breached any agreement with the person, whether in an individual or fiduciary capacity; or
9. The third person makes, or has actual knowledge that another person has made, a report to the local adult protective services office or law enforcement stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

Three additional safe harbors, applicable to financial institutions and carryovers from N.C.G.S. Section 32A-42(b), are provided in N.C.G.S. Section 32C-1-120(d) that do not require a person to do any of the following:

1. Open an account for a principal at the request of an agent if the principal is not currently a customer of the person;
2. Make a loan to the principal at the request of the agent; or
3. Permit the agent to conduct business not authorized by the terms of the power of attorney, or otherwise not permitted by applicable statute or regulation.

The third prong in the NCUPOAA’s multi-tier approach to the promotion of enhanced effectiveness of powers of attorney becomes applicable if a third person’s refusal of a power of attorney does not meet one of the foregoing safe harbors. Under N.C.G.S. Section 32C-1-120(e), a person that refused to accept an acknowledged power of attorney without legitimate grounds for refusal is potentially subject to:

1. A court order mandating acceptance of the power of attorney;
2. Liability for reasonable attorney’s fees and costs incurred in any action or proceeding that man-

Additionally, N.C.G.S. Section 32C-1-120(f) provides that “[t]he principal, the agent or a person presented with a power of attorney may initiate a proceeding to determine whether and to what extent acceptance of a power of attorney shall be mandated. The court may award costs and expenses, including reasonable attorneys’ fees to the agent only where the proceeding has substantial merit.” Also, under N.C.G.S. Section 32C-1-116(a)(4)(e), subject matter jurisdiction for such proceeding runs concurrent between the clerk of superior court and the superior court.

Other Third Person Provisions

Under N.C.G.S. Section 32C-1-122, the NCUPOAA does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with the NCUPOAA. The purpose of this provision is to alleviate any concerns that there might be certain regulations or other applicable law which govern financial institutions and other entities which may conflict with the provisions of the NCUPOAA. It should be noted that N.C.G.S. Section 32C-1-120(b)(2) provides a safe harbor for refusal to accept a power of attorney for any transaction that would be inconsistent with applicable law.

A power of attorney created pursuant to the NCUPOAA is durable unless the instrument expressly provides that it is terminated by the incapacity of the principal under N.C.G.S. Section 32C-1-104. The presumption of durability should act to further promote the acceptance of powers of attorney by third persons by alleviating concerns that often surrounds the validity of power of attorney upon the incapacity of the principal prior to recordation under current N.C.G.S. 32A-9.

Under N.C.G.S. Section 32C-1-105, “a power of attorney must be (i) signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney and (ii) acknowledged. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgements.” As previously discussed, the importance of this section is the limitation of liability under N.C.G.S. Section 32C-1-119 for third persons accepting powers of attorney that otherwise may have resulted in liability to the third person for conducting a transaction under a forged or otherwise invalid power of attorney.

A power of attorney executed in North Carolina on or after Jan. 1, 2018 will be valid if it complies with the requirements of N.C.G.S. Section 32C-1-105. N.C. 32C-1-106(a). Similar to other provisions in the NCUPOAA, the importance of this section to third persons is the assurance of validity of a power of attorney; it is this assurance that is at the underpinnings of the broad grant of protection from liability afforded third persons under N.C.G.S. Section 32C-1-119. Understanding that clients are more mobile and in an effort to further promote acceptance of powers of attorney, a power of attorney executed in another state is valid in North Carolina if, when the power of attorney was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to N.C.G.S.
Section 32C-1-107 or the requirements of a military power of attorney pursuant to Section 10 U.S.C. 1044b, as amended. Again, the interchange between N.C.G.S. Section 32C-1-119(d)(2) whereby a third person may request an opinion of counsel, N.C.G.S. Section 32C-1-106(c) relating to validity of foreign powers of attorney, and the safe harbors for rejections of powers of attorney under N.C.G.S. Section 32C-1-120(c) is highlighted when reviewing the statutory framework of the NCUPOAA through the lens of promoting acceptance of powers of attorney executed in foreign jurisdictions.

In the past, notwithstanding the penalties for unreasonable refusals to recognize powers of attorney provided in N.C.G.S. Section 32A-41(a), third persons were nonetheless reluctant to accept out-of-state powers of attorney in fear of facing liability for transactions conducted thereunder.

A photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original except as provided by statute other than Chapter 32C. N.C.G.S. § 32C-1-106(d). While original powers of attorney will still be required in various instances (e.g., recordation), it is anticipated that this provision of the NCUPOAA will assist in furthering the acceptance of powers of attorney by third persons by action of the limitation of liability under N.C.G.S. Section 32C-1-119.

The provisions of N.C.G.S. Section 32C-1-109 provide for when a power of attorney is effective. Similar to the provisions of the NCUPOAA relating to durability, execution and validity, the statutory framework for the effectiveness of a power of attorney is critical in the role of assuring that third persons are protected from liability when accepting powers of attorney. “A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.” N.C.G.S. § 32C-1-109(a). As such, a third person may rely on such a power of attorney as being valid under N.C.G.S. 32C-1-119 absent actual knowledge to the contrary. If a power of attorney is effective upon the occurrence of a future event or contingency under N.C.G.S. Section 32C-1-109(b) or upon the incapacity of the principal under N.C.G.S. Section 32C-1-109(c), it follows that a third person may not rely on the broad release from liability in same manner that it may do so for powers of attorney immediately effective under N.C.G.S. Section 32C-1-109(a). As third persons are charged with the knowledge of the requirement of an occurrence of a future event or contingency as indicated in a power of attorney, it follows that they must take additional steps to ensure the effectiveness of the power of attorney before conducting transactions with the agent thereunder. It should be noted that the NC drafters included a provision in N.C.G.S. Section 32C-1-109 to ensure that once a power of attorney under N.C.G.S. Section 32C-1-109(c) becomes effective, it does not subsequently become ineffective upon the principal’s regaining capacity. This provision was added in direct response to case law that held third persons have a duty under these types of powers of attorney to verify the effectiveness of the power of attorney for each transaction conducted thereunder.

