

New North Carolina Uniform Power of Attorney Act

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As you may be aware, North Carolina adopted the Uniform Power of Attorney Act effective January 1, 2018. The new POA Act effectively rewrites the entire POA statute as it applies to General Powers of Attorneys. The new POA Act does not apply to Health Care Powers of Attorney.

If you have a General Power of Attorney, it is important to have it reviewed in light of the new statute to ensure that your document complies with the new requirements. One of the major changes under the new law is that powers of attorney are automatically durable, meaning the Power of Attorney is still valid upon the incapacity of the Principal, unless the document explicitly states an intention that it not be durable. Under the prior version of the statute, the reverse was true. Traditionally and under the common law, powers of attorney are only valid so long as the principal has the capacity to sign contracts. If the principal was incapacitated and unable to sign a contract, then neither could an agent on the principal's behalf. That changed when powers of attorney started including clauses stating that the power of attorney was valid to obligate the principal on contracts, even if the principal was incapacitated, making those powers of attorney "durable." Under the old statute, a clause making a power of attorney durable was only valid if the Power of Attorney was recorded with the register of deeds in the county of the principal's residence. The new statute changes this requirement, and does not require the power of attorney to be recorded with the register of deeds for to be durable. They will still need to be recorded as part of any real estate transactions being performed by the Agent on the Principal's behalf.

In addition, the term "Attorney-in-Fact" has been dropped and replaced with the simpler term "Agent" to describe the appointee under a power of appointment. Another definitional change is that the law now refers to

“incapacity” of the principal, no longer using the term “disability.” This change is to acknowledge the fact that being disabled does not necessarily render an individual incapable of managing their property or business affairs. The definition of incapacity stresses the inability to manage property or business affairs. This distinction between incapacity and disability is especially important if you are using springing powers of attorney, which only become effective upon the incapacity of the principal.

Another major change is that powers of attorney now must be acknowledged, no other witnesses are required except the notary – whereas POAs executed before January 1, 2018 were sufficient with just witnesses, all POAs executed January 1, 2018 or later require a notary acknowledgement. A power of attorney that was validly executed prior to January 1, 2018 under the laws as they existed at that time is still valid. So if clients have powers of attorneys that were witnessed but not acknowledged, they do not need to worry that their powers of attorney are no longer valid.

The new act also creates a category of “hot powers” that need to be explicitly stated in a power of attorney for the agent to possess those powers. The rules of construction in the new statute apply to POAs created prior to January 1, 2018. Whether or not the POA was created before or after January 1, 2018 is irrelevant to the requirement that the hot powers be explicit in the document, unless the application of the new statute would substantially impair the rights of a party to a POA executed prior to January 1, 2018. Therefore, if you have a power of attorney executed prior to January 1, 2018, the agent can only exercise the hot powers if they are explicitly stated in the power of attorney.

The NC Hot Powers are powers to

- 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.

In addition to the powers listed above, there are also hot powers with respect to Trusts, specifically the powers to:

- 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).

The legislature also created a statutory form general power of attorney, and limited power of attorney as to real estate. The statutory form power of attorney is very generic and does not address many situations we encounter with our clients. The statutory form power of attorney is not a substitute for a well-drafted power of attorney tailored to a client's individual needs. In our estate planning practice, we do not use the statutory form general power of attorney, but instead our own modified form as a starting point for drafting powers of attorneys for clients.

This is not an exhaustive list of the changes in the new statute, so if you use of powers of attorney, it is important to familiarize yourself with the new statute. If you have any questions on the new statute, please reach out to Kathryn Duffy at kduffy@nexsenpruet.com or 704.338.5369.