

Legal and Practical Aspects of Advance Directives and Powers of Attorney¹

I. Introduction:

Advance Directives and Powers of Attorney are legal documents that allow an individual to give another person legal authority to act on her or his behalf. This authority can extend to financial, personal, or health care matters. These documents are important for everyone, but particularly for those facing serious illness. They enable a person to plan when relatively healthy for a time when he or she may be too sick to handle his or her own affairs. With these planning documents, one can name a trusted person to act for him or her and give that person instructions ahead of time about how to exercise the authority that is granted.

If a person becomes incapacitated without having prepared powers of attorney and advance directives, it can be difficult or impossible for family or friends to handle the person's financial affairs and health care decisions. For health care decision-making, providers will follow statutory guidelines to determine which family member or other person to turn to for health care decisions. There will probably be no indication of the person's preferences about end-of life care. With respect to financial matters, no one is given legal authority by statute, so the only way to handle financial affairs will be to seek appointment of a guardian, a process that is much more time-consuming and involved than the preparation of advance directives.

Advance directives and powers of attorney are important tools for healthy and sick people alike to plan ahead for incapacity. When these documents are in place, people can concentrate of giving care and assistance in a difficult time, without the need to scramble to obtain needed legal authority. There are three advance planning documents that are typically prepared:

- 1. Power of Attorney:** A document that permits a named individual to act on behalf of another person in business, financial, personal, and other matters.
- 2. Health Care Power of Attorney:** A document that permits a named individual to make health care decisions for another person when that person is mentally or physically unable to make or communicate health care decisions.
- 3. Living Will:** A document in which a person states her or his desire for a "natural death," and provides directions about end-of-life care.

These documents are creations of state law, and may have slightly different names in different jurisdictions. For instance, some states use the term "health care proxy" instead of North Carolina's "health care power of attorney." But despite differences in terminology and form, advance directives from one state will generally be recognized in other states. Because the Clinic only represents North Carolina residents, this manuscript will cover only the law of North Carolina.

¹ These materials were based originally on a manuscript by E. William Kratt of Wyrick, Robbins, Yates and Ponton, L.L.P. in Raleigh, North Carolina and published by the North Carolina Bar Foundation. Expanded and updated in January 2018 by Allison Rice, of Duke University School of Law.

II. The Lawyer's Work with Power of Attorney and Advance Directives:

When an attorney is engaged to prepare planning documents, there are several discrete tasks to be done:

- 1) explain the available documents to the client in simple, understandable language;
- 2) discuss alternatives to documents, such as representative payee for Social Security benefits, joint ownership of property, etc., and their efficacy;
- 3) interview the client to obtain information about the client's situation, needs, trusted friends and family, desires, and goals;
- 4) counsel and assist the client in making choices that will effectuate the client's goals;
- 5) prepare the necessary documents;
- 6) review the documents with the client for correctness;
- 7) execute the documents;
- 8) distribute the completed documents as directed by the client (to medical providers, agents, and/or family members).

It may come as a surprise that the actual drafting of the documents may often be the quickest and most straightforward part of the lawyer's work. All lawyers preparing the documents begin with statutory forms and/or template documents that they tailor to the needs of the particular client. Sometimes the drafting may be complicated, but often the work that is most challenging and interesting is that of educating and counseling the client. To do this, it is necessary to have an in-depth understanding of the particular documents and the legal context in which they exist. The remainder of this manuscript discusses each of the three main advance directives in detail.

III. MANAGEMENT OF MONEY AND PROPERTY -- THE POWER OF ATTORNEY:

A power of attorney is a legal document that creates an agency relationship. In this document, one person gives another the legal authority to do certain acts on her or his behalf. Before covering the details of powers of attorney, it is important to address other ways in which clients might get assistance in management of their money and affairs.

There are a number of options for people who wish to permit a trusted friend or relative to help them manage their money, property, and personal affairs. Some of those options are discussed below, along with their advantages and disadvantages.

- a. **Joint bank accounts:** Many people naturally think of adding a trusted friend or relative onto their bank account to enable that person to assist them if they become unable to handle their own affairs. This is a very simple solution to the problem of access to funds when hospitalized or incompetent. However, this arrangement can have some serious disadvantages:
 - i. The co-owner of the account can spend money without the client's knowledge or permission, and without any accountability;
 - ii. The funds in the account could be subject to the co-owner's creditors;
 - iii. If the co-owner dies, a portion of the account could be frozen to cover the co-owner's taxes and debts, and also included in the co-owner's estate and be distributed to the co-owner's heirs.

