

# The Authority to Make Gifts under the New North Carolina Uniform Power of Attorney Act

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The new [North Carolina Uniform Power of Attorney Act](#) (the Act) goes into effect on January 1, 2018. I recently blogged about the judicial relief provisions under the Act [here](#). Next Tuesday, December 12th from noon to 1:15 pm, the School of Government in partnership with the N.C. Administrative Office of the Courts will be offering a free webinar on this new law. The Honorable James Stanford, Clerk of Superior Court, Orange County, Allison Smith, NCAOC assistant legal counsel, Janice Davies, an attorney with Davies Law, PLLC, and I will be presenting. Anyone can register for the webinar [here](#). Note, registration closes tomorrow at noon.

One of the things we'll be discussing during the webinar are the provisions in the Act related to the authority of the agent (under prior law, the "attorney-in-fact") under a power of attorney (POA) to make a gift. The court has an interest in the agent's gift authority for two primary reasons:

1. A proceeding may be filed before the clerk seeking a remedy for the breach by the agent of the agent's gifting authority under the POA. [G.S. 32C-1-117](#).
2. A proceeding may be filed requesting the clerk enter an order authorizing a gift. [G.S. 32C-1-116\(a\)\(4\)](#).

The purpose of this post to give you preview of Tuesday's webinar and to discuss the gift provisions under this new law. They can be a bit tricky to put together if you just read the Act straight through.

## Types of Authority under the Act

The Act sets forth two clear categories of authority that may be granted to the agent by a principal under a POA:

1. Specific authority
2. General authority

**Specific authority** is authority that must be expressly granted in the POA for the agent to act and may not be inferred from a general grant of authority. [G.S. 32C-2-201\(a\)](#) identifies actions by the agent under the POA that require an express grant of authority in the POA, including the authority to make a gift, change rights of survivorship, change beneficiary designations, and renounce or disclaim property. These actions require a specific grant of authority because of the risk these acts pose to the principal's property and estate plan.

By contrast, **general authority** may be granted in a POA by including language in the POA that states the agent has the authority to "do all acts that a principal could do." Such language incorporates all of the categories of general authority set forth in G.S. 32C-2-204 through G.S. 32C-2-216, including the provisions related to real property, tangible personal property, insurance and annuities, estates, trusts and beneficial interests, claims and litigation, and taxes. The drafter of a POA may incorporate by reference all or some these provisions of general authority when describing the agent's authority in the POA. A drafter may choose to grant the general authority to the agent by listing the

descriptive term, such as “real property,” or the related statutory citation, such as “G.S. 32C-2-204.” [G.S. 32C-2-201\(d\)](#)

The **authority to make a gift** under a POA does not fit squarely in either of these two categories. It is referred to as both general and specific authority under the Act. [G.S. 32C-2-201\(a\)\(1\)\(a\)](#) (specific authority to make a gift); [G.S. 32C-2-217](#) (general authority to make a gift). It is most helpful to treat the authority to make a gift under a POA as something different, a third category that breaks down as set forth below. These gifting provisions apply to a POA executed on or after January 1, 2018. They also apply to a POA executed prior to that date provided that the application of a provision does not impair a substantial right of a party and the POA does not expressly state otherwise. [G.S. 32C-4-403\(a\)\(1\)](#).

## **The Agent’s Authority to Make a Gift**

### **a. No Authority if the POA is Silent Regarding Gifts**

The first thing to note about gifts under the Act is that if the POA is silent regarding gifts then the agent does not have the authority to make gifts without a court order, as discussed in (d) below. This includes if the POA states that the agent has the general authority to “do all acts that a principal could do” or otherwise states that the agent has the authority to manage the principal’s property. **This broad language does not confer gifting authority on the agent.**

