

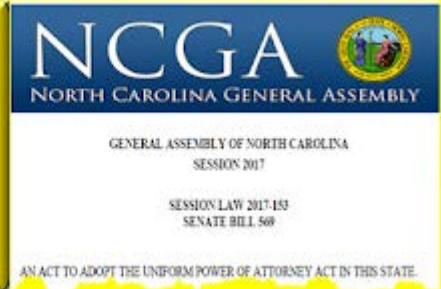


CHICAGO BULL

(11-28-2017, REV. 9-10-2019)

The New NC Uniform Power of Attorney Act, NCGS Ch. 32C
Effective January 1, 2018!

CAUTION!
Do not throw away Ch. 32A just yet!



***A closing is approaching and you hear the dreaded words:
“They want to close under a power of attorney. OK?”***

Beginning January 1, 2018, your answer may have changed dramatically!! Under [Session Law 2017-153](#), Senate Bill 569, the New North Carolina “Uniform” Power of Attorney Act took effect January 1, 2018, as Chapter 32C of the North Carolina General Statutes. The Act had been heavily negotiated for several years. In addition, [S.L. 2018-142](#), effective December 14, 2018, made several key technical corrections.) It completely *prospectively* replaced the old [Chapter 32A](#), which is repealed (other than Health Care for the Principal or a Minor under Articles 3 and 4 of Chapter 32A). But HOLD ON!! DO NOT THROW AWAY YOUR COPY OF CHAPTER 32A!! (READ ON ...)

YOU, YOUR STAFF, YOUR REAL ESTATE BROKER FRIENDS, YOUR TITLE INSURERS, YOUR CLIENTS WHO ARE AGENTS (NEW) OR ATTORNEYS-IN-FACT (PREVIOUSLY) AND OTHERS INVOLVED IN REAL ESTATE TRANSACTIONS WILL NEED TO BE EXTREMELY & IMMEDIATELY PROACTIVE IN ANY TRANSACTION IN WHICH A POWER OF ATTORNEY (“POA”) MAY BE INVOLVED!

So “What’s the Big Deal?” you might ask! A LOT!!

NEW Broader definitions of powers authorized (and limitations), under Chapter 32C, Article 2, “[u]nless the exercise of the authority by an agent under a power of attorney is otherwise prohibited by another agreement or instrument to which the authority or property is subject” or unless prohibited by the power of attorney itself or by the new statute (such as fiduciary obligations). G.S. 32-2-201 *et seq.*

Authority for Real Property Transactions under a General Grant of Authority or Statutory Forms are extremely broad, including to buy, sell, lease, encumber, subdivide and otherwise deal with the property. G.S. 32C-2-204.

FORMS! Though powers of attorney can be in any form that has the sufficient appointment, designation of authority and execution to authorize the transaction, the Act creates several new statutory forms allowing reference to statutory authority rather than having to specifically detail in the power of attorney itself.

NEW Statutory Short Form Power of Attorney replaces the old and includes much broader definitions of powers authorized, if initialed. G.S. 32C-2-204; G.S. 32C-3-301

- CAUTION #1: The Principal must still initial the appropriate powers intended!
- CAUTION #2: It does not address Agent's authority when principal was settlor of a trust under G.S. 36C-6-602.1; G.S. 36C-4-411(a)

NEW Statutory North Carolina Limited Power of Attorney for Real Property can be used for real and personal property, can be drafted for either a specific transaction or real property generally, can authorize self-dealing, and can have a limited life (expiration). G.S. 32C-3-303

FORMS & INFORMATION ARE AVAILABLE ON OUR [WEBSITE!](#)

Power of attorney (or certified copy) must be recorded in NC for NC real property transactions. If recorded in a NC county registry other than that in which the Land which is the subject of the transaction is located, the recorded instrument (deed, deed of trust or other) must include the book, page and county of the NC recording. G.S. 47-28.

Definition of "Agent" includes Attorney-in-Fact under G.S. 32C-1-102(1), which specifically provides:

- (1) Agent.--A person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

The **Agent's Certification** is much broader and has much broader statutory protections. G.S. 32C-3-302, G.S. 32C-1-119 and G.S. 32C-1-120

- Recommended Practice Note: As a closing attorney, you should always seek to obtain this certification and record it, -- to protect your clients but also to protect you and make those protections a matter of public record! (Plus it will save you having to locate it 5 years later when you get that dreaded call: "You remember that deal you closed for me a few years ago? Well we have a problem...")

Durability is now presumed (unless the POA provides specifically otherwise). G.S. 32C-1-104; G.S. 32C-4-403(a)(4). Though recordation is still required for real estate transactions under G.S. 47-38, but is no longer required for durability. NOTE: This presumption is a major change from pre-2018 powers of attorney used for pre-2018 closings, which required specific statement of durability.