- iv. The co-owner may have to pay taxes on a portion of the interest on the account.
 - v. Although our clients are lower income, for high income individuals, there could be gift tax implications related to adding or removing a co-owner on a bank account.
- b. **Personal agency accounts:** This is a special type of account that is set up with the bank. In this type of account, the selected person is not an owner of the account, but is able to make transactions, even after the client might become incompetent. This kind of account can be set up in addition to executing a power of attorney. This kind of account is an effective solution for managing a particular bank account, but does not give authority for other transactions that might become necessary.
- c. **Social Security – Representative Payee:** If a client receives benefits from the Social Security Administration and is unable to handle those benefits because of incompetence, mental illness, or intellectual disability, Social Security can set up a “representative payee.” The case funds are then sent to the payee, rather than the beneficiary. The payee is responsible for putting the funds in a special account and using them only for the benefit of the client. The payee arrangement is an effective way to give a trusted person (or agency) the ability to manage the funds of an individual who is unable to do so. However, it does not give any other legal authority.
- d. **Guardianship:** If a client is incompetent, s/he will not be able to execute a power of attorney or add someone to her/his bank accounts. If a power of attorney was not executed by the client before s/he became incompetent, and there are more funds to be managed than just a Social Security check it may be necessary for a guardian to be appointed to handle the client’s finances. Compared to executing a power of attorney, guardianship is a much more involved, time-consuming process. It also subjects the client’s finances to public inspection, as guardianship court records are open to the public. Avoiding the complications of a guardianship is one reason for executing a power of attorney while the client is still able.

POWERS OF ATTORNEY

Powers of attorney are governed by Chapter 32C of the North Carolina General Statutes and the state’s common law of agency and fiduciaries. North Carolina’s power of attorney law was completely revised effective January 1, 2018 to mostly track the Uniform Power of Attorney Act. Some clients may have previously done a power of attorney under the former law, Chapter 32A of the General Statutes. Those powers of attorney are still valid, and Chapter 32C applies to them, “unless application of a particular provision of this Chapter would substantially impair rights of a party.”²

Chapter 32C sets out detailed rules for powers of attorneys, including the duties and powers of a person granted authority, rules of construction, as well as the requirements for execution. It includes several “statutory forms.” In the power of attorney, the person giving the power is the “principal.” The person given the powers is called the “agent.” Under the previous statute, the agent was called “attorney in

² N.C. Gen. Stat. § 32C-4-403(a)(1).

fact,” and you may see some references to that term in materials and forms used prior to January 1, 2018.

a. Types of Powers of Attorney

People use powers of attorneys for a variety of purposes. Powers may be **general or limited**. The power of attorney might be effective indefinitely, or for a limited time and purpose. For example, a person may need to sign documents for a real estate closing at a time when he or she is unavailable or out of state. Rather than try to reschedule the transaction, she might execute a power of attorney authorizing another person to sign the papers in her place.³ Or a person might plan for unforeseen events by giving a friend or family member broad and indefinite powers to handle her affairs if she becomes sick or is in an accident. Such a power of attorney may never be used, but is prepared as a precaution.

A **general power of attorney** grants broad authority to the agent for matters relating to real and personal property, taxes, banking, legal actions, insurance and a wide range of similar business/financial areas. This is the type of power of attorney generally prepared by the Clinic.

b. Who Can Make a Power of Attorney

Anyone who is at least 18 years old and mentally competent can make a power of attorney.

c. Who Can Serve as Agent

Anyone who is at least 18 years old and mentally competent can serve as agent.

d. Power of Attorney Forms

No particular form is required for a general power of attorney, but as mentioned above, the statute provides a “statutory form power of attorney.”⁴ Our template form is adapted from the statutory form. We customize the form for each individual client.

e. Authorities (Powers) under the Power of Attorney

Article 2 of the statute covers the authority that may be granted under a power of attorney.⁵ The statute sets out two kinds of grants of authority (power): “general” and “specific.” Some powers may be given by just a “general” reference to the authority in the document. Other powers can only be given by including express language granting a specific power. Those powers are set forth in Section 32C-201(a). These are powers that are more sensitive and possibly subject to abuse, such as giving gifts and changing beneficiaries or survivorship. These authorities are referred to as the “hot powers.” The statutory form, and some other forms, provide blanks for the client to initial the authorities being granted.