Under N.C.G.S. Section 32C-1-111, a principal may designate two or more persons to act as coagents. While a principal may require in the power of attorney that coagents act jointly, absent such an expression of intent, each coagent may exercise the coagents’ authority independently and without the knowledge, consent, or joinder of any other agent or coagents, as the case may be. Additionally, unless the power of attorney provides otherwise, if any one or more coagents resigns, dies, becomes incapacitated, or otherwise fails to act, the remaining agent or coagents may continue to act on behalf of the principal. It is anticipated that presumption of joint and several authority of coagents will further promote acceptances of powers of attorney.

Conclusion

The NCUPOAA provides much needed clarity and protection to third persons who are asked to accept powers of attorney. While current NC statutes extended protections similar to those found in N.C.G.S. Sections 32C-1-119 and 120, other provisions in the NCUPOAA provide additional clarity and further assurances to third persons that hopefully will lead to greater effectiveness of powers of attorney in North Carolina.

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North Carolina Uniform Power of Attorney Act
Judicial Relief and Procedure

By Elizabeth K. Arias and James E. Hickmon

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 accounting 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 asking 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-2-203 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 summonses 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 to 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).

Appeal. 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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Federal Cases

Charitable deduction denied for failure to provide cost basis of property contributed.

In Reri Holdings I, LLC v. Commissioner, 149 T.C. No. 1 (July 3, 2017), the Tax Court denied a charitable deduction for the contribution of a remainder interest in an LLC to a university because of the taxpayer's failure to strictly or substantially comply with the applicable substantiation requirements for the contribution. The taxpayer's Form 8283 for the contribution contained a summary of the appraisal of the remainder interest but omitted the taxpayer's initial cost basis with respect to the remainder interest. The taxpayer purchased the remainder interest for $3,400,000 approximately eighteen months before the charitable contribution and claimed a charitable deduction of $33,019,000, so the disclosure of the basis amount would have alerted the Service to the disparity between the recent purchase price and the deduction claimed. Because of the nature of the information that was omitted, the taxpayer was denied substantial compliance and was subject to a gross valuation misstatement penalty for claiming a deduction in excess of 400% of the correct deduction amount.

Charitable deductions denied for lack of contemporaneous written acknowledgments, insufficient records, and failure to obtain appraisals.

In Ohde v. Commissioner, T.C.M. 2017-137 (July 10, 2017), the Tax Court upheld the denial of a $145,000 charitable deduction and the issuance of an accuracy-related penalty for a married couple's failure to provide contemporaneous written acknowledgments with individual dollar amounts and cost basis information for more than 20,000 noncash items the taxpayers claimed to have donated to Goodwill, including clothing, books, toys, furniture, and other household items. The taxpayers produced receipts for their donations that included general descriptions of the types of property contributed but that did not describe any specific items or their conditions. While taxpayers later produced a spreadsheet containing a description of specific items, that list was not prepared contemporaneously with the donations. The court held that each category of donated items (e.g., clothing, books, etc.) was subject to aggregation for purposes of the application of the additional records requirements for contributions of noncash property in excess of $500 and the qualified appraisal requirements for contributions of noncash property in excess of $5,000. The taxpayers reported contributions in excess of $500 in 11 separate categories, together constituting more than 99% of the total contributions claimed, and the taxpayers did not submit the additional information required for such contributions, being (1) the date the property was acquired, (2) a description of the property, (3) the cost or other basis of the property, (4) the fair market value of the property, and (5) the method used for determining the property's fair market value. Further, the taxpayers reported contributions in excess of $5,000 in four separate categories, together constituting more than 88% of the total contributions claimed, and the taxpayers submitted no appraisals. The taxpayers did submit several Forms 8283, but neither Goodwill nor any appraiser executed those forms. The court cast doubt on the credibility of the taxpayers' claims, particularly provided that the taxpayers had claimed more than $292,000 in deductions for noncash charitable contributions in the three years prior to the year in question and nearly $105,000 in deductions for the contributions in the two years after, all for contributions of similar household items. The court upheld a 20% accuracy-related penalty on the amount of the taxpayers' underpayment as a result of the taxpayer's negligence attributable to insufficient recordkeeping.

Roth IRA arrangement invalidated for lack of business purpose.

