

Third Party Refusals to Accept a Power of Attorney under the New North Carolina Uniform Power of Attorney Act

Mary signs a power of attorney (POA) appointing her son, Frank, as her agent authorized to act on her behalf. The POA is acknowledged by a notary public and states that the agent has the authority to do all acts that the principal could do. The POA is effective immediately and durable by default under the new North Carolina Uniform Power of Attorney Act (NCPOAA) effective January 1, 2018. [S.L. 2017-153 \(S569\)](#) (not applicable to health care POAs or consent to health care for a minor under G.S. Chapter 32A).

Months later, Mary suffers a massive stroke and is no longer able to manage her property or business affairs because she is unable to make or communicate decisions. Frank retrieves the original POA from Mary's safe and takes it to the bank and attempts to withdraw money from Mary's checking account to pay some of her bills. The bank refuses to accept the POA and conduct the transaction. A friend of Frank's notes he had a similar problem with his father's POA. He had to ultimately seek court-ordered guardianship of his father to be able to conduct the necessary transactions on his father's behalf because of the bank's refusal to accept the POA. Is Frank stuck because of the bank's refusal? Must he obtain guardianship to be able to carry out his duties under the POA on behalf of Mary?

The short answer is no. Instead of filing for guardianship, upending Mary's planning for her incapacity through the POA, and incurring the time, expense, and oversight required through a guardianship proceeding, Frank could petition the court for an order to determine whether and to what extent acceptance of the POA is mandated. [G.S. 32C-1-120\(f\)](#).

Two sections of the new NCPOAA, 1-119 and 1-120, are intended to promote the acceptance of POAs by third parties in cases like the one involving Frank and Mary. [Section 1-119](#) provides for protections for persons who in good faith rely on a POA while [Section 1-120](#) creates liability for certain refusals to accept an acknowledged POA.

Section 1-120 is the subject of this post. It establishes (a) a timeline for acceptance of the POA, (b) a list of legitimate grounds for refusing to accept a POA, (c) sanctions for refusing on an illegitimate ground, and (d) the procedure for seeking judicial relief to determine whether and to what extent a POA must be accepted by a third party. While the imposition of the timeline is new to NC law, many of the other procedures for mandating acceptance of the POA are similar to prior NC law repealed by the NCPOAA.

A. Timeline for Acceptance of the POA

The NCPOAA establishes a timeline for a person presented with an acknowledged POA to respond. A "person" as defined under the NCPOAA includes individuals as well as entities such

as financial institutions. G.S. 32C-1-102(8). After being presented with an acknowledged POA, the person has **seven business days** to either:

1. accept the POA;
2. refuse to accept the POA on a statutorily authorized ground (listed in Section B below); or
3. request a certification, a translation, and/or an opinion of counsel.

G.S. 32C-1-120(b)(1). See G.S. 32C-1-119(d) (describing the certification, translation, and opinion of counsel). G.S. 32C-3-302 contains a form agent's certification that may be used by the agent in response to such a request by a third party. There is no form for a translation or opinion of counsel.

It is important for agents and courts to know that if a person fails to accept the POA within seven business days, a person shall not be deemed to have unreasonably refused a POA on that basis alone. G.S. 32C-1-120(h). In a similar vein, if the person promptly requests a certification, translation, or opinion of counsel, the person is not deemed to have unreasonably refused to accept a POA prior to the receipt of the items in a reasonably requested form. G.S. 32C-1-120(i).

If the person requests a certification, a translation, or an opinion of counsel, then within **five business days** after receipt of the requested items in reasonably satisfactory form, the person shall either:

1. accept the power of attorney or
2. refuse to accept the POA on a statutorily authorized ground (listed in Section B below).

G.S. 32C-1-120(b)(2).

Nothing in the statute requires the third person to communicate the ground for refusing to accept the POA to the agent or the principal at the time of the refusal or to communicate the refusal in writing. It may be simply that the person refuses to conduct the transaction. In practice, a third party may not make the the ground for refusal clear until after a proceeding to mandate acceptance is initiated.

B. Legitimate Grounds for Refusing to Accept a POA

Similar to prior NC law, there are circumstances or legitimate grounds listed in the NCPOAA when a person may refuse to accept an acknowledged POA without incurring any liability for such refusal. G.S. 32A-42 (repealed); G.S. 32C-1-120(c). The NCPOAA includes more circumstances where third parties are protected from liability than prior NC law and the uniform law. First and foremost, a person is not required to accept and may not be held liable for refusing to accept a POA that has not been duly acknowledged. G.S. 32C-1-120(a). The NCPOAA lists a number of other circumstances when a person is not required to accept a POA including if:

1. The person is not otherwise required to engage in a transaction with the principal in the same circumstances.
2. Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with applicable federal law.
3. The person has actual knowledge of the termination of the agent's authority or of the POA before exercise of the power.
4. A request for a certification, a translation, or an opinion of counsel is refused.
5. The person requesting a certification, a translation, or an opinion of counsel does not receive the requested items in reasonably satisfactory form within a reasonable period of time.
6. The person in good faith believes that the POA is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel has been requested or provided.
7. The person has reasonable cause to question the authenticity or validity of the POA or the appropriateness of its exercise by the agent.
8. The agent or principal has previously breached any agreement with the person, whether in an individual or fiduciary capacity.
9. The person makes, or has actual knowledge that another person has made, a report to the local adult protective services office or law enforcement stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.
10. The agent is requesting the person to:
 1. Open an account for a principal at the request of an agent if the principal is not currently a customer of the person,
 2. Make a loan to the principal at the request of the agent, or
 3. Permit an agent to conduct business not authorized by the terms of the POA, or otherwise not permitted by applicable statute or regulation.