³ The statute includes a “Limited Power of Attorney For Real Property” form at N.C. Gen. Stat. § 32C-3-303.

⁴ N.C. Gen. Stat. § 32C-3-301.

⁵ N.C. Gen Stat. § 32C-2-201 et seq.

General Authorities: The general authorities are those set out in Sections 32C-2-204 through 32C-2-216. The listing of general authorities outlines the areas of authority that are given to the agent. The statute contains a detailed description of each of these authorities, which you should review carefully. **You will need to be able to explain each of these powers to clients.**

- Real Property
- Tangible Personal Property
- Stocks and Bonds
- Commodities and Options
- Banks and Other Financial Institutions
- Operation of Entity or Business
- Insurance and Annuities
- Estates, Trusts, and Other Beneficial Interests
- Claims and Litigation
- Personal and Family Maintenance
- Benefits from Governmental Programs or Civil or Military Service
- Retirement Plans
- Taxes

Although clients may not consider all of the above general powers to be personally relevant, it is usually recommended that clients leave the general powers list intact – “just in case.” Even if they seem not to apply, they do no harm and could be useful in an unanticipated situation. But the client ultimately determines which powers to include or exclude.

Specific Authorities: The specific authorities are set forth in Section 32C-2-201(a). These are powers that the client should consider carefully. The specific authorities are:

- Make a gift
- Create or change rights of survivorship (e.g. on jointly owned properties)
- Create or change a beneficiary designation (e.g. on life insurance or a retirement account)
- Delegate authority granted under the power of attorney
- Waive the principal’s right to be a beneficiary of a joint and survivor annuity⁶, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate
- Renounce or disclaim an interest in property, including a power of appointment⁷
- Exercise authority over the content of electronic communications sent or received by the principal.⁸

⁶ An annuity is an investment device offered by an insurance company where the investor pays a lump sum of money for a future stream of income. A “joint and survivor annuity” continues regular payments as long as one of the annuitants is alive. It is often purchased by married couples who want to guarantee that a surviving spouse will receive regular income for life

⁷ A “power of appointment” is authority given by a person making a will to another person, allowing that person to dispose of the property in testator’s estate.

⁸ Additionally, there are two powers with respect to powers under a trust set forth at N.C. Gen. Stat. § 32-2-201(a)(2) that we do not include in our form because they address areas beyond our area of practice.

Needless to say, these “hot powers,” including gifting, changing survivorship, and changing beneficiary designations, present the potential for abuse and self-dealing, so each client preparing a power of attorney should consider carefully whether s/he wishes to include these powers.

Limitations on exercise of specific authorities: If any of these powers are included in the client’s power of attorney, the statute requires that they be exercised in accordance with

- the principal’s objectives, if known, or
- If unknown the principal’s best interest, based on all relevant factors, including
 - The value and nature of the principal’s property
 - The principal’s foreseeable obligations and need for maintenance
 - Minimization of taxes
 - Eligibility for a benefit, program or assistance under a statute or regulation
 - The principal’s personal history of making or joining in making gifts
 - The principal’s existing estate plan

Exercise of specific authorities in favor of the agent or person to whom the agent owes a support obligation: Because the specific authorities or “hot powers” are so ripe for abuse, the statute requires that those powers can only be exercised in favor of the agent if the power of attorney specifically so provides.⁹ So if the agent will be authorized to make gifts to herself, to change beneficiaries or survivorship, or one of the other “hot powers,” the document must include a specific provision to that effect.

Several of these powers warrant further discussion, as they have the potential to be abused and/or create family conflict.

i. **Gifting**

The authority to make gifts can be given by either general or specific authority. Unless otherwise specified, the gifting power is under the general authority,¹⁰ and is subject to limitations set out in Section 32C-2-217. The power to gift is the power to give away the principal’s money or property without receiving anything in return. Why would the principal want the agent to have this authority? In a situation where the principal might be incapacitated for an extended period of time, the principal might want the agent to be able to continue the principal’s historical pattern of gift giving, such as to family members, church, or charity. Alternatively, the principal may want the agent to be able to take care of less typical gifts in connection with getting her or his affairs in order when faced with a serious illness. For example, the principal may want his agent to transfer title to his no-longer-needed vehicle as a gift to a friend or family member. Another situation in which gifting may be needed is to transfer assets to enable the principal to become eligible for Medicaid or avoid

⁹ N.C. Gen. Stat. § 32C-2-201.