In Block Developers LLC v. Commissioner, T.C.M. 2017-142 (July 18, 2017), the Tax Court upheld excise taxes imposed on a Roth IRA arrangement that was deemed to have no valid business purpose. The taxpayer owned a series of companies that built retaining walls using patent-protected specialty blocks. The taxpayer sold the patents for the specialty blocks to an LLC co-owned by the taxpayer's attorney and four Roth IRAs created by the taxpayer and his family members. The LLC in turn licensed the patents back to one of the taxpayer's companies in exchange for a royalty equal to 10% of the company's gross sales of the blocks. The purchase price for the patents was $250,000 and was almost entirely financed by the company, since the LLC was capitalized with less than $10,000. However, royalties paid by the company to the LLC in the first month of the arrangement totaled more than $270,000, so the LLC fully satisfied its debt to the company almost immediately (with the company's money). Royalties paid by the company to the LLC over the next six years totaled nearly $1 million, $800,000 of which was funneled into the Roth IRAs. In finding that the arrangement served no legitimate business purpose, the Tax court noted that the sale of the patents was not necessary for the taxpayer to raise cash (as the taxpayer claimed), the LLC did not market the patents to third parties, the taxpayer's companies continued to produce, test, certify, and promote the blocks as if the companies owned the patents, the legal realities of the transaction were not well-defined, the records kept regarding the transaction and resulting cash payment were inconsistent, and the royalty obligations were sporadically enforced. The court concluded that the transaction was "just a conduit to shunt money to the [IRAs]" and upheld the Service's excise tax on the amounts funneled to the IRAs that exceeded the maximum contribution amounts. The court further held that in auditing the LLC, the Service was required to send audit notices to the LLC's direct members but not necessarily to any indirect members (such as the taxpayer as an IRA beneficiary) when the Service had not been affirmatively furnished with the identity or contact.
information of any such indirect members (despite that the Service knew such information from its own files).

Sale of land did not constitute farming income to enable taxpayers to be “qualified farmers” eligible for an increased deduction cap with respect to a qualified conservation easement.

In Rutkoske v. Commissioner, 149 T.C. No. 6 (Aug. 7, 2017), the taxpayers were brothers who were each 50% members of an LLC that owned 355 acres of real property and, in the form of a conservation easement, conveyed development rights in the property to a public charity as a part gift/part sale before subsequently selling its remaining interest in the property to a third party. The taxpayers claimed they were “qualified farmers,” within the meaning of Section 170(b)(1)(E)(v), due to more than 50% of their gross income coming from the trade or business of farming; however, to meet that threshold, the brothers claimed that their income from the sale of the real property constituted income from the trade or business of farming. While taxpayers argued that the sale of the property was part of the capital investment required for the business of farming, the Tax Court rejected that position and found that the plain language of IRC Section 2032A(e)(5) did not include the sale of land, even if the land was related to farming activity, in the calculation of a taxpayer’s income directly attributable to farming. The court conceded that the taxpayers were farmers in the general sense and that in a typical year, they would have been qualified farmers. However, the taxpayers’ income in the year of the sale was at issue, and the sale income not qualifying as farming income caused the taxpayers’ disqualification. As qualified farmers, the taxpayers would have been entitled to deduct the value of the gift portion of the conservation easement up to 100% of their adjusted gross income (less other charitable contributions), instead of the typical limit of 50%.

Tax Court denial of charitable deduction for conservation easement and description of partnership contributions as disguised sales vacated and remanded.

In BC Ranch II, L.P. v. Commissioner, 867 F3d 547, 2017 WL 3446583 (5th Cir. Aug. 11, 2017), the Fifth Circuit vacated and remanded three of the Tax Court’s findings in BC Ranch II, L.P. v. Commissioner, T.C. Memo 2015-130 (July 14, 2015). The Tax Court had disallowed a charitable deduction for a series of conservation easements because several five-acre homesite parcels had been reserved within the easement boundaries, and the easements permitted the modification of the boundaries of the homesite parcels provided that no homesite parcel exceeded five acres and the conservation purposes of the easements were not adversely affected. The Tax Court determined that such potential for modification violated the requirement the conservation easements be perpetual. The Fifth Circuit disagreed, finding that the easements were perpetual as required because neither the exterior boundaries nor the total acreage of the easements could be changed and the charitable recipient had to consent to any modification. The Tax Court had also found fault with the required baseline documentation associated with the easements, but the Fifth Circuit again disagreed and noted that the documentation requirements were intended to be flexible. The Fifth Circuit ultimately remanded the matter to the Tax Court for consideration of other objections to the conservation easement deductions raised by the Service that were not addressed in the Tax Court’s initial ruling. The Tax Court had also found that capital contributions of $350,000 to $550,000 by limited partners to the partnership that owned the conserved land were receipts from disguised sales when each such limited partner was deeded one of the five-acre homesite parcels. Since each homesite parcel was worth less than $30,000, the Service had relied on the value of the limited partners’ use of the partnership’s common areas and the value of the limited partners’ charitable income tax deductions resulting from the conservation easement in justifying that the full amounts of the capital contributions constituted disguised sale proceeds. The Fifth Circuit found that the record included no valuation of the common area usage rights, cast doubt on whether the value of such rights would materially add to the homesite parcel values, and chided the Service for relying on the value of a conservation easement deduction that the Service had simultaneously argued should be disallowed.

In determining unrelated business taxable income, social club could not deduct losses incurred from activity not intended to generate profit.

In Losantiville Country Club v. Commissioner, T.C.M. 2017-158 (Aug. 14, 2017), the taxpayer was a social club qualifying as a tax-exempt organization under Section 501(c)(7). The club collected revenue from members through membership dues and from nonmembers through surcharges for the use of its facilities. Under its Form 990-Ts filed for 2010, 2011, and 2012, the club allocated a proportion of its overhead expenses against its nonmember revenues, resulting in a loss purportedly attributable to its nonmember revenue activities. Taxpayer subsequently deducted such loss from its investment income for purposes of determining its unrelated business taxable income. The Tax Court denied the deduction because such loss did not result from an attempt to collect revenue from which the taxpayer intended to profit. The court ruled that its activities with respect to nonmember revenue should be analyzed under Regulations § 1.183-2, which provides factors to consider in determining whether an activity is carried on for profit. The club contended that its activities with respect to nonmember revenue should be analyzed under Regulations § 1.183-2, which provides factors to consider in determining whether an activity is carried on for profit, but the court ruled such regulations inapplicable because they only apply to individuals and S corporations and not to tax exempt entities.