Incapacity can be proven, for purposes of a power of attorney taking effect on incapacity, either by the person authorized by the principal to make that determination OR upon personal examination and written determination by 2 physicians or psychologists, an attorney-at-law, a judge or an appropriate governmental official. G.S. 32C-1-109(c); G.S. 32C-1-102(6)b. G.S. 32C-1-108 addresses the determination of and relationship with a court appointed guardian. Incapacity is specifically defined under G.S. 32C-1-102(6):

G.S. 32C-1-102(6). Incapacity.--The inability of an individual to manage property or business affairs because the individual has any of the following statuses:

- a. An impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.

b. Is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return.

Gifting powers must be much clearer in the POA. G.S. 32C-2-217; G.S. 32C-2-201(a)-(e), which provide in relevant part (as amended by S.L. 2018-142):

§ 32C-2-201. Authority requiring specific grant; grant of general authority.

(a) Unless the exercise of the authority by an agent under a power of attorney is not otherwise prohibited by another agreement or instrument to which the authority or property is subject, then the following apply:

(1) An agent may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent that authority:

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

(2) An agent may do the following only if the power of attorney or terms of the trust expressly grants the agent that authority:

- a. Exercise the powers of the principal as settlor of a revocable trust in accordance with G.S. 36C-6-602.1.
- b. Exercise the powers of the principal as settlor of an irrevocable trust to consent to the trust's modification or termination in accordance with G.S. 36C-4-411(a).

(b) Notwithstanding a grant of authority to do an act described in subsection (a) of this section, an agent may exercise such authority only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, which may include the following:

- (1) The value and nature of the principal's property.
- (2) The principal's foreseeable obligations and need for maintenance.
- (3) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.
- (4) Eligibility for a benefit, a program, or assistance under a statute or regulation.
- (5) The principal's personal history of making or joining in making gifts.
- (6) The principal's existing estate plan.

(c) Notwithstanding a grant of authority to do an act described in subsection (a) of this section, unless the power of attorney otherwise provides, an agent may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(d) Subject to subsections (a), (b), (c), (e), and (f) of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in G.S. 32C-2-204 through G.S. 32C-2-216.

(e) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to subsections (b) and (c) of this section and G.S. 32C-2-217.

...

§ 32C-2-217. Gifts authorized by general authority.

(a) In this section, a gift "for the benefit of" an individual includes a gift to a trust, an account under the Uniform Transfers to Minors Act, a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code, and an ABLE account as defined under section 529A of the Internal Revenue Code.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to do the following:

- (1) Make a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal for the following purposes:
 - a. To or for the benefit of an individual so long as the value of the gift does not exceed the greater of (i) the amount determined to be in accordance with the principal's history of making or joining in the making of gifts or (ii) the annual dollar limit 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 if the principal's spouse agrees to consent to the split gift pursuant to section 2513 of the Internal Revenue Code in an amount per donee not to exceed twice the annual federal gift tax exclusion limit.
 - b. To any organization described in sections 170(c) and 2522(a) of the Internal Revenue Code in accordance with the principal's history of making or joining in the making of gifts.
- (2) Consent, pursuant to section 2513 of the Internal Revenue Code to the splitting of a gift made by the principal's spouse with respect to gifts described in subdivision (1) of this subsection.

§ 32C-2-218. Gifts authorized by court order.

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, including a gift that is in addition to, or that otherwise differs from, the gifts authorized by the power of attorney.

§ 32C-2-219. Certain acts authorized by the court.

(a) Except as provided in subsection (b) of this section, an agent under a power of attorney that does not expressly grant the agent the authority to do an act described in G.S. 32C-2-201(a) may petition the court for authority to do the act described in G.S. 32C-2-201(a) that is reasonable under the circumstances.

(b) This section shall not apply to the authority of an agent to make a gift pursuant to G.S. 32C-2-218.

NOTE: Compare prior GS 32A-2 for pre-2018 POA's

"Self-dealing" and fiduciary provisions apply to a much broader group, i.e. the Agent and anyone to whom the Agent owes an obligation of support. Self-dealing is prohibited without specific stated authority in the POA, or a Clerk's order, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise, whether with or without consideration. GS 32C-2-201(b) and (c).

NOTE: Compare authority to provide for family maintenance – principal, spouse, those for whom principal has an obligation of support, and now those whom principal has customarily supported or indicated an intent to support. G.S. 32A-2 as compared to G.S. 32C-2-213(a), subject to self-dealing restrictions under G.S. 32C-2-201(c).

Fiduciary obligations are set forth in G.S. 32C-1-114, which requires that, if the agent acts, they must:

- 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.
- Act in good faith.