¹⁰ N.S. Gen. Stat. § 32C-2-201(e).

Medicaid estate recovery (which allows the state to recover what it paid for Medicaid against the beneficiary's estate).

Statutory Limitations on Gifts: Not all clients will want to authorize the agent to make gifts. If the client does wish to authorize gifting, it's a good idea to specify to which individuals or class of individuals (e.g., "my children") those gifts could be made. Unless otherwise specified, any gifting authority will be subject to the limitations set out in 32C-2-217(b), which limits a gift to an individual to the greater of

- i. An amount in accordance with the principal's history of making gifts, or
- ii. The dollar amount of the annual gift tax exclusion (currently \$15,000).
- iii. Gifts to Charity: in accordance with history of such gifts.

If the principal wishes to authorize more extensive gifting, the power of attorney must state this specifically. In our form document, we include optional language for making gifts to facilitate eligibility for Medicaid. Assets owned by the client, including the family home, would be consumed quickly by the enormous costs of nursing home care. There is government assistance through Medicaid that can cover the cost of this care, but those benefits are generally not available until an individual has exhausted his or her assets (with some exclusions). Complicated and often changing program rules permit individuals to transfer property in certain ways so as to preserve assets for heirs, rather than losing them to nursing home expenses or the state's recoupment of costs via "estate recovery."¹¹

A competent client can take advantage of those rules (with expert assistance) in order to preserve property for heirs. However, if the client is incompetent and the client's agent is handling her/his affairs, it might not be possible to make a needed transfer without authority for such gifting in the power of attorney. Standard gift provisions would not permit making an unusual and large gift, such as a transfer of an interest in the client's home.

If your client owns a home and has assets, s/he should be counseled about the option of adding an additional gifting power to permit transfer of property to qualify for governmental benefits (Medicaid) or avoid state cost recoupment. The question regarding this power boils down to whether the client *has* significant assets and wants to use those assets for care when the need arises, or whether he or she wants to keep the assets in the family and rely on government assistance for long term care. If the client's choice is the latter, you should include the appropriate power under in the document.

¹¹ "Estate recovery" is a mechanism by which the state recoups its Medicaid payments after the client's death. This could result in the loss of the family home or other property which would otherwise pass to heirs.

ii. Creating or changing survivorship

This power permits the agent to create, change or terminate rights of survivorship in banks or brokerage accounts. Needless to say, this is not a power to grant lightly.

iii. Creating or changing beneficiary designations

This power permits the agent to create or change a beneficiary designation in insurance, annuity, retirement or other accounts with beneficiary designations. Again, this is not a power to grant lightly, and like the survivorship provision above, allows the agent to change the principal's estate plan. However, a completely legitimate and sometimes necessary use of this power is in the event that there is a need to move the principal's retirement accounts from one brokerage firm to another. There will be a need to set up beneficiaries in the new accounts, and the agent would not have power to do so without authorization in the power of attorney.

iv. Delegating authority granted

This power permits the agent to appoint someone to serve as agent if the agent is temporarily unable to serve.

v. Accessing contents of electronic communications

This power gives the agent authority over electronic communications, including email, social media, etc.

The gifting, survivorship and beneficiary powers have great potential for abuse and creation/exacerbation of family conflict. These powers are most appropriate when the agent is a spouse or only child in an intact family, without children from prior marriages. If the client is thinking about granting these powers, it's especially important to learn about the client's family and potential family conflict.

Exercising Specific Authority powers in favor of the attorney in fact. If the client wants the agent to be able to exercise any of the "hot powers" *in favor of him or herself – such as giving himself gifts* -- this *must be stated specifically*. The statute provides:

... unless he power of attorney otherwise provides, an agent may not exercise authority under a power of attorney 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, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise."¹²

So if the client wishes to permit the agent to make gifts to her or himself, or exercise the powers regarding survivorship or beneficiary designation in her favor, include specific language to that effect in the document.

¹² N.C. Gen. Stat. § 32C-2-201(c).