Unpaid gift taxes resulting from net gift not deductible by decedent’s estate for estate tax purposes.

In Estate of Sommers v. Commissioner, 149 T.C. No. 8 (Aug. 22, 2017), the Tax Court denied a deduction taken by a decedent’s estate for the amount of gift taxes payable with respect to net gifts made by the decedent within three years of the decedent’s death. Regulations § 20.2053-6(d) generally permit the deduction for estate tax purposes of unpaid gift taxes with respect to gifts made by a decedent during life, but the court ruled that such deduction does not apply with respect to net gifts because the donees of such gifts, and not the estate of the donor, are responsible for the payment of the gift taxes. The court also declined to apportion the estate tax payable as a result of the gift taxes being included in the decedent’s estate against the
gift donees because under applicable state law, such apportionment
would only be permissible if the donees had received property in-
cludible in the decedent’s gross estate. Since the gifted property was
not included in the decedent’s estate (only the amount of the gift tax
was includible), the donees were not responsible for any estate tax
payable as a result of the decedent’s death.

Deed conveying conservation easement satisfied contemporane-
ous written acknowledgment requirements.

In Big River Development, L.P. v. Commissioner, T.C.M. 2017-
166 (Aug. 28, 2017), the Tax Court upheld a deduction taken by a
limited partnership for a conservation easement. The partner-
ship income tax return included a Form 8283 signed by the donee’s
president, but the Form 8283 failed to include a statement that the
donee provided no goods or services in exchange for the contribu-
tion. A subsequent letter from the donee to the partner-
ship did include the requisite statement, but it was sent more than
two years after the transfer of the easement. While the letter pro-
vided by the donee was found not to be contemporaneous with the
transfer of the easement, the Tax Court determined that the deed
conveying the easement did satisfy the substantiation require-
ments for a deduction. The deed was signed by the donee’s presi-
dent and, while it indicated that the donee would provide services
as to the property in connection with the transfer, those services
were funded by a $93,500 fee paid by the partnership under the
terms of the deed. The deed also contained a merger clause indicat-
ing that its terms constituted the entire agreement of the parties, so
that was sufficient for the Tax Court to conclude that no additional
goods or services were provided to the donor.

IRS permitted to examine estate tax return of predeceased spouse
in connection with DSUE claimed by surviving spouse.

In Estate of Sower v. Commissioner, 149 T.C. No. 11 (Sept. 11,
2017), the Tax Court upheld the Service’s adjustment of the de-
cceased spouse unused exemption amount (DSUE) available to the
estate of a surviving spouse based on a reexamination of the state
tax return of the predeceased spouse. The predeceased spouse’s
return erroneously calculated the DSUE by failing to take into
account the predeceased spouse’s lifetime gifts. The Service had
initially issued a closing letter with respect to the predeceased
spouse’s estate. However, the closing letter did not stop the IRS
from reexamining the predeceased spouse’s return for purposes
of determining the DSUE because the letter did not constitute a
negotiated closing agreement, no party was demonstrated to have
relied on the closing letter to its detriment, and no double taxation
was at stake. Further, the evaluation of the DSUE was not an im-
permissible second examination of the predeceased spouse’s estate
because the IRS sought to obtain no additional information as to
the predeceased spouse’s estate, and, in any event, the rule against
reexamination only protects the predeceased spouse’s estate, not
the surviving spouse’s estate. Finally, there was no statute of limi-
tations for the examination of the predeceased spouse’s estate for
purposes of calculating the surviving spouse’s DSUE because the
DSUE would apply to tax assessed against the estate of the surviv-
ing spouse and not the estate of the predeceased spouse.

Early distribution from retirement account subject to income tax and
penalties and not offset by business or education expense deductions.

In Cates v. Commissioner, T.C.M. 2017-178 (Sept. 13, 2017),
the Tax Court upheld the ordinary income and 10% penalty tax
imposed on an early distribution from the taxpayer’s 401(k). The
taxpayer failed to complete a qualified rollover of the distrib-
uted amount and could not substantiate deductions the taxpayer
claimed for tuition expenses. The taxpayer also claimed deductions
for business-related expenses, but the court determined that no such
deductions were available because the expenses were reim-
bursable by the taxpayer’s employer. The court upheld the accu-
roracy-related penalty assessed against the taxpayer for substantial
underpayment because the taxpayer did not establish reasonable
cause or good faith with respect to the underpayment.

Federal Administrative Developments

Proposed Section 2704 Regulations Withdrawn.

In Second Report to the President on Identifying and Reducing
Tax Regulatory Burdens (Oct. 2, 2017), the Treasury Department
announced its plan to withdraw the proposed Treasury Regula-
tions under Section 2704 that were initially released in Aug. 2016.

Distributions from incomplete gift trust were completed gifts by
grantor of trust and were not gifts by distribution committee.

