

GENERAL ASSEMBLY OF NORTH CAROLINA
1995 SESSION

CHAPTER 331
SENATE BILL 724

AN ACT TO DESCRIBE CIRCUMSTANCES UNDER WHICH AN ATTORNEY-IN-FACT MAY MAKE GIFTS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 32A-1 reads as rewritten:

"§ 32A-1. Statutory Short Form of General Power of Attorney.

The use of the following form in the creation of a power of attorney is lawful, and, when used, it shall be construed in accordance with the provisions of this Chapter.

'NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32A OF THE NORTH CAROLINA GENERAL STATUTES WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

State of

County of

I ~~....., the undersigned, hereby appoint~~ my attorney-in-fact for me I, appoint to be my attorney-in-fact, and give such person full power to act in my ~~name, place and stead~~ name in any way which I ~~myself could do if I were personally present could act for myself,~~ with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes ~~to the extent that I am permitted by law to act through an agent.~~ Statutes. (DIRECTIONS: Initial the line opposite any one or more of the subdivisions as to which the principal desires to give the attorney-in-fact authority.)

- (1) Real property ~~transactions; transactions~~ _____
- (2) Personal property ~~transactions; transactions~~ _____
- (3) Bond, share, stock, securities and commodity ~~transactions; transactions~~ _____
- (4) Banking ~~transactions; transactions~~ _____
- (5) Safe ~~deposits; deposits~~ _____
- (6) Business operating ~~transactions; transactions~~ _____
- (7) Insurance ~~transactions; transactions~~ _____
- (8) Estate ~~transactions; transactions~~ _____
- (9) Personal relationships and ~~affairs; affairs~~ _____
- (10) Social security and ~~unemployment; unemployment~~ _____
- (11) Benefits from ~~military service; military service~~ _____

- (12) Tax matters _____
(13) Employment of agents _____
(14) Gifts to charities, and to individuals other than the attorney-in-fact _____
(15) Gifts to the named attorney-in-fact _____

(If power of substitution and revocation is to be given, add: 'I also give to such person full power to appoint another to act as my attorney-in-fact and full power to revoke such appointment.')
(If period of power of attorney is to be limited, add: 'This power terminates

....., 19.....')

(If power of attorney is to be a durable power of attorney under the provision of Article 2 of Chapter 32A and is to continue in effect after the incapacity or mental incompetence of the principal, add: 'This power of attorney shall not be affected by my subsequent incapacity or mental incompetence.')
(If power of attorney is to take effect only after the incapacity or mental incompetence of the principal, add: 'This power of attorney shall become effective after I become incapacitated or mentally incompetent.')
Dated 19.....

..... (Seal)

Signature

STATE OF COUNTY OF

On this day of,, personally appeared before me, the said named to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

My Commission Expires

.....
(Signature of Notary Public)

Notary Public (Official Seal)".

Sec. 2. G.S. 32A-2(3) reads as rewritten:

- "(3) Bond, ~~Share~~ Share, Stock, Securities and Commodity Transactions. – To request, ask, demand, sue for, recover, collect, receive, and hold and possess any bond, share, instrument of similar character, commodity interest or any instrument with respect thereto together with the interest, dividends, proceeds, or other distributions connected therewith, as now are, or shall hereafter become, owned by, or due, owing payable, or belonging to, the principal at the time of execution or in which the principal may thereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in the name of the principal for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for the principal, all indorsements, acquittances, releases, receipts, or other sufficient discharges for the same."

Sec. 3. G.S. 32A-2(12) reads as rewritten:

"(12) ~~Tax.~~ Tax matters. – To prepare, execute, verify and file in the name of the principal and on behalf of the principal any and all types of tax returns, amended returns, declaration of estimated tax, report, protest, application for correction of assessed valuation of real or other property, appeal, brief, claim for refund, or petition, including petition to the Tax Court of the United States, in connection with any tax imposed or proposed to be imposed by any government, or claimed, levied or assessed by any government, and to pay any such tax and to obtain any extension of time for any of the foregoing; to execute waivers or consents agreeing to a later determination and assessment of taxes than is provided by any statute of limitations; to execute waivers of restriction on the assessment and collection of deficiency in any tax; to execute closing agreements and all other documents, instruments and papers relating to any tax liability of any sort; to institute and carry on through counsel any proceeding in connection with determining or contesting any such tax or to recover any tax paid or to resist any claim for additional tax on any proposed assessment or levy thereof; and to enter into any agreements or stipulations for compromise or other adjustments or disposition of any tax."

Sec. 4. G.S. 32A-2 is amended by adding the following new subdivisions to

read:

"(14) Gifts to Charities, and to Individuals Other Than the Attorney-In-Fact.