Construction of Authorities granted under the power of attorney. The statute provides additional detail about what may be done in exercising the powers set forth under the general authorities. This list is included in Section 32C-2-203. You should be familiar with this list, but usually will not need to go over it with the client.

f. Nomination of Guardian

There may be occasion where, in spite of there being a power of attorney in place, there might be a need for a guardian to be appointed for the client if s/he becomes incompetent. We include a default provision stating that the client nominates the named agent as guardian. This is consistent with the statute, Section 32C-1-108.

g. Signing Requirements

A power of attorney must be signed by the principal in front of a notary public. No other witnesses are required, but if a client anticipates using the form in another state, it might be prudent to have it also signed by two witnesses, as this is required in some states. If a principal is mentally competent, but physically unable to sign the document, he or she may direct another person to sign on his or her behalf, "in the principal's conscious presence."¹³ In such a case, the notary's acknowledgment must be adjusted to reflect this situation.

It is essential that the principal sign the power of attorney precisely as his or her name is printed in the document. Otherwise the document may be rejected by third parties and/or the register of deeds if the document is presented for registration.

h. When the Power of Attorney Becomes Effective and Ends

The person executing a power of attorney can decide when it goes into effect and when it ends, though in no event can the power of attorney be made to extend beyond the death of the principal. A power of attorney can come into effect immediately upon signing, or at a future time. Powers that come into effect later are referred to as "springing."¹⁴

i. Commencement of Powers – Effective Immediately

Unless otherwise specified, a power of attorney is effective upon execution. The agent can exercise powers even if the principal is competent and able to handle her or his affairs. As a matter of agency law, the agent is subject to the direction of the principal, so the agent is bound to follow the principal's instructions about when and how to use the power of attorney. However, the principal is bound by the agent's as to third parties unless the power of attorney has been validly revoked.

Many clients find that it is most convenient to have the power of attorney be effective immediately, as this puts less burden on the agent at the time when he or

¹³ N.C. Gen. Stat. § 32C-1-105.

¹⁴ N.C. Gen. Stat. § 32C-1-109.

she needs to act for the principal. If the client does not wish for the agent to act until the need arises, the client can retain the original of the document, not share copies, tell the agent where the original power of attorney is kept and that it should not be used while the client is able to handle her own affairs. Many people executing powers of attorneys follow this course. It should be noted, however, that the new statute provides that unless otherwise specified by another section of the North Carolina General Statutes, a photocopy or electronic copy of the document "*has the same effect as the original.*"¹⁵

- ii. **Commencement of Powers – effective later – Conditional/Springing Power of Attorney:** Some clients may be hesitant to sign a document that grants immediate powers. This hesitation may come from distrust of the agent, not feeling ready to relinquish powers, a feeling that giving powers to another means they are giving up the fight against their disease, or a combination of these concerns. Such clients may prefer to execute a Conditional Power of Attorney. A principal can state any future event or contingency that will cause the powers to "spring" into effect, including incapacity, or written authorization by the principal or other parties. Most commonly the contingency will be the principal's incapacity.
 1. **Incapacity defined.** The new statute includes a definition of incapacity as "the inability of an individual to manage property or business affairs" because a) the individual has "an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance," or b) the individual is "missing, detained, including incarcerated . . . or outside the United States and unable to return."¹⁶
 2. **Determining the occurrence of the contingency.** If a power of attorney has springing powers, the document must provide specifically for how the occurrence of the contingency will be established. The power of attorney may state how the occurrence of the contingency can be documented. The client may authorize one or more persons to determine in writing that the event or contingency has occurred.¹⁷ If the contingency is incapacity, that person could be one or more of the client's physicians. Or it could be a trusted third party. It should be noted that in our experience, physicians are often hesitant to sign off on a determination of incapacity. However, the new statute's definition of incapacity is a major improvement over the non-defined term from the prior statute, so physicians may be more willing to make the needed determination.
 3. **Disadvantages of Conditional Power of Attorney:** The disadvantage of a conditional power of attorney is the uncertain status of that document when presented to a third person. If a bank is asked to accept an agent's authority to sign documents based on a conditional power of attorney

¹⁵ N.C. Gen. Stat. § 32C-1-106(d).

¹⁶ N.C. Gen. Stat. § 32C-1-102(6).

¹⁷ N.C. Gen. Stat. § 32C-1-109(b).