In PLR 201729009 (July 21, 2017), the Service provided that when
a grantor created an irrevocable trust for the benefit of beneficia-
ries other than the grantor under which distributions could be
made pursuant to (i) the unanimous consent of a committee of
trust beneficiaries, (ii) the consent of the grantor and a majority
of such committee, (iii) the direction of the grantor, subject to an
ascertainable standard, or (iv) the direction of the grantor upon
the grantor’s death, then (a) the grantor’s transfer of property to
the trust was an incomplete gift, (b) any distribution from the trust
would constitute a completed gift by the grantor to the distribu-
ees, (c) the trust was not a grantor trust with respect to the grantor
or any committee member, and (d) no committee member had a
general power of appointment with respect to the trust property.

CRUT investment in college endowment did not cause UBTI for
CRUT even though endowment activities caused UBTI for college.

In PLR 201729014 and PLR 201729013 (July 21, 2017), and PLR
201730022 and PLR 201730019 (July 28, 2017), the Service pro-
vided that income realized by a charitable remainder unitrust from
investing in a college’s endowment was not unrelated business tax-
able income (“UBTI”), even though the endowment included in-
vestments that constituted UBTI to the college and the college was
the trustee and remainder beneficiary of the trust. The endowment
did not constitute a partnership, and payments by the endowment
to the trust were only made pursuant to a schedule that was una-
fected by the performance of the endowment’s assets, so the UBTI
nature of the endowment’s income was not relevant to the char-
acterization of the trust’s income from the endowment payments.
Judicial reformations of trusts to correct errors and ambiguities did not affect GST exempt status.

In PLR 201732029 (July 21, 2017), the Service found that the judicial reformation of a grandfathered GST trust to correct a scrivener's error that would have denied a share of the trust assets to the descendants of a predeceased child of the primary beneficiary upon the primary beneficiary's death did not cause the trust to lose its GST exempt status or cause gift tax consequences. In PLR 201735009 (Sept. 1, 2017), the Service found that an amendment to a grandfathered GST trust that unintentionally caused a potential extension of the duration of the trust did not affect the trust's GST exempt status when the amendment was declared void ab initio by a court order made in accordance with applicable state law. Federal regulations permit the judicial modification or construction of a grandfathered GST trust to resolve a bona fide ambiguity in the trust terms or to correct a scrivener's error if the modification or construction is consistent with applicable state law (notwithstanding whether the modification extends the terms of the trust, though no extension occurred in these cases).

Relief granted for inadvertent terminations of S corporation status.

In PLR 201730002 (July 28, 2017), the Service retroactively restored a corporation's S corporation status that had been terminated as a result of the corporation's sole owner, an LLC co-owned by an individual and a grantor trust with respect to such individual, becoming an ineligible shareholder upon the individual's death due to the trust's grantor trust status being terminated and the LLC thus becoming a partnership for income tax purposes. In PLR 201730021 (July 28, 2017), the Service retroactively restored a corporation's S corporation status that had been terminated as a result of two trusts that were shareholders failing to file timely ESBT elections. In both cases, the Service found relief appropriate because the terminations were inadvertent, the circumstances causing the terminations were corrected within a reasonable period, and the applicable taxpayers treated their tax circumstances as if S corporation status had not been terminated.

Affirmative allocation of GST exemption allowed despite absence of Notice of Allocation.

In PLR 201731005 and PLR 201731010 (July 28, 2017), the Service found that when two taxpayers made gifts to a trust, elected out of the automatic allocation of GST exemption with respect to the gifts, and affirmatively allocated GST exemption to the gifts on Schedule D of their gift tax returns, the affirmative allocation of GST exemption was valid notwithstanding the fact that the taxpayers did not attach the otherwise required Notices of Allocation to their returns.

Conversion of non-grantor CLAT to grantor CLAT was not a transfer for income tax purposes and did not result in charitable deduction for Grantor.

In PLR 201730018, PLR 201730017, and PLR 201730012 (July 28, 2017), the Service found that a trust modification granting the settlor's brother a power to substitute assets in a nonfiduciary capacity from a CLAT, thereby causing the settlor to be treated as the owner of the trust for income tax purposes and converting the trust from a non-grantor trust to a grantor trust, did not constitute a transfer of the trust assets from the trust to the grantor for income tax purposes (unlike the conversion of a grantor trust to a non-grantor trust during the settlor's lifetime). Further, the modification did not constitute self-dealing because the settlor's brother was not a disqualified person for purposes of the private foundation rules. Finally, though contributions to CLATs that are grantor trusts generally entitle the grantor to a charitable income tax deduction at the time of contribution, the Service did not permit the settlor to take any charitable income tax deduction as a result of the conversion, since the conversion did not represent a transfer from the settlor to the trust. The modification did not appear to be retroactive, and the trust had taken charitable income tax deductions in prior years with respect to its annuity payments to charity.

Service recognizes common law marriage.

In TAM 201734007 (Aug. 25, 2017), the Service ruled that a decedent and the decedent's common law spouse (as recognized under applicable state law) were married for federal tax purposes when the decedent died.

Inadvertent tax payments by trust beneficiary on behalf of trust, when reimbursed, did not trigger estate, gift or GST tax.

In PLR 201735005 (Sept. 1, 2017), when the beneficiary of a grandfathered GST trust was incorrectly directed to pay income tax attributable to a capital gain realized by the trust, did in fact pay such tax, and was later reimbursed for such tax by the trust within the statute of limitations for her legal recovery of the tax, no actual or constructive transfer or addition to the trust occurred for estate, gift, or GST tax purposes.

Service grants extension to make carryover basis election.

In PLR 201735015 (Sept. 1, 2017), the Service permitted the estate of a decedent who died in 2010 to file a late Form 8939, electing out of estate tax treatment and submitting to carryover basis treatment, when professional advisors the estate relied on in good faith failed to file the form or recommend it to be filed.

