# POWERS OF ATTORNEY IN REAL PROPERTY TRANSACTIONS: UPDATES FROM 2018


Chicago Title CLE Seminar
Securing the Castle 2019

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ORIGINAL ENACTMENT
S.L. 2017-153 (SB 569)
EFFECTIVE 1/1/2018

GENERAL STATUTES COMMISSION TECHNICAL CORRECTIONS
S.L. 2018-142, SEC. 27
EFFECTIVE 12/14/2018

**CHICAGO BULL**
**(11-28-2017 Rev. 12-14-2018)**

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

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

CAUTION WATCH YOUR STEP

NCGA

**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 is set out in Articles 1 through 9. It completely prospectively replaced the old Chapter 32A, which is repealed (other than Health Care Power of Attorneys and Minor under Articles 3 and 4 of Chapter 32A). Technical Corrections were enacted under Session Law 2018-142, Sec. 27, effective December 14, 2018, regarding limited matters noted below.

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 (NOW) 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!!

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.

We invite you to view this and previous Chicago Bulls, Articles, Forms and News at WWW.NORTHCAROLINA-CTIC.COM
Share your comments and feedback with us by clicking "Contact Us"!



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## TITLE INSURANCE

**If the transaction involves execution of closing documents by an agent or attorney-in-fact pursuant to a power of attorney, receipt of:**

**(a) attorney's certification that**

**(1) the power of attorney is effective at the time of closing and authorizes the agent or attorney-in-fact to act on behalf of the principal with regard to the real property transaction to be insured;**

**(2) the power of attorney (or a certified copy) is recorded in the office of the Register of Deeds in North Carolina in which the Land is located or in which the principal is domiciled, or, for a non-resident principal, in any county in North Carolina in which the principal owns real estate or has a business reason for registration; and**

**(3) if the power of attorney is not recorded in the county in which the Land lies, the recording information (book, page and county) is referenced in the instrument executed by and recorded on behalf of the agent or attorney-in-fact pursuant to the power of attorney.**

**(b) agent's certification pursuant to G.S. 32C-3-302 regarding the transaction to be insured.**

## FAQS – USING POWERS OF ATTORNEY FOR REAL PROPERTY TRANSACTIONS

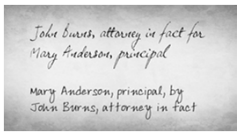
?Does the POA have to be some special form?

?What about a pre-2018 POA for a current transaction?

?Does it have to be recorded? If so, where?

?POA is recorded in a different county.

?Now what?

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## TYPES OF POWER OF ATTORNEY

**LIMITED**
- For some specific task
- Only effective while the principal is still alive and in his full cognitive faculties.

**GENERAL**
- Agent will represent the principal across all activities
- May list the broad areas of responsibility

**SPRINGING**
- Become effective later than the date of signing
- Spring into action when a stipulated event occurs

**DURABLE POA**
- Remains in force if and when the principal is incapacitated or incompetent.

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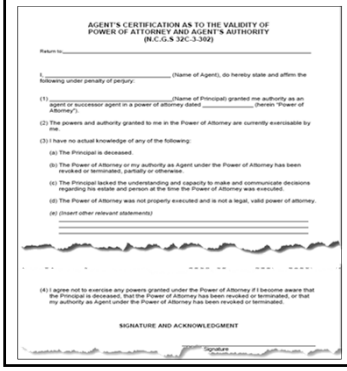

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY
(N.C.G.S 32C-3-302)

Return to:

I, _____ (Name of Agent), do hereby state and affirm the following under penalty of perjury:

(1) _____ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated _____ (herein "Power of Attorney").

(2) The powers and authority granted to me in the Power of Attorney are currently exercisable by me.

(3) I have no actual knowledge of any of the following:

(a) The Principal is deceased.

(b) The Power of Attorney or my authority as Agent under the Power of Attorney has been revoked or terminated, partially or otherwise.

