Uniform Power of Attorney Act Brings Change to North Carolina

By Crystal Welton

Powers of attorney are the most cost-effective and efficient method for individuals to appoint another individual, or other individuals, to have the ability to make financial and/or healthcare decisions on his behalf. Powers of attorney, in most instances, can alleviate the need for the costlier and time-intensive guardianship (or conservatorship) proceedings, which requires the court's continued and ongoing involvement.

In 2002, a national study of durable powers of attorney was performed by the Uniform Law Commission and exposed the need to address many issues not contemplated in the original Uniform Durable Power of Attorney Act or in many states' statutes regarding powers of attorney. In 2006, the Uniform Law Commission created the Uniform Power of Attorney Act ("UPOAA"), which supersedes the Uniform Durable Power of Attorney act and the Uniform Statutory Form Power of Attorney Act; the UPOAA consists of four articles: 1) Definitions and General Provisions; 2) Authority; 3) Statutory Form; and 4) Miscellaneous Provisions.

Currently, Chapter 32A of the North Carolina General Statutes governs powers of attorney in North Carolina. On July 20, 2017, Governor Cooper signed the bill (Session Law 2017-153) allowing the North Carolina Uniform Power of Attorney Act (the "Act") to become law effective January 1, 2018; the Act will be located in Chapter 32C of the NC General Statutes. Unlike the current law, the Act presumes that all powers of attorney enacted thereunder are durable unless the document states otherwise. G.S. § 32C-1-104. In addition, with a Power of attorney executed after January 1, 2018, the Act does not require that the power of attorney be registered in the office of the register of deeds unless the transactions concerns the conveyance of real property as provided in G.S. § 47-28.

The Act consists of four articles. The first contains the general provisions that pertain to the creation and use of a power of attorney. While there are mandatory rules in the first article, the majority of the provisions therein are default rules that can be altered by a power of attorney. Article 2 describes the different types of authority that can be granted to an agent, some of which must be expressly stated in the document. Article 3 provides a statutory short form power of attorney, which includes an agent's certification, and a limited power of attorney for real property. Article 4 includes miscellaneous provisions dealing with powers of attorney created before the enactment of the Act and the how the Act relates to other laws.

One major difference between Chapter 32A and the Act is that the Act provides protections for the principal as it relates to the agent, including mandatory and default duties for the agent, liability for agent misconduct, provisions for judicial review of the agent's conduct, and the requirement that the power of attorney has to include express language to grant an agent authority that could substantially reduce, or even eliminate, the principal's property or modify the principal's estate plan. The Act mandates that the agent 1) "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest," 2) "act in good faith," and 3) "act only within the scope of authority granted in the power of attorney." G.S. § 32C-1-114(a).

Another difference between current law and the Act is that the Act makes a clear distinction between the termination of a power of attorney and the termination of the agent's authority under the power of attorney. Another primary purpose of the Act is to provide broad protections for good faith acceptance and refusals of powers of attorney, consequences for arbitrary refusals of an acknowledged powers of attorney, and recognition of the portability of powers of attorney validly created under other law.

The Act requires that certain powers, which are referred to as "hot powers", must be expressly granted in the power of attorney for the agent to have the authority to act. "Hot powers" include the ability 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 a power of appointment, and exercise authority over the content of electronic communication sent or received by the principal. G.S. § 32-2-201(a). Prior to requiring that a principal expressly grant these "hot powers" to an agent in the power of attorney, these areas resulted in great deal of abuses of power, and breach of fiduciary duty, by agents and thus subsequently resulted in substantial litigation.

In Article 2, the provisions concerning general authority are referenced in G.S. §32C-2-204 through G.S. §32C-2-217, including, but not limited to, real estate, tangible personal property, and stocks. A principal can incorporate by reference the general powers described in G.S. §32C-2-204 through G.S. §32C-2-217, which would also give the agent the authority to act as provided in G.S. § 32C-2-203. Additionally, a power of attorney that grants an agent authority to do all acts that a principal could do pursuant to G.S. §32C-2-201(d) also authorizes the agent to act as provided in G.S. § 32C-2-203. Please note the final version of the law that was adopted includes language in Article 2 that references G.S. §32C-2-220; however, the final version of Article 2 of the Act stops at G.S. §32C-2-219, and G.S. §32C-2-220 does not exist.

The Act also deals with the fact that most agents are family members, who are oftentimes presumed to have an inherent conflict of interest because they may be more likely to benefit from actions taken on behalf of the principal. These conflicts of interest do not necessarily prevent an agent from acting competently for the principal's benefit. However, the Act addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests.
Involuntary Commitments in North Carolina

By Marjorie J. Brown

Mary awoke one evening to find her husband Tim standing over her. Diagnosed with Alzheimer’s, Tim was in an agitated, confused and enraged state, and threatened to kill her. Mary ran out of the house and called the police. The police responded and recommended that Mary have her husband committed for evaluation and treatment.

Kevin’s mother lived with him and his wife. Not only did she have a diagnosis of Alzheimer’s, but she was also diagnosed with high blood pressure and diabetes. Kevin could not get her to take any of her medications, and she began to lose weight and decline. She refused to go to the doctor and Kevin became increasingly worried.

Kimberly, 73 years old, diagnosed with dementia and deemed incompetent, fell at home. Home health called 911, and her guardian, who met the EMTs at the house. Although her guardian requested she be transported to the hospital to be examined, Kimberly declined transport. The EMTs informed the guardian that they could not transport her since she declined transport and the guardian would have to go through the magistrate in order to get her transported.

These incidents, or ones that are similar, are occurring with regularity throughout the state. As a result, there is an increased request for assistance with the involuntary commitment process. The process may be initiated by any person who has reason to believe a person is mentally ill and is either a danger to themselves or others. (NCGS 122C-261(a)). When applied to an adult, the definition of mental illness, as per NCGS 122C-3(21), is “an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control”.

There are three tracks to initiate the process of involuntary commitment: layperson petitioner affidavit (which most of our clients will utilize), clinician petitioner exam and affidavit, and clinician exam and emergency certificate. The main difference between these is when a person is required to appear directly in front of the magistrate. When a layperson is the petitioner, Form AOC-SP-300 Affidavit and Petition For Involuntary Commitment must be filled out with the facts on which the petitioner’s opinion is based and presented in person to the magistrate; whereas if a clinician fills out the paperwork it may be simply faxed into the magistrate.

If the magistrate finds reasonable grounds to believe the respondent probably meets the criteria for commitment, an order will be issued for custody and transportation. The order will be issued to law enforcement or any other person authorized under 122C-251 to take the respondent into custody for examination. The interesting part is that we all know that this part of the process can be particularly unsettling for an individual with dementia or Alzheimer’s. The statute allows for custody and transportation to be completed by family or friends if the danger to self or others by respondent is not substantial. (NCGS 122C-251(f)). Regardless of who carries out the custody and transportation order, transportation must occur within 24 hours of the order or a new custody order must be issued (NCGS 122C-261(e)).

Familiarize yourself with N.C General Statutes Chapter 122C as well as the UNC School of Government “The Magistrate’s Role In Involuntary Commitment” and the December 2014 issue Commitment Issues for Law Enforcement and you can effectively aid your clients as they navigate the Involuntary Commitment process.

1. NC General Statutes Chapter 122C Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985

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