Surviving spouse substituted as beneficiary of IRA after judicial termination of trust originally designated as beneficiary.

In PLR 201736018 (Sept. 8, 2017), when a trust that was the beneficiary of a decedent's IRA was judicially terminated in the aftermath of the decedent's death, resulting in the IRA assets being payable to the decedent's surviving spouse free of trust, the Service treated the IRA as having passed directly from the decedent to the surviving spouse, making the IRA eligible for “rollover” treatment.

Service may only communicate with taxpayers’ representatives with respect to forms specifically listed on Form 2848 Power of Attorney.
In Chief Counsel Advice 201736021 (Sept. 8, 2017), the Service found that Form 2848 Powers of Attorney only cover the tax returns and forms specifically listed on the Form. Separate forms that are commonly attached to tax returns, including international information returns, must be separately listed on Form 2848 in order for the IRS to communicate with the named representative regarding such forms.

Procedure simplified for private foundations to determine if grants to foreign charities are qualifying distributions.

In Revenue Procedure 2017-53 (Sept. 14, 2017), the Service issued guidance simplifying the procedure for a private foundation to determine if a foreign grantee qualifies as a public charity for purposes of the qualifying distribution private foundation rules. Revenue Procedure 92-94 has been modified and superseded.

Service waives income tax consequences of IRA distribution to non-IRA account when taxpayer relied on incorrect professional advice.

In PLR 201737016 (Sept. 15, 2017), when an attorney advised a taxpayer to transfer the assets of the taxpayer's IRA to an account arranged by the attorney, told the taxpayer the new account was an IRA account when it was not, and then embezzled the assets of the new account, the Service waived the treatment of the account transfer as taxable income to the taxpayer (due to the assets leaving the original IRA and not being re-contributed or “rolled over” to another IRA within 60 days) and permitted the taxpayer to contribute an amount up to the transferred amount to a new IRA account to re-establish the IRA.

North Carolina Cases

No North Carolina income tax deduction for gain on maturity of bonds purchased at discount despite federal income tax deduction.

In Fidelity Bank v. NC DOR (392A16, 393PA16) (Aug. 18, 2017), the North Carolina Supreme Court denied a North Carolina income tax deduction with respect to gain on the maturity of United States government bonds that were purchased at a discount from face value. Such gain (“market discount income”) is deductible for federal income tax purposes because it is considered under the Code to be "interest" with respect to such bonds for such purposes, and interest earned from such bonds is deductible under the Code. North Carolina law provides that interest earned on United States government bonds is deductible for North Carolina income tax purposes but does not incorporate the provision of the Code defining market discount income as interest. The court provided that since North Carolina law does not incorporate the Code wholesale but rather only incorporates provisions on a piece-by-piece basis, the failure of North Carolina law to incorporate the definition of market discount income as interest means that for North Carolina law purposes, interest is defined in accordance with its plain meaning, which does not include market discount income.

Clerk's removal of guardian of estate and trustee of special needs trust upheld by Supreme Court.

In In re Estate of Skinner (277A16) (Sept. 29, 2017), a divided North Carolina Supreme Court held that the Assistant Clerk of Court did not commit an abuse of discretion in removing a principal's spouse as trustee of a special needs trust for the principal and guardian of the principal’s estate when, within 60 days of the special needs trust being funded with approximately $170,000, the trustee/guardian spent nearly $160,000 of such funds on a house for the principal and the trustee/guardian, furnishings and appliances for such house, a prepaid funeral expense insurance policy for the principal, and a payment of more than $8,000 to the trustee/guardian’s personal business, approximately $2,500 of which was acknowledged to be in reimbursement of legal expenses the trustee/guardian personally incurred in pursuit of marriage to the principal (who was incapacitated at the time of the marriage, which occurred four years before the special needs trust was funded) and in pursuit of being named as trustee and guardian. The Court of Appeals had overturned the Assistant Clerk's judgment as being “so arbitrary that it could not have been the result of a reasoned decision.” The Supreme Court admitted that the Assistant Clerk had made certain errors in justifying the removal, such as presuming that the purchase of the funeral expense insurance policy violated a term of the trust when it did not and presuming that the trustee/guardian improperly benefitted from the purchase of house as a result of residing there with the principal. However, the Supreme Court held that the Assistant Clerk's removal of the trustee/guardian was justified because the facts indicated a general breach of fiduciary duty by the trustee/guardian in spending such a high percentage of the special needs trust funds within such a short amount of time in ways that either directly or indirectly benefitted the trustee/guardian. The dissenting justices disagreed that the purchase of the house, furnishing, and appliances was inconsistent with the purpose of the special needs trust, which the dissenting justices determined was to improve the principal's quality of life while not adversely affecting the principal's eligibility for government benefits. The dissenting justices deemed the removal as a misapprehension of applicable law by the Assistant Clerk.

Power of attorney void when principal is judicially incompetent at time of execution.

In O’Neal v. O’Neal (16-1299) (July 5, 2017), the Court of Appeals declared void ab initio (i) two powers of attorney executed by a principal previously adjudicated incompetent (and whose competency had not been restored) and (ii) three deeds executed by the purported attorney-in-fact on behalf of the principal under the auspices of the voided powers of attorney. The court equated the capacity to execute a power of attorney to the capacity to execute a general contract and distinguished that capacity from the capacity to marry or to make a will, neither of which are per se absent when the principal has been adjudicated incompetent. The court provided that third parties dealing with attorneys-in-fact or agents have constructive knowledge of whether the principal was judicially incompetent at the time the principal executed the applicable power of attorney due to the public nature of incompetency court proceedings.