- Act only within the scope of authority granted in the power of attorney.
- And, unless the power of attorney specifically allows otherwise, the agent must:
- Act loyally for the principal's benefit.
 - Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
 - Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances.
 - Keep a record of all receipts, disbursements, and transactions made on behalf of the principal.
 - Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.
 - Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including the following:
 - The value and nature of the principal's property.
 - The principal's foreseeable obligations and need for maintenance.
 - 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.

If the Agent is the spouse of the Principal and owns property individually, the Agent can waive the **inchoate marital interest** of the non-owning Principal, even if it benefits the Agent or someone to whom the Agent owes an obligation of support. G.S. 32C-2-204(10)

Co-agents can act independently unless the POA provides otherwise. G.S. 32C-1-111.

BEWARE the POA executed outside North Carolina!!! The POA must identify the governing state law or it is presumed to be the state in which it is *executed* (even if it is regarding North Carolina property). So if it is executed in Missouri, that's Missouri law unless the POA specifically says otherwise? Good news! If you are not a licensed Missouri lawyer, familiar with Missouri law, you can require the Agent to provide an opinion from one! G.S. 32C-1-119

BEWARE!! For refusing to accept the POA, requesting outside opinions or requiring an Agent Certification, strict time limits apply, i.e. 7 business days after presentation for acceptance, in order to avoid liability for unreasonably refusing to accept it or for requiring a Certification of Agent or for requiring an opinion on counsel! And once received you must accept or reject for a legitimate reason within 5 days. G.S. 32C-1-119 and G.S. 32C-1-120. NOTE: You can still refuse to accept the POA but may face liability if that refusal is deemed unreasonable.

Delegation of authority to exercise voting rights or management powers with respect to an entity are strictly limited. For example, assume the president of a corporation signs a general POA authorizing his son to act as the president's agent. While the president can give broad authority to the son to act on behalf of the president as an individual, the president cannot give an agent authority to act on president's behalf as president of the company—only the company can confer that authority. Thus, the Act does not apply to the extent a POA purports to delegate management rights with respect to an entity. G.S. 32C-2-209.

So, on or after January 1, 2018, if you anticipate closing a transaction relying on a power of attorney: ACT FAST! Review and analyze it immediately to meet the 7-day refusal or request for certification or opinion notice requirement (if needed).

Was it executed prior to January 1, 2018?

a. G.S. Ch. 32A powers apply, if referenced – so pull out your handy copy for any questions. (For your convenience, we have posted a full set on our [website!](#)) G.S. 32C-4-403(d)

b. New G.S. Ch. 32C will not apply to the extent:

- The POA references Ch. 32A OR
- The POA contains a clear intention on the authority with which you are concerned OR
- Applying the New Act presumptions would substantially impair the rights of a party created by the POA prior to 2018. G.S. 32C-4-403.

Was it executed on or after January 1, 2018?

a. If it references NEW G.S. Ch. 32C powers or specifically outlines the powers, then you just analyze based on the new law.

b. If it does not reference a statute, it is governed by its terms and the statutory presumptions (and limitations) of Ch. 32C still apply as above. G.S. 32C-2-202 and G.S. 32C-2-203.

c. If it references repealed G.S. Ch. 32A powers, you may need to seek help – including a NEW power of attorney – ASAP! There are no more Ch. 32A powers to incorporate by reference after December 31, 2017! New Ch. 32C applies!

Form of Execution by Agent was authorized under amended G.S. 47-43.1 as follows:

When an instrument purports to be executed by parties acting through another by virtue of a power of attorney, it shall be sufficient if the attorney or agent signs such instrument either in the name of the principal by the attorney or agent or signs as attorney or agent for the principal; and if such instrument purports to be under seal, the seal of the agent shall be sufficient.

Acknowledgment by a notary of execution by the Agent is still acceptable under the generic notarial certificates of G.S. 10B-41 or the individual notarial certificate under G.S. 47-38.

G.S. 47-43 *also* allows for the specific notarial form for attorneys-in-fact and was revised by S.L. 2018-142 to refer to agents:

North Carolina, _____ County.

I (here give name of the official and the official's title), do hereby certify that (here give name of agent) (the "Agent"), agent for (here give names of parties who executed the instrument through the Agent) (the "Principal"), personally appeared before me this day, and being by me duly sworn, says that the Agent executed the foregoing and annexed instrument for and on behalf of the Principal, and that the Agent's authority to execute and acknowledge the instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official in whose office power of attorney is recorded, and the county and state of recordation), on the (day of month, month, and year of recordation), and that this instrument was executed under and by virtue of the authority given by the instrument granting the Agent power of attorney; that the Agent acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the Principal.

WITNESS my hand and official seal, this _____ day of _____, (year) _____

(Official seal.)

Signature of Officer

Is it a military power of attorney? See federal statute, 10 U.S.C.S. § 1044b. Military powers of attorney: requirement for recognition by States, notarized in accordance with 10 U.S.C.S. § 1044a. Authority to Act as Notary.

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