

# Judicial Relief under the New GS Chapter 32A, the North Carolina Uniform Power of Attorney Act

**Author :** Meredith Smith

**Categories :** [Clerks of Superior Court](#), [Estates](#), [Guardianship](#)

**Tagged as :** [Clerk of Superior Court](#), [estates](#), [guardianship](#), [Incompetency power of attorney](#)

**Date :** September 1, 2017

On July 20, 2017, Governor Cooper signed [Session Law 2017-153](#) (S569) known as the North Carolina Uniform Power of Attorney Act (NCPOAA). **This new law goes into effect on January 1, 2018** and applies to powers of attorney (POA) in North Carolina. It repeals provisions in [GS Chapter 32A](#) that pertain primarily to financial POAs, including the statutory short form POA in Article 1 and the enforcement provisions in Article 5. It does not apply to POAs that grant authority to a person to make health care decisions for another person. Article 3, health care POAs, and Article 4, consent to health care for a minor, under [GS Chapter 32A](#) continue to apply and are mostly unaffected by the NCPOAA.

The NCPOAA adopts, in large part, the [Uniform Power of Attorney Act](#) published by the Uniform Law Commission (ULC). In both the uniform law and the NCPOAA, there are sections on judicial relief. As noted by the ULC, the purpose of this judicial relief is two-fold: (i) to protect vulnerable or incapacitated persons who grant authority to another under a POA against financial abuse, and (ii) to protect the self-determination rights of the principal. [Uniform Power of Attorney Act, Comment, Sec. 116](#).

The judicial relief provisions as adopted in NC are heavily modified from the uniform law. This is due in part to the fact that the judicial relief provisions under the NCPOAA specifically list proceedings that may be brought under the act and allocate jurisdiction over those proceedings between the clerk, who serves as [the ex officio judge of probate in NC](#), and the superior court. The distribution of jurisdiction under the NCPOAA among these judicial officials mirrors estate proceedings under [GS 28A-2-4](#). There are proceedings that are exclusively within the clerk's jurisdiction, ones that are initiated before the clerk but may be transferred by a party to superior court, and then finally proceedings that are excluded from the clerk's jurisdiction that may only be brought in superior court. The NCPOAA also sets forth the procedures, standing, venue, and appeal rights for these proceedings.

## 1. Jurisdiction

### a. Clerk's Exclusive Jurisdiction

Under the NCPOAA, the clerk has original, exclusive jurisdiction over certain proceedings. Original jurisdiction before the clerk means that if a proceeding is filed, the proceeding must be filed before the clerk of superior court. Exclusive jurisdiction means that once it is filed before the clerk it may not be transferred to another court – the clerk decides all issues of fact and law and enters the order. [GS 1-301.3\(b\)](#). One exception to this rule is if a clerk has a conflict of interest. See [GS 7A-104\(a\), \(a1\)](#).

Under [GS 32C-1-116\(a\)](#), the clerk has original, exclusive jurisdiction over the following proceedings:

- To compel an accounting by an agent, including the power to compel production of evidence substantiating any expenditure by the agent of the principal's assets. Note, as of July 21, 2017, the clerk has expanded contempt authority. [SL 2017-158 \(H236\)](#). Once the NCPOAA is effective on January 1st, the clerk will have the authority to hold an agent in contempt for failure to comply with an order compelling an accounting or an order to

produce evidence substantiating an expenditure.

- To terminate a POA or limit, suspend, or terminate the authority of an agent when a guardian of the estate or general guardian is appointed by the clerk. Under [GS 32C-1-108\(b\)](#), if the clerk appoints a guardian of the estate or general guardian or other fiduciary, the POA and the agent's authority continues unless it is limited, suspended, or terminated by the court.
- To determine compensation of an agent. The clerk has the authority to determine reasonable compensation for an agent under a POA where the POA does not specify the manner or amount of compensation and the principal becomes incapacitated. [GS 32C-1-112](#).

#### **b. Clerk's Non-Exclusive Jurisdiction**

There are some proceedings under the NCPOAA where the clerk has original, but not exclusive jurisdiction. This means the proceeding must be initiated before the clerk but then may be transferred to superior court upon the filing of a notice of transfer by any party. Notably, the NCPOAA does not provide that the clerk may file a notice of transfer on the court's own motion. See [GS 32C-1-116\(a\)\(4\)](#). This is unlike estate proceedings where the clerk expressly has that authority. See [GS 28A-2-4\(a\)\(4\)](#).

