

More on Gifting Authority under the North Carolina Uniform Power of Attorney Act

I [previously wrote](#) about an agent's authority to make gifts under the new North Carolina Uniform Power of Attorney Act (NCUPOAA) that went into effect in North Carolina on January 1, 2018. There are two additional points to keep in mind if you are an agent, a third party, or a court examining the agent's authority granted by the principal to make gifts under a POA.

1. **The Old G.S. Chapter 32A Gifting Provisions May Still Apply**

The session law enacting the NCUPOAA repealed the provisions of the former G.S. Chapter 32A related to non-health care powers of attorney. [S.L. 2017-153, Sec. 2.8](#) (repealing Articles 1, 2, 2A, 2B, and 5 of G.S. Chapter 32A). However, one instance when those provisions still apply despite being repealed is if the principal executed a Statutory Short Form POA *prior to* January 1, 2018 in accordance with former G.S. 32A-1. For example, the POA might look something like this and make references to the authorities conferred under the former provisions of G.S. Chapter 32A:

NC STATUTORY SHORT FORM GENERAL POWER OF ATTORNEY

G.S. 32A-1

Under those circumstances, the powers conferred by the former G.S. 32A-2 apply provided the principal executed the POA before January 1, 2018. [G.S. 32C-4-403\(d\)](#). This includes the provisions related to (i) gifts to charities and other individuals under the now repealed G.S. 32A-2(14) and (ii) gifts to the agent under G.S. 32A-2(15).

One difference between the gifting provisions under the NCUPOAA and the former G.S. 32A-2 is that the general authority to make a gift to individuals and charities under former law was limited to the principal's history of making or joining in the making of gifts. G.S. 32A-2(14)(a) (repealed). Under the NCUPOAA, gifts to charities follow a similar restriction but gifts to individuals are limited to the *greater of* (i) the amount of 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, without regard to whether the gift tax exclusion applies to the gift. [G.S. 32C-2-217\(b\)\(1\)\(a\)](#) (also establishing limits if the principal's spouse consents to split the gift). Under both former and current law, the principal could specify additional or different gift making authority in the POA.

Another difference between the NCUPOAA and the provisions under the former G.S. 32A-2 related to gifts are the restrictions on self-dealing. Under the former G.S. 32A-2(15), the agent could not make a gift of the principal's property to the agent or the estate, creditors, or creditors of the estate of the agent unless the POA expressly granted the agent such authority. This authority was often granted by initialing or otherwise marking the line for "gifts to the named attorney in fact" on the statutory short form under prior law. See G.S. 32A-1 (repealed).

The restriction on self-dealing set forth in the NCUPOAA is broader. An agent may not exercise any authority, specific, general, incidental, or otherwise, under a POA to create *in the agent or to any individual to whom the agent owes a legal obligation of support* an interest in the principal's property. [G.S. 32C-2-201\(c\)](#). This includes any interest created by gift. For example, unless the POA expressly states otherwise, if a parent of a minor child is an agent under a POA subject to the NCUPOAA, the parent may not exercise authority to create an interest in the principal's property in the minor child because parents generally owe a legal obligation of support to their minor children. See Cheryl D. Howell & Jan S. Simmons, [North Carolina Trial Judges' Bench Book](#), District Court: Vol. 1, Family Law, p. 3-3 (2016). The principal may override this default rule and expressly provide in the POA that an agent may exercise authority to create an interest in the principal's property in the agent or an individual to whom the agent owes an obligation of support. [G.S. 32C-2-201\(c\)](#). A principal may choose to allow this type of self-dealing in a POA when the principal's spouse or other beneficiary of the principal's estate is the agent.

2. There's a BIG Exception to the Gifting Restrictions under the Personal and Family Maintenance Provisions of the NCUPOAA

One area of general authority that may be granted to an agent under the NCUPOAA is "personal and family maintenance," which is set forth more fully in [G.S. 32C-2-213](#). *This authority does not*

depend on and is not limited by any authority that the agent may or may not have with respect to gifts. G.S. 32C-2-213(b). As I noted in my [earlier post](#), if a POA is silent with regard to gifts, the agent does not have the authority to make gifts without a court order. [G.S. 32C-2-201\(a\)\(1\)a](#). This includes if the POA states that the agent has the general authority to do all acts that a principal could do. Even if the POA states the agent has the general authority to make a gift, the amount and recipients of the gift are limited. See *generally* G.S. 32C-2-217.