### **b. General Authority to Make a Gift**

If the POA specifically states that the agent is authorized to make gifts or grants general authority to the agent with respect to gifts or grants the agent the authority only as set forth in G.S. 32C-2-217, then the agent’s gifting authority is limited under the terms of the POA. The agent is authorized under the Act to make a gift of the principal’s property or to consent to the splitting of a gift made by the principal’s spouse, subject to the Internal Revenue Code (IRC), for the following limited purposes:

1. To or for the benefit of an **individual** up to certain amounts set forth in G.S. 32C-2-217(b)(1)(a), including gifts to:
  1. A trust
  2. An account under the Uniform Transfers to Minors Act
  3. A tuition savings account or prepaid tuition plan as defined under section 529 of the IRC
  4. An ABLE account as defined under section 529A of the IRC
2. To certain **charitable organizations** set forth in the IRC in accordance with the principal’s history of making or joining in the making of gifts.

[G.S. 32C-2-217\(a\) and \(b\)](#). This authority is similar to the authority of the agent to make gifts under prior law in accordance with the principal’s history of gift giving. G.S. 32A-2(14) (repealed).

### **c. Gifts Requiring Additional Specific Authority**

Any authority that enlarges or modifies the agent’s general authority to make a gift requires specific, express language in the POA. For example, if the principal wants the agent to be able to make unlimited gifts to a trust and the principal does not have a history of making such gifts, then it is advisable for the principal to expressly state such authority in the POA.

### **d. Gifts Authorized by Court Order**

If the POA is silent or limited as to the agent’s gift making authority or the agent wants to make a gift that is different from a gift authorized by the POA, the agent may always petition the court for an order authorizing the agent to make a

gift of the principal's property that is reasonable under the circumstances. G.S. 32C-2-218. This is similar to prior NC law, which authorized the agent to file a special proceeding to obtain the authority to make a gift. G.S. 32A-14.10 (repealed).

The petition to make a gift is filed as an estate proceeding before the clerk. [G.S. 32C-1-116\(a\)\(4\)](#); [G.S. 32C-1-116\(c\)](#); [G.S. 32C-2-218](#). Any party may file a notice of transfer of the proceeding to superior court within 30 days after being served with a copy of the pleading requesting relief. [G.S. 32C-1-116\(a\)\(4\)](#); [G.S. 28A-2-6\(h\)](#).

**Other Rules Generally Applicable to Gifts under the Act**

1. **Gifts in Accordance with Principal's Objectives if Known.** Unless the POA states otherwise, the agent has a duty to make gifts in accordance with the principal's objectives if actually known by the agent and if unknown then consistent with the principal's best interest based on all relevant factors, including certain factors specified in the Act such as the principal's foreseeable obligations and future need for maintenance. [S. 32C-2-201\(b\) and \(e\)](#). Note, these factors may be helpful for the court to refer to for guidance when determining whether to enter an order authorizing a gift by the agent under G.S. 32C-2-218.
2. **No Gifts to Agent or to People the Agent Owes Legal Obligation of Support.** An agent may not exercise authority to make a gift under a POA to create in the agent or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property unless the POA states otherwise. [S. 32C-2-201\(c\) and \(e\)](#).

The figure below summarizes the authority to make a gift under the Act. I hope you'll tune in for more on Tuesday. Don't forget to register by noon tomorrow.

**Figure 1. The Agent's Authority to Make a Gift under the Act**

| Language in the POA   | Agent's Gift Authority  |
|---|---|
| POA silent or says agent has all powers of the principal                              | No authority to make a gift   |
| POA only says the agent has the authority to make a gift or references G.S. 32C-2-217 | Agent ONLY has the authority to make gifts as set forth in G.S. 32C-2-217, subject to G.S. 32C-2-201(b) and (c) |
| Any other authority to make gifts   | Must be specifically set forth in the POA, subject to G.S. 32C-2-201(b) and (c) unless POA says otherwise       |

▪ Note the court may authorize any gift that is reasonable under the circumstances, including a gift that is in addition to or differs from a gift authorized by the POA. G.S. 32C-2-218.