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- a. Except as provided in G.S. 32A-2(14)b., to make gifts of any of the principal's property to any individual other than the attorney-in-fact or to any organization described in sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. As used in this subdivision 'Internal Revenue Code' means the 'Code' as defined in G.S. 105-2.1.
- b. Except as provided in G.S. 32A-2(14)c., a power described in G.S. 32A-2(14)a. may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or creditors of the estate of the attorney-in-fact.
- c. If the power described in G.S. 32A-2(14)a. is conferred upon two or more attorneys-in-fact, it may be exercised by the attorney-in-fact or attorneys-in-fact who are not disqualified by G.S. 32A-2(14)b. from exercising the power of appointment as if they were the only attorney-in-fact or attorneys-in-fact.
- d. An attorney-in-fact expressly authorized by this section to make gifts of the principal's property may elect to request the clerk of

the superior court to issue an order to make a gift of the property of the principal.

- (15) Gifts to the Named Attorney-In-Fact. – To make gifts to the attorney-in-fact named in the power of attorney or the estate, creditors, or creditors of the estate of the attorney-in-fact."

Sec. 5. Chapter 32A of the General Statutes is amended by adding the following new Articles to read:

"ARTICLE 2A.

"Authority of Attorney-In-Fact to Make Gifts.

"§ 32A-14.1. Gifts under power of attorney.

(a) Except as provided in subsection (b) of this section, if any power of attorney authorizes an attorney-in-fact to do, execute, or perform any act that the principal might or could do or evidences the principal's intent to give the attorney-in-fact full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact shall have the power and authority to make gifts in any amount of any of the principal's property to any individual or to any organization described in sections 170(c) and 2422(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. As used in this subsection, 'Internal Revenue Code' means the 'Code' as defined in G.S. 105-2.1.

(b) Except as provided in subsection (c) of this section, or unless gifts are expressly authorized by the power of attorney, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

(c) If the power of attorney described in subsection (a) of this section is conferred upon two or more attorneys-in-fact, it may be exercised by the attorney-in-fact or attorneys-in-fact who are not disqualified by subsection (b) of this section from exercising the power of appointment as if they were the only attorney-in-fact or attorneys-in-fact. If the power of attorney described in subsection (a) of this section is conferred upon one attorney-in-fact, the power of attorney may be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact pursuant to an order issued by the clerk in accordance with the procedures and provisions of Article 2B of this Chapter.

(d) Subsection (a) of this section shall not in any way impair the right, power, or ability of any principal, by express terms in the power of attorney, to authorize or limit the authority of any attorney-in-fact to make gifts of the principal's property.

(e) An attorney-in-fact expressly authorized by this section to make gifts of the principal's property may elect to request that the clerk of the superior court issue an order approving a gift or gifts of the property of the principal.

(f) This section shall apply to all powers of attorney executed prior to, on, or after the effective date of this section.

"ARTICLE 2B.

"Gifts Authorized by Court Order.

"§ 32A-14.10. Gifts authorized by court order.

An attorney-in-fact, acting under a power of attorney that does not contain the grant of power set out in G.S. 32A-14.1 and does not expressly authorize gifts of the principal's property, may initiate a special proceeding before the clerk of superior court in accordance with the procedures of Article 33 of Chapter 1 of the General Statutes for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney. The principal and any guardian ad litem appointed for the principal are the defendants in a proceeding pursuant to this Article. The clerk may issue an order setting forth the amounts, frequency, recipients, and proportions of any gifts of the principal's property after considering all relevant factors, including, but not limited to: (i) the size of the principal's estate; (ii) the principal's foreseeable obligations; (iii) the principal's foreseeable maintenance needs; (iv) the principal's personal history of making or joining in the making of lifetime gifts; (v) the principal's estate plan; and (vi) the tax effects of the gifts. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the clerk's order shall be submitted to the judge of the superior court and approved by the court before the order becomes effective.

"§ 32A-14.11. Appeal; stay effected by appeal.

Any party in interest may appeal from the decision of the clerk to the judge of the superior court. The procedure for appeal shall be the same as the procedure for appeal in other special proceedings governed by Article 33 of Chapter 1 of the General Statutes. An appeal taken from the decision of the clerk shall stay the decision and order of the clerk until the cause is heard and determined by the judge upon the appeal taken.

"§ 32A-14.12. Costs and fees.

All costs and fees arising in connection with a proceeding under this Article shall be assessed the same as costs and fees are assessed in special proceedings governed by Article 33 of Chapter 1 of the General Statutes."

Sec. 6. Nothing in this act is intended to alter or otherwise affect the law of this State with regard to presumptions of fraud or fiduciary responsibilities.

Sec. 7. Article 2A of Chapter 32A as set out in Section 3 of this act is intended as a codification of the existing North Carolina common law.

Sec. 8. This act becomes effective October 1, 1995.

In the General Assembly read three times and ratified this the 27th day of June, 1995.

Dennis A. Wicker
President of the Senate

Harold J. Brubaker
Speaker of the House of Representatives