Ten Important Changes in the N.C. Uniform Power of Attorney Act

December 19, 2018

While it may be hard for some to believe, we are rapidly approaching an important anniversary: Jan. 1, 2019 will mark one year from the date the North Carolina Uniform Power of Attorney Act (codified as Chapter 32C of the N.C. General Statutes) (the "Act") became effective. The Act ushered in a number of changes regarding how powers of attorney ("POAs") are executed and interpreted under North Carolina law. (For instance, the term "attorney-in-fact" has been replaced with the term "agent.") The good news is the Act is much more comprehensive than North Carolina's pre-2018 law in this area, so more situations are specifically covered. The bad news is the Act is more complicated and potentially confusing. While an analysis of all of the Act's modifications and technical corrections is beyond the scope of this article, ten important changes to powers of attorney (as compared to North Carolina law before 2018, or "pre-Act") are set forth below.

Durability

Under the Act, the rules regarding durability (i.e., whether a POA remains in effect after a principal becomes "incapacitated" or "mentally incompetent") have been turned on their head. Pre-Act, the rule was that a POA was not durable unless it expressly stated otherwise. Now the rule is a POA is durable unless the POA expressly states it isn't. As a result, a POA from, say, 2010, with no express durability language, would be interpreted differently on Jan. 1, 2018, than it was on Dec. 31, 2017.

Notarization

Pre-Act, a POA was not required to be acknowledged (i.e., notarized). Now a POA must be notarized. To be fair, many institutions (such as banks) that are regularly presented with POAs, have long required that POAs be notarized, since the pre-Act statutes afforded protection to persons who relied in good faith on a duly signed, acknowledged POA that

otherwise appeared regular on its face. Please note that a POA that was validly executed before 2018 under the then-existing laws would still be valid.

Registration Requirements

In contrast to the pre-2018 law, the Act does not require a POA (whether or not it is durable) to be registered (i.e., recorded) in the office of the register of deeds. A POA involved in a real estate transaction, however, must still be registered, pursuant to N.C. Gen. Stat. § 47-28.

Revocability

Under the pre-Act POA statues, a subsequently executed POA could revoke an older POA in the event of an inconsistency in the two instruments—even without express revocation language. Under the new law, the old POA survives unless the new POA provides that the specific POA is revoked or that all other POAs are revoked.

Out-of-state POAs; Excluded POAs.

Unlike the pre-Act statutes, the Act covers all POAs—including POAs from other states and even foreign countries. There are four types of POAs that are not covered by the Act, but they are excluded based on their subject matter rather than their geographical origin. The four POAs not covered by the Act are: (i) a power coupled with an interest (that is, a power accompanied by an interest in the subject matter of the power; for example, a power granted to a creditor to sell pledged collateral); (ii) a power to make health care decisions; (iii) a proxy or other delegation to exercise voting rights or management rights with respect to an entity (unless the POA grants the agent power with respect to operation of an entity or business that would necessarily include such voting/management rights), and (iv) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

Seals

The requirement that North Carolina real property be conveyed "under seal" (e.g., by printing the word "seal" beside a signature) was eliminated in 1999. Under old N.C. Gen. Stat. § 47-43, however, an attorney-in-fact did not have the authority to sign an instrument "under seal" on behalf of the principal unless the POA itself was "executed under seal." (This could be a problem if a real estate conveyance had the word "seal" beside the signature block, for instance.) Fortunately, this requirement was removed effective Jan. 1, 2018. In addition, the Act expressly authorizes an agent to "execute, acknowledge, seal, deliver, file or record any instrument . . . the agent considers desirable to accomplish a purpose of a transaction." (emphasis added)

New Deadlines

In keeping with the pre-2018 law, under the Act, a person who unreasonably refuses to accept a POA may be exposed to liability. The Act, however, puts some new deadlines in place. First, within seven business days after being presented with a POA, a person must accept it, refuse to accept it (for one of the reasons set forth in the Act, such as the POA has not been properly notarized, the agent or principal has previously breached an agreement with the business being asked to accept the POA, etc.) or requested a certification a translation, or an opinion of counsel from the agent. Once the requested item(s) has been received, the person then has five business days to accept or refuse to accept the POA.

Statutory Limited POA for Real Property

The Act introduced a new statutory form, the "North Carolina Limited Power of Attorney for Real Property." This type of statutory form did not exist under the pre-Act law. The new form grants the agent full authority (among other things) to act on behalf of the principal with respect to specifically identified real property, as well as all tangible personal property and financial transactions related to the real property. The form helps to solve the problem of whether a limited POA used in a real estate transaction is specific enough to the transaction while also being broad enough to allow for necessary related activities (especially when financing is required). Helpfully, the form expressly grants the authority to act with respect to banks and other financial institutions.

Opinion of Counsel

If presented with a POA, you can ask the principal to provide (among other things) an opinion of counsel at the principal's expense if you ask within seven business days. The person or institution requesting the opinion of counsel must provide in writing (including an email or other record) the reason for the request. (In some cases, it might make sense to have bank counsel assist in formulating the reason for the request to be sure the legal opinion addresses the proper issues with the POA.) The opinion of counsel can be relied upon without further investigation. However, financial institutions should carefully review such an opinion to be sure it adequately addresses the issue(s) surrounding the POA. If it doesn't, you have five business days after receipt of the opinion to accept or reject the power of attorney.

Construction/Application of the Act

The Act (including its presumption of durability) applies to POAs executed before, on and after Jan. 1, 2018, unless: (i) the terms of the POA in question clearly indicate a contrary intent, or (ii) application of a particular provision of the Act would "substantially impair the rights of a party."

The big exception to this rule of construction is when dealing with a Statutory Short Form POA signed before 2018 under the authority of the old N.C. Gen. Stat. § 32A-1. In that case, the powers conferred by former N.C. Gen. Stat. § 32A-2 would still apply. As a result, the agent's authority under such a POA must be determined under the old N.C. Gen. Stat. § 32A-2 versus the more broadly defined powers contained in the Act.

As noted previously, these ten changes—while important—don't cover all the Act's modifications to pre-2018 law governing powers of attorney. Given the complexity of the North Carolina Uniform Power of Attorney Act and the potential risks that banks face for allowing unauthorized activity involving customer funds, consultation with bank counsel is often the most prudent course when dealing with a difficult POA or an agent that may be exceeding his or her powers.