As under the former G.S. 32A-2(9), authority under the NCUPOAA with respect to personal and family maintenance includes the authority to perform acts necessary to maintain the customary standard of living of the principal and the principal's spouse. G.S. 32C-2-213(a)(1). Consistent with prior law which authorized the agent to do all acts necessary to maintain the customary standard of living for other dependents of the principal, G.S. 32C-2-213(a)(1) provides that the agent may perform acts to maintain the customary standard of living for children and other individuals legally entitled to be supported by the principal. New to NC law is the authority of the agent to perform such acts for other individuals whom the principal has customarily supported or indicated an intent to support. G.S. 32C-2-213(a)(1)d. This authority is not tied to a legal obligation of support and may include the principal's parents or grandchildren, if such support is customarily provided by or intended to be provided by the principal. The agent's authority to perform acts necessary to maintain the customary standard of living for children and other individuals includes both those individuals living at the time the POA is executed as well as those that are later born.

In addition to authorizing the agent to perform acts to maintain the customary standard of living for the principal, the principal's spouse, children and other individuals legally entitled to be supported, and individuals whom the principal has customarily supported or indicated an intent to support, the general authority with respect to "personal and family maintenance" includes a laundry list of other acts the agent may perform for such individuals. This includes the authority to provide living quarters, including operating costs such as repairs, improvements, and taxes, for those individuals. G.S. 32C-2-213(a)(3). This may be done through purchase, lease or other contract. *Id.* In the alternative, the agent may elect to simply provide funds for shelter rather than directly purchase, lease, or contract for the living quarters. In addition, the agent may provide for normal domestic help, usual vacations and travel expenses, food, clothing, appropriate education, and other current living costs for such individuals as well as expenses for necessary health care and custodial care. G.S. 32C-2-213(a)(4). Finally, the agent may continue any provision made by the principal for cars or other means of transportation for the statutorily authorized individuals. G.S. 32C-2-213(a)(7).

Similar to prior law, the agent with general authority over personal and family maintenance may continue making payments incidental to the membership or affiliation of the principal in an organization or to continue contributions to those organizations. G.S. 32C-2-213(a)(9). This may include a religious institution, club, society, or order. *Id.* This is potentially a broad exception to the gifting prohibitions under the NCUPOAA to the extent the agent is simply continuing a contribution

to an organization on behalf of the principal. A potential area for litigation is when a POA is silent regarding the agent's gifting authority and an agent desires to continue contributions of the principal to an organization. The NCUPOAA does not define what constitutes the continuance of a contribution as compared to a new contribution.

All of the authority listed in G.S. 32C-2-213 may be exercised by the agent regardless of what the POA states about gifts. However, the restrictions on self-dealing set forth in G.S. 32C-2-201(c) still apply. So the agent may not exercise authority with respect to personal and family maintenance to create an interest in the principal's property in the agent or in any individual to whom the agent owes a legal obligation of support unless the POA states otherwise.

When examining an agent's authority to make a gift under a POA, keep in mind the structure I set forth in my [last post](#). But, don't forget about these two extra wrinkles as well. Gifting authority was one of the most litigated areas related to POAs under prior law and I expect that likely won't change with the enactment of the NCUPOAA. See *e.g.* *Horry v. Woodbury*, 189 N.C. App. 669 (2008), dissent, rev'd 363 N.C. 7 (2009) (adopting dissenting opinion); *Estate of Graham v. Morrison*, 168 N.C. App. 63 (2005); *Estate of Graham v. Morrison*, 156 N.C. App. 154 (2003); *Conlon v. Self*, N.C. App. 180 (2003) (unpublished); *Hutchins v. Dowell*, 138 N.C. App. 673 (2000); *Whitford v. Gaskill*, 345 N.C. 475 (1997); *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816 (1997).