G.S. 32C-1-120(c) and (d).

If a person refuses to accept an acknowledged POA on a ground not listed above, then the person may be subject to the sanctions described in Section C below. For example, the list of grounds above does not include the requirement that the POA is recorded with the local register of deeds.

The default rule under the NCPOAA is that a POA does not have to be recorded to be valid and effective, even after the principal's incapacity. G.S. 32C-1-106; G.S. 32C-1-109. This is a change from prior NC law, which stated that no POA was valid subsequent to a principal's incapacity unless it was recorded. See G.S. 32A-9 (repealed). The one exception to the new rule under the NCPOAA is if the agent will engage in real estate transactions such as buying or selling real property, then the POA must be recorded. [G.S. 47-28](#). If a person refuses to accept a POA for a transaction unrelated to real property solely on the basis that the POA is not recorded, it could subject the person to sanctions for refusing to accept the POA unless the person is able to show a statutory ground for refusal applies.

C. Sanctions for Refusing to Accept the POA

The sanctions for refusing to accept an acknowledged POA in violation of G.S. 32C-1-120 are the same as under prior NC law. G.S. 32C-1-120(e). See G.S. 32A-41(a) (repealed). A person that refuses to accept an acknowledged POA where there is no applicable ground for refusing the POA may be subject to all of the following:

1. A court order mandating acceptance of the POA.
2. Liability for reasonable attorneys' fees and costs incurred in any action or proceeding that mandates acceptance of the POA.
3. Any other remedy available under applicable law.

D. Court Proceeding to Determine Whether and to What Extent Acceptance is Mandated

The principal, the agent, a guardian, or any other interested person, including a person asked to accept a POA, may initiate a proceeding to determine (i) whether and (ii) to what extent acceptance of a POA is mandated. G.S. 32C-1-120(f); G.S. 32C-1-116(c). The statute does not prescribe limitations on when the proceeding may be initiated. An agent may initiate the proceeding if the third party does not respond to the agent's request to accept the POA. An agent may initiate the proceeding after an initial request to the third party to accept the POA or after delivery of an agent's certification, translation, or opinion of counsel. A third party may initiate the proceeding immediately upon receipt of the request to accept the POA from the agent. An interim guardian appointed as a result of the third party refusal to accept the POA may initiate the proceeding to potentially eliminate the need for a subsequent full guardianship appointment.

The proceeding is initiated by petition and filed as an estate proceeding before the clerk. G.S. 32C-1-116(a)(4)(e); G.S. 32C-1-116(c). There is no form petition available. After the filing of the petition, any party may file a notice of transfer of the proceeding to superior court. G.S. 32C-1-116(a)(4); G.S. 28A-2-6(h). The notice of transfer must be filed within 30 days after the party requesting is served with a copy of the pleading requesting relief. *Id.* If a notice of transfer is filed, the clerk must transfer the matter to superior court. *Id.* For additional information on estate proceedings related to POAs filed before the clerk, my earlier blog post on the topic is available [here](#).

At the hearing, the court may narrow the contested issues between the parties by identifying the ground that purportedly applies to the third party refusal. For example, if a petition is filed by an agent to mandate acceptance by a third party and the third party responds that acceptance is not required, the court may ask the third party to identify the specific statutory ground in G.S. 32C-1-120(a), (c), or (d) that applies to the third party's refusal. The parties can then focus the testimony and other evidence at the hearing on that particular issue or issues. If the agent is able to show that none of the legitimate grounds for refusing a POA apply to the transaction in question, then the court enters an order mandating acceptance of the POA. If instead a legitimate ground

for refusal applies, the court enters an order that acceptance of a POA is not mandated.

The court has the discretion as part of the proceeding to award costs and expenses, including reasonable attorneys' fees. G.S. 32C-1-120(f). However, the court may only award attorneys' fees to the agent where the proceeding has substantial merit. *Id.* The court's order awarding attorneys' fees to an agent should include findings related to the merit of the case and a conclusion of law that the proceeding has substantial merit.

In response to the bank's refusal to accept the POA, Frank is not left without remedy to work within the existing POA and honor Mary's expectations about how her affairs will be handled and who will handle them after her incapacity. Frank could file a petition with the clerk of superior court seeking an order (a) mandating the acceptance of the POA by the bank, and (b) assessing costs and expenses, including reasonable attorneys' fees, against the bank if the proceeding has substantial merit. Frank should be prepared to assert at the hearing why the bank's refusal to accept the POA does not fall within a legitimate ground for refusal listed in the statute. Ultimately by seeking an order mandating acceptance, Frank may avoid having to file a guardianship proceeding to get the authority he needs to act on Mary's behalf as well as the related expenses of such a proceeding and subsequent guardianship appointment.