(usable only when the principal meets the incapacity definition) then the agent will be required to verify the incompetence of the principal before the power of attorney will be honored. This can present an obstacle for the agent at what will no doubt be a difficult time. There may also be some difficulty obtaining the doctor's sign-off (if this is how the incapacity is to be documented).

i. Durability:

An agent can only do what the principal can do. If the principal becomes mentally incapacitated, and thus legally unable to act on her or his own behalf, the question arises whether the agent can continue to act under the power of attorney. After all, for most individuals, the whole point of executing a power of attorney is to have someone who can handle the principal's affairs *when they are unable to*.

A power of attorney is "**durable**" if the agent continues to have authority when the principal is incapacitated. Under the new statute, a North Carolina power of attorney is **durable by default**.¹⁸ There is no need to include language to this effect, but our forms do include the language so that this will be clear to the client, agent, and anyone who is asked to accept the document. Under prior law, the default was that the power of attorney was NOT durable unless it specifically so stated. Additionally, prior law required that a power of attorney be recorded with the register of deeds if it was to be used after incapacity. This requirement has been dropped.

j. Registration (or "recording") of a power of attorney

As indicated above, prior law required that a power of attorney be recorded to be used after incapacity. For this reason, many of our former clients have recorded powers of attorney. Under the new law, the only time a power of attorney must be recorded is if it will be used in a real estate transaction.

k. The Agent's Fiduciary Duties

The duties of the agent are set forth in Section 32C-1-114 of the statute. These duties apply whether or not they are set forth in the power of attorney document. We include a few of them as a reminder to the agent. We also provide the agent with information about their duties. Certain duties are "non-waivable" and others can be waived in the power of attorney.

2. Non-waivable duties:¹⁹

1. Act in accordance with the principal's reasonable expectations to the extent actually known by the agent, and otherwise, in the principal's best interest.
2. Act in good faith

¹⁸ N.C. Gen. Stat. § 32C-1-104.

¹⁹ N.C. Gen. Stat. § 32C-1-114(a).

3. Act only within the scope of authority granted in the power of attorney.

Waivable duties:²⁰ These duties can be modified in the power of attorney.

1. Act loyally for the principal's benefit
2. Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
3. Act with reasonable care, competence, and diligence
4. Keep a record of all receipts, disbursements and transactions
5. Cooperate with the health care agent
6. Attempt to preserve the principal's estate plan to the extent actually known, if preserving the plan is consistent with the principal's best interests
7. Account to the principal or a person designated by the principal.

Previous law had duties regarding duties of accounting to the clerk of court and obtaining a bond. Those requirements no longer exist. Our power of attorney forms do not list out all of the duties of the agent, but we do include record-keeping and accounting, and ask the client to state to whom accounting should be made, if any.

- I. **Liability.** If an agent acts in an unauthorized manner, he will be liable to the principal for damages or loss resulting from such acts. Unauthorized acts include those prohibited by statute and case law. The agent is not generally liable for actions taken at the direction of the principal.

Likewise, because the agent is acting in the place of the principal, the principal will be bound by the actions of the agent, provided that those actions are within the agent's stated authority or are ratified by the principal. If the agent is not authorized to act, and a third party accepts his authority at face value, the agent will be liable to the third party. Whether acting in an authorized manner or not, the agent will generally be personally liable for his tortious acts, and jointly and severally liable with the principal for his negligence.

- m. **Duty to Act.** An individual holding a power of attorney for a principal may, but is not generally required to, take action under that document. The failure of a duly appointed agent to use the authority granted under the power of attorney does not subject the agent to individual liability unless there is an enforceable contract with the principal or some other party.
- n. **Restrictions on Authority of Agent.** Certain actions cannot, as a matter of public policy, be taken by an agent on behalf of a principal, even if specifically authorized in writing. These restrictions include the authority to make or revoke a last will and testament,²¹ to marry, to get a divorce,²² to perform a contract for personal services; and to vote.²³

²⁰ N.C. Gen. Stat. § 32C-1-114(b).

²¹ N.C. Gen. Stat. § 31-3.3.

²² N.C. Gen. Stat. § 50-8.

²³ N.C. Gen. Stat. § 163-54.

