

Should You Take Advantage of North Carolina's New Uniform Power of Attorney Act?

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North Carolinians have a new Uniform Power of Attorney Act (“the new Act”) that became effective on January 1, 2018.¹ Powers that an agent appointed in a power of attorney (“POA”) can exercise under the new Act are spelled out with much more specificity than under the former Power of Attorney Statute (the “former Statute”), and, in some cases, are greatly expanded to give the agent broader authority to act on behalf of the person creating the POA (the “Principal”). The new Act states that it applies to all North Carolina powers of attorney—regardless of whether the POA was created *before*, or *after*, the new Act became law, but there is an exception, discussed below.

So, if you have a POA created under the former Statute, does it need to be updated to take advantage of the new Act? The answer depends on whether your current POA is a North Carolina Statutory Short Form or a POA drafted by your attorney. The Statutory Short Form requires the Principal to pick and choose the powers granted to his or her agent from a laundry list of powers, such as “Real estate transactions,” “Banking transactions” and “Tax matters.” To determine exactly what each of the powers entail, one must refer to the Statute, where the powers are defined. The new Act incorporates the same format—a list of succinctly-labeled powers to choose from—but, as noted above, the new Act more clearly defines each grant of power and, in many cases, expands those powers as compared to the old Statute.

Even though the new Act says that it applies to all North Carolina POAs *no matter when created*, there is an important exception that should be considered when deciding if a Statutory Short Form POA should be updated. The exception is that if a Statutory Short Form POA was created under the former Statute, that is, before January 1, 2018, the definitions set forth *in the former Statute* must be used when interpreting the powers granted to the agent. Therefore, it is important to update a Statutory Short Form POA created *before* January 1, 2018, if you want your POA to reflect the more specific & expanded definitions of the new Act.

What if your POA isn't the Statutory Short Form; that is, your POA is comprised of paragraphs in which your attorney painstakingly spelled out your agent's powers? For years, many attorneys have substituted their own, more comprehensive POAs for the Statutory Short Form—specifically describing each power granted to the agent and expanding the scope of the powers to meet anticipated, and unanticipated, needs of the Principal. If your POA is an attorney-drafted POA, and not the Statutory Short Form, it may already include most of the expanded provisions contained in the new Act. You should check with your attorney to determine whether or not your current POA should be updated to include the expanded provisions of the new Act, and, at the very least, incorporate by reference the expanded provisions of the new Act.

Some of the most welcomed changes under the new Act address the issues surrounding incapacity of the Principal. One of the primary reasons for establishing a POA is to give someone authority to manage your affairs in the event of mental incapacity. While the former Statute set out the requirements for a power of attorney to become effective, or continue to be effective, during incapacity of the Principal (referred to as a “durable POA”), the former Statute did not define incapacity. This left both the agent and the custodian of the Principal's assets with no procedure for making a legally-supported determination of the incapacity of the Principal. The new Act not only contains a precise definition of incapacity, it also made all POAs durable by default unless the POA specifically states that it terminates upon the incapacity of the Principal. This is the opposite of the former Statute, which says that a POA is durable only if the document states that it remains effective after the incapacity or mental incompetence of the Principal.

¹ The NC Uniform Power of Attorney Act is codified at NCGS § 32C-1-101 *et seq.* The NC Powers of Attorney Act, which is mostly replaced by the new Act, is codified at NCGS § 32A-1 through § 32A-43. The provisions of Chapter 32 relating to Health Care Powers of Attorney (§ 32A-15 through § 32A-27) and Consent to Health Care for Minor (§ 32A-28 through § 32A-34) remain unchanged.

There is another significant feature regarding incapacity included in the new Act: it is no longer necessary to record a POA in the registry of deeds—no matter when the POA was created—in order for it to be durable. Going forward, the only time a POA must be recorded is when the POA is used in a real estate transaction, and the new Act provides a Short Form Limited POA which satisfies that statutory requirement. Given the fact that registry documents can be accessed by anyone, from anywhere, I believe it is more important than ever to limit the amount of information in the public’s purview, and eliminating this outdated recording requirement was long-overdue.

As the demographics of our State continue to shift toward a more elderly population, the need for incapacity planning—of which an effective POA is a critical component—will continue to increase. A POA is less critical for folks who have a funded revocable trust. However, for non-trust assets, such as IRAs and 401(k)s, an effective POA, and an agent who is fully-authorized to act in the best interest of the Principal, are a must! The new North Carolina Uniform Power of Attorney Act will make it easier for agents to carry out their fiduciary duties and should reduce or eliminate the concerns of banks, brokerage firms and other custodians when they are asked to acknowledge the agent’s authority to act.



As a licensed attorney for more than 3 decades, Attorney Krall has helped thousands of individuals and families protect and preserve assets & reduce the cost and complexity of transferring assets to loved ones. By staying on top of the rapidly-changing income tax and estate tax laws, Attorney Krall continues to help clients identify and take advantage of tax-saving opportunities while planning for life’s inevitable transitions.