Decedent's estate not bound by arbitration clause in assisted living agreement when neither decedent nor any legal agent of decedent executed agreement.
In McLaurin v. Med Facilities of NC, Inc. (16-1161) (July 5, 2017), in a claim by the estate of a decedent against the decedent's assisted living facility at the time of the decedent's death, the Court of Appeals held an arbitration clause in the assisted living agreement unenforceable against the decedent's estate when the decedent did not execute the agreement and the decedent's "responsible party" under the agreement, who did execute the agreement and by virtue thereof was responsible for the decedent's financial obligations to the facility under the agreement, had not been appointed the decedent's attorney-in-fact or otherwise legally designated as the decedent's agent at the time the agreement was signed (notwithstanding that such responsible party was also the decedent's executor).

**Pre-mortem gift of principal’s real property by attorney-in-fact upheld when power of attorney specifically authorized gifts.**

In Russell v. Russell (17-21) (July 5, 2017), the Court of Appeals upheld a gift of real property made by an attorney-in-fact on behalf of a principal immediately prior to the principal's death when gifts of real property were specifically authorized by the power of attorney and no evidence indicated that the attorney-in-fact failed to take into account certain factors the power of attorney required the attorney-in-fact to consider in making gifts of the principal's property, which factors included the participation of the recipient in the decedent's care and the tax consequences of the gift.

**Purported surviving spouse not entitled to spousal allowance from decedent’s estate when marriage deemed void.**

In In re: Meetze (16-796) (July 18, 2017), when two purported surviving spouses of the decedent claimed the statutory one-year spousal living allowance from the decedent's estate, the court awarded the allowance to the spouse whose purported marriage was earlier. The later of the two marriages was deemed void because the decedent was still married to the earlier spouse at the time – no divorce proceeding between the decedent and the earlier spouse was ever completed. The later spouse contested the evidentiary validity of the earlier spouse's marriage license because it was not separately authenticated in the court proceeding, but the court ruled that the marriage license, as a certified public record, was self-authenticating.

**Promissory note unenforceable when conveyance in consideration of note was unenforceable.**

In Kyle v. Felfel (16-1318) (Aug. 1, 2017), a promissory note was made in consideration of the grant of an option to purchase real property. However, the grantor of the option never executed the instrument conveying the option. Because the option, as an interest in real property, was unenforceable due to the statute of frauds, the note, even though executed by the grantee of the option, was not enforceable against the grantee due to lack of consideration.

**Statute of frauds applies to family settlement agreement dividing an interest in land.**

In Blount v. Whitley (16-1234) (Aug. 1, 2017), the court ruled that a family settlement agreement dividing an interest in land is subject to the statute of frauds.

**Selection of New York law in premarital agreement honored in North Carolina divorce proceeding.**

In Wolfe v. Wolfe (16-57) (Aug. 1, 2017), for equitable distribution purposes in a North Carolina divorce proceeding, the court honored a provision in the parties’ premarital agreement selecting New York law to govern the agreement. Under North Carolina law, an unchallenged provision in a contract selecting a foreign jurisdiction’s law is honored by the court unless it lacks a reasonable basis or is contrary to North Carolina law or public policy, even if neither party affirmatively petitions the North Carolina court to apply the foreign law. The court is responsible for applying the law validly selected by the parties. In Wolfe, the parties married in New York and later moved to North Carolina. The court by implication provided that the choice of New York law for the premarital agreement had a reasonable basis and that applying New York law to the premarital agreement was not contrary to North Carolina public policy.

**No survival action available for negligent act that causes decedent’s death; estate must bring wrongful death claim within shorter statute of limitations.**

In Bullard v. Prime Building (16-1279) (Sept. 5, 2017), the Court of Appeals dismissed a survival action advanced by the administrator of a decedent's estate as time-barred because the alleged negligent act giving rise to the survival action caused the decedent's death, and no viable alternate explanation for the decedent's death existed, meaning that the administrator's only available claim for such negligent act was a wrongful death action. Whereas the three-year statute of limitations for survival actions was still open, the two-year statute of limitations for wrongful death actions had expired.

**Estate must exhaust all assets before accessing joint bank account co-owned by decedent to pay estate claims.**

In Fortner v. Hornbuckle (17-44) (Sept. 5, 2017), among other procedural holdings, the court held that a bank account held jointly by a decedent and a survivor could not be accessed by the decedent's estate unless the account funds were necessary to satisfy claims against the decedent's estate after all other estate assets (including illiquid or non-income producing assets) had been exhausted.

**North Carolina Statutes**

**Trust Decanting Statute Replaced.**

SL 2017-121 – Uniform Trust Decanting Act (July 18, 2017) North Carolina’s Uniform Trust Decanting Act differs from the prior North Carolina trust decanting statute in the following notable ways:
Key Revisions:
- Statutory trust decanting can now be considered a modification of the existing trust or the transfer of trust assets to a separate trust. Under the prior statute, any decanting constituted the transfer of trust assets to a separate trust.
- The statutory decanting power may now be exercised by a trustee who is also a beneficiary of the trust. Previously, a statutory decanting could only be performed by a non-beneficiary trustee.
- Under the prior statute, 60 days’ notice of a statutory trust decanting must be given to the qualified beneficiaries of the trust with respect to which the decanting power is being exercised. Under the new statute, such notice must also be given to the settlor of the trust (but only if the post-decanting trust would be a grantor trust with respect to the settlor), any person with the power to remove or replace the fiduciary performing the decanting, and all other fiduciaries of the trust. The notice must now include a copy of the original trust in addition to the post-decanting trust. Any party entitled to notice of a proposed decanting may initiate a court proceeding to approve or disapprove of such proposed decanting.
- If the decanting would eliminate the ability of the settlor or another person to terminate grantor trust status with respect to the trust, or if it would convert the trust to a grantor trust without providing the settlor the ability to terminate grantor trust status, then the settlor may unilaterally prevent the decanting from occurring.
- Statutory trust decanting is no longer expressly considered to be the exercise of a special power of appointment with respect to the trust property.