The proceedings under the NCPOAA that fall within the clerk's original, but not exclusive jurisdiction include:

- To determine an agent's authority and powers.
- To construe terms of the power of attorney under GS Chapter 32C.
- To determine any question arising in the performance by an agent of the agent's powers and authority, which includes but is not limited to the authority:
  - To determine whether and to what extent an agent holds a specific grant of authority under GS 32C-2-201.
  - To approve an agent's ability to make certain gifts under GS 32C-2-217 because the power of attorney grants the agent only a general authority with respect to gifts.
  - To authorize the agent to make a gift of principal's property under GS 32C-2-218.
  - To authorize the agent to do to do certain acts (except make a gift under GS 32C-2-219) that require a specific grant of authority.
  - To determine whether and to what extent acceptance of a power of attorney is mandated. GS 32C-1-116(a)(1)-(4).

If the proceeding remains before the clerk and is not transferred to superior court, the clerk has the authority to enter declaratory relief under [GS Chapter 1, Article 26](#), to the extent it is not inconsistent with the NCPOAA. GS 32C-1-116(a)(4).

#### **c. No Clerk Jurisdiction; actions before Superior Court**

The NCPOAA excludes certain actions related to POAs from the clerk's jurisdiction. The clerk does not have jurisdiction over the following actions and such actions must be filed before the superior court:

- **To modify or amend a POA.**
- By or against creditors or debtors of an agent or principal.
- Involving claims for monetary damages, including breach of fiduciary duty, fraud, and negligence.
- To set aside a power of attorney based on undue influence or lack of capacity.
- To recover property transferred or conveyed by an agent on behalf of a principal with the intent to hinder, delay, or defraud the principal's creditors.

These mirror the actions excluded from the clerk's jurisdiction related to estates under GS 28A-2-4.

## 2. Actions before the Clerk Filed as an Estate Proceeding

If a proceeding is filed under the NCPOAA before the clerk, it is filed as an estate proceeding under [GS 28A-2-6](#). This statute includes procedures for commencing an estate proceeding, including the requirement to issue an estate proceedings summons, the standard for pleadings, the method for obtaining an extension of time to file, and the applicability of the rules of civil procedure. My colleague, Ann Anderson, published a bulletin on estate proceedings under GS 28A-2-6, which may be found [here](#).

The NC Administrative Office of the Courts is in the process of examining the applicable filing fees associated with the costs of filing these proceedings. The cost of an estate proceeding filed in connection with a decedent's estate is \$120.00. See [GS 7A-307](#).

## 3. Standing to File

The section on judicial relief under the NCPOAA also identifies who has standing to file one of these proceedings before the clerk. [GS 32C-1-116\(c\)](#). This includes:

- The principal
- The agent
- A general guardian, guardian of the estate, or guardian of the person
- The personal representative of the estate of a deceased principal
- Any other interested person, including a person asked to accept a power of attorney

*Id.*

## 4. Venue

Venue for a proceeding brought under the NCPOAA is proper (i) in the county where the principal resides or is domiciled, (ii) any county where an agent resides, or (iii) any county in which property of the principal is located. [GS 32C-1-116\(d\)](#).

## 5. Mandatory Dismissal

If a proceeding is filed before the clerk, the clerk is required to dismiss the petition if the principal (the individual who grants authority to an agent in a POA) files a motion requesting a dismissal. [GS 32C-1-116\(f\)](#). The one exception to this mandatory dismissal rule is if the clerk determines the principal is incapacitated. *Id.* For purposes of GS Chapter 32C, incapacity is defined as the inability to manage property or business affairs because the individual: (i) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance, or (ii) is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return. [GS 32C-1-102\(6\)](#).

*Note*, there appears to be an error in the NCPOAA regarding references to the definition of incapacity. References are made throughout GS Chapter 32C, including the subsection on mandatory dismissal, to [GS 32C-1-102\(5\)](#) which is the definition of good faith, when it appears the intent was to reference the definition of incapacity under [GS 32C-1-102\(6\)](#).

## 6. Appeal of the Clerk's Order

Appeal of the clerk's order entered under GS Chapter 32C is pursuant to [GS 1-301.3](#). [GS 32C-1-116\(g\)](#). This means a party aggrieved by an order of the clerk may appeal to superior court by filing a written notice of appeal with the clerk within 10 days of entry of the order after service of the order on the other party. [GS 1-301.3\(c\)](#). On appeal, the superior court does not conduct a new trial but rather reviews the clerk's order "on the record." The judge of the

superior court reviews the clerk's order to determine only the following:

- Whether the findings are supported by the evidence.
- Whether the conclusions of law are supported by the findings of facts.
- Whether the order or judgment is consistent with the conclusions of law and applicable law.

[G.S. 301.3\(d\)](#). Therefore, it is important for a clerk who enters an order in a proceeding under the NCPOAA to make findings of fact and conclusions of law in a written order. In the absence of a written order with findings and conclusions, the superior court will likely remand the matter for the clerk to make such findings and conclusions in a written order.