(c) The Principal lacked the understanding and capacity to make and communicate decisions regarding his estate and person at the time the Power of Attorney was executed.

(d) The Power of Attorney was not properly executed and is not a legal, valid power of attorney.

(e) (Insert other relevant statements)

(4) I agree not to exercise any powers granted under the Power of Attorney if I become aware that the Principal is deceased, that the Power of Attorney has been revoked or terminated, or that my authority as Agent under the Power of Attorney has been revoked or terminated.

SIGNATURE AND ACKNOWLEDGMENT

Signature

## FAQS – USING POWERS OF ATTORNEY FOR REAL PROPERTY TRANSACTIONS

? Must we have an Agent's Certification?

? Must it be recorded?

? What if there's an old one?

G.S. §32C-3-302

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## FAQS – USING POWERS OF ATTORNEY FOR REAL PROPERTY TRANSACTIONS

?My lender requires we use "attorney-in-fact" not just "agent." What do we do?

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?They say the principal is incompetent.

- Can I rely on the POA?

?POA says it is not effective until Principal is incapacitated or incompetent. Now what?

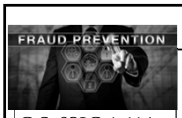


## FAQS – USING POWERS OF ATTORNEY FOR REAL PROPERTY TRANSACTIONS


- ❑What about gifts? What must the POA say?
- ❑Can agent waive his spouse's marital interest using the POA?
- ❑What if Agent and Principal are related?
- ❑What if Agent and proposed grantee are related?

(Gifts, self-dealing & fiduciary duties)






## DOES THE TRANSACTION *APPEAR* TO BE CONSISTENT WITH FIDUCIARY RESPONSIBILITIES?

G.S. §32C-1-114

Agent must always act :

1) 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) in good faith;
3) loyally for the principal's benefit;
4) only within the scope of authority granted in the POA; and
5) in a manner so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.

## GIFTS – GENERAL VS. SPECIFIC AUTHORITY G.S. 32C-2-201

- SPECIFIC EXPRESS GRANT OF AUTHORITY
- Consistent with either:
  - "***principal's* <u>objectives</u>** if actually known by the agent" *or*
  - "***principal's* <u>best interest</u>** based on all relevant factors," including:
    - (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.
- NOT create **<u>in the agent, or in an individual to whom the agent owes a legal obligation of support</u>**, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise."
- Also subject to G.S. § 32C-2-217

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## GENERAL AUTHORITY WITH RESPECT TO GIFTS G.S. § 32C-2-217(B), *<u>ONLY</u>*:

*<u>Unless POA provides otherwise</u>*, general authority w/r/t gifts authorizes *only*:

a. To/for benefit of* an individual *<u>if value of the gift</u>* does not exceed:

- principal's history of making or joining in the making of gifts or
- annual federal gift tax exclusion (IRC 2503(b) (or twice if spouse joins)

b. To any organization described in IRC §§ 170(c) and 2522(a) in accordance with the principal's history of making or joining in the making of gifts.

- NOTE: Consent, splitting gift with spouse under IRC § 2513.

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## FAQS – USING POWERS OF ATTORNEY FOR REAL PROPERTY TRANSACTIONS

The principals are on vacation in Colorado.

Can we just send the POA there for them to sign and send back?

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## CONTROLLING LAW: WHICH JURISDICTION?

**Does *not* have to be the jurisdiction in which executed!**

UPOAA Official Comment:

The phrase, "*the law of the jurisdiction indicated in the power of attorney,*" is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law.

| **POA SAYS:** | **Governing law:** |
|---|---|
| NC Statutory Short Form POA | NC law |
| States "governed by X state law" | X state's laws |
| No mention of governing law | Law of the ***state in which signed & acknowledged*** |

**WATCH OUT!!**

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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) ____

***WHAT IF I DON'T HAVE BOOK AND PAGE OF POA BECAUSE NOT YET RECORDED?***

***WHAT DO I SAY IN MY NOTARIAL CERTIFICATE?***

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