Helpful Additions:
- The statute expressly provides that third parties may rely on the valid exercise of the statutory decanting power.
- The statute includes a savings provision to “fix” purported exercises of the decanting power that are partially invalid.
- If additional property of the original trust is discovered after a decanting of all of the assets of the original trust, then such later discovered property is subject to the decanting without any new action being required.

Clarifications:
- The statutory decanting power is made expressly inapplicable to trusts established for charitable purposes (without any specifically designated beneficiaries).
- The statute provides that the settlor of a trust established or modified pursuant to decanting is the settlor of the original trust.

Provisions to Prevent Abuse:
- Any restrictions on the exercise of the decanting power under the provisions of the original trust must be included in the post-decanting trust.
- Either the qualified beneficiaries or the court must approve any express increase in fiduciary compensation pursuant to decanting.

Additional Provisions of Note:
- The fiduciary power to distribute trust principal alone (without the power to distribute trust income) enables a fiduciary to exercise the statutory decanting power with respect to trust income and principal.
- The statute purports to make the decanting power available to any trust with its principal place of administration in North Carolina, regardless of the governing law of the trust. Query whether this provision expresses a strong public policy of North Carolina against the application of the law of a foreign jurisdiction selected by the grantor in the trust decanting context such that North Carolina law would override the grantor’s selected law under N.C.G.S. Section 36C-1-107 for purposes of trust decanting.
- The prior statute’s permissive language regarding the granting of powers of appointment pursuant to decanting has been expanded to reference powers of appointment granted to future beneficiaries in addition to current beneficiaries, but the statute provides that any powers of appointment granted to future beneficiaries may only be exercisable once such future beneficiaries become current beneficiaries.

Wills may be judicially modified to correct ambiguities; judicial modification of trusts to correct mistakes must be pursued through general trust modification avenues unless mistake resulted in ambiguous terms.

SL 2017-152 – Reform/Correct/Wills/Trusts (7/20/2017)

If the terms of a will are ambiguous and were affected by a mistake of fact or law, the court may reform the will to conform to the testator’s intent as proved by clear and convincing evidence. The court may also modify a will to conform to the testator’s tax objectives if the modification is “not contrary to the testator’s probable intent.”

Reformation of trusts under N.C.G.S. Section 36C-4-415 to correct mistakes is now only available if the terms of the trust are ambiguous. Before, ambiguity was not a prerequisite for trust reformation under N.C.G.S. Section 36C-4-415 pursuant to mistake.

Power of attorney statute replaced.

Court orders generally effective regardless of timely stamping; suspended or disbarred attorneys removed from court-supervised fiduciary positions; estate accounting due dates clarified.


An order or judgment is valid and enforceable notwithstanding the initial failure of the court to affix a file stamp or date stamp thereto if the clerk later appropriately stamps and enters the order or judgment. The order or judgment would be effective as of the initial date of filing notwithstanding the later act of stamping. The parties to the action must be given notice of the later stamping.

If an attorney is serving as executor, collector, or guardian and is suspended or enjoined from practicing law or is disbarred, the attorney is removed from such fiduciary position.

The default due date for the annual accounting of an executor with respect to an estate is 30 days after the anniversary of the executor’s qualification (if no fiscal year is selected). The selection of a fiscal year for the estate by the executor would cause the annual accounting to be due by the fifteenth day of the fourth month following the close of the fiscal year.

Failure to respond to North Carolina Department of Revenue within prescribed windows causes termination of refund request.

SL 2017-204 – Various Changes to Revenue Laws. Under laws initially passed in 2007, if a taxpayer requests a refund from the North Carolina Department of Revenue and the department does not respond within six months, the request is considered denied, and the taxpayer must then further request review by the department within 45 days of the expiration of the original six-month period. The department is then legally required to respond. Session Law 2017-204 updates those procedures to provide that if the department responds by requesting additional information from the taxpayer, and the taxpayer fails to respond in any way to two separate requests for additional information from the department, each of which allows the taxpayer 30 days to respond, then the department’s denial of the taxpayer’s requested refund becomes final and not subject to further administrative or judicial review.

Spouse’s separate descendants may be beneficiaries of non-marital deduction trusts statutorily protected from creditors.

SL 2017-212 – Budget and Agency Technical Corrections. Under N.C.G.S. § 36C-5-505(c), any inter vivos trust created by a settlor that either qualifies for the martial deduction from the federal gift tax or is otherwise for the benefit of the settlor’s spouse and the settlor’s descendants during the lifetime of the settlor’s spouse is protected from the creditors of the settlor (subject to the provisions of the North Carolina Uniform Voidable Transactions Act). Session Law 2017-212 provides that the beneficiaries of such a protected non-marital deduction trust during the lifetime of the settlor’s spouse may also include descendants of the settlor’s spouse who are not descendants of the settlor.

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