- o. Compensation of an Agent.** A power of attorney can provide for compensation for an agent.²⁴ As our client's are appointing friends or family as agents, our form documents state the agent shall serve without compensation.
 - p. Co-Agents and Successor-Agents.** The client can appoint more than one agent, and specify whether the co-agents can act independently or must act together.²⁵ Unless otherwise specified, the co-agents have the authority to act independently. This set-up will generally be more convenient and efficient, but will require coordination between the co-agents. Requiring that the agents act jointly could create inconvenience and lead to inaction. Discuss these issues with your client if he or she is interested in appointing co-agents.

Many clients will also want to appoint a successor (or alternate) agent to serve in the event the primary agent is unable or unwilling to serve. This is recommended, if the client has a second trusted person to name. If there are co-agents, the successor agent would not have authority until both co-agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.²⁶

- q. Termination.** The power of attorney terminates under the following circumstances:²⁷
 - 1. The principal **dies.** It is important for clients and agents to know that the agent will have no further powers after the principal's death. If a client needs to provide for disposing property after death, he or she should be advised to have a Will prepared.
 - 2. if the power of attorney is not durable, the principal becomes incapacitated.
 - 3. The principal revokes the power of attorney (see details below)
 - 4. The power of attorney provides that it terminates
 - 5. The purpose of the power of attorney is accomplished
 - 6. The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney. (This is a good reason for the principal to consider having a successor agent.)
 - 7. A guardian of the principal's estate or general guardian terminates it.

The **authority of an agent**, may also terminate, without the entire document terminating. In addition to the circumstances above, the authority of an agent who is the spouse of the principal will terminate upon divorce, unless the power of attorney provides otherwise.

- r. Revocation of a Power of Attorney**

A power of attorney may be revoked during the life of the principal by the principal at any time that he is competent to do so. A power of attorney must be revoked as provided for in Section 32C-1-110(g) of the General Statutes:

²⁴ N.C. Gen. Stat. § 32C-1-112.

²⁵ N.C. Gen. Stat. § 32C-1-111(a).

²⁶ N.C. Gen. Stat. § 32C-1-111(b)(2).

²⁷ N.C. Gen. Stat. § 32C-1-110(a).

1. If the durable power of attorney is registered, then by registering an instrument of revocation in all places where the power of attorney has been recorded, with proof of service on the agent, in accordance with Rule 5 of the NC Rules of Civil Procedure.
2. If the durable power of attorney is not registered, then by a written revocation executed when not incompetent, by being “burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the principal or another at the principal’s direction. Although the statute does not require notice to the agent of revocation, until the agent is notified that he or she lacks authority, the agent retains the authority to bind the principal. For this reason, the former agent should be notified in writing of revocation in all cases.

Regardless of whether the previous power of attorney has been recorded, our practice is to prepare a revocation for the client’s signature and send a copy of the revocation to the discharged agent by both first class mail and certified mail, return receipt requested.

- s. **Practicalities – Using the Power of Attorney.** The agent can use the original power of attorney, a photocopy or an electronic copy.²⁸ In signing documents or checks in the principal’s name, the agent should sign her/his own name, not the principal’s name. This is an appropriate way to sign: *Jane Jones, agent for Sally Smith.*

IV. HEALTH CARE PLANNING DOCUMENTS

Two documents are commonly used in connection with health care decision-making. The **Health Care Power of Attorney** permits a client to give authority to another person to make health care decisions when she or lacks sufficient understanding or capacity to make or communicate health care decisions.²⁹ This is a type of power of attorney that is limited to health care matters. The Health Care Power of Attorney permits the client to give another person authority in a wide range of areas, including consenting to treatment, decisions about mental health treatment, withholding or withdrawal of life prolonging measures, and about organ donation and disposition of remains. The client decides which of the powers to grant, and can also give instructions about how those powers should be implemented. No particular form is required, but as with the financial power of attorney, North Carolina statutes set out a form that can be used.³⁰

The second document, the **Living Will**, deals exclusively with end-of-life care. A living will states a desire for a natural death, so it is only applicable to people who wish to die without artificial interventions. Not all clients will want a Living Will. With respect to end of life care, the two documents work together. The Living Will gives directions; the Health Care Power of Attorney authorizes another person to make decisions in support of those directives.

²⁸ N.C. Gen. Stat. § 32C-1-106(d).

²⁹ N.C. Gen. Stat. § 32A-15 (b).

³⁰ N.C. Gen. Stat. § 32A-25.1.

a. Health Care Power of Attorney

It is important to understand that unlike under a financial power of attorney, the Health Care Power of Attorney **does not give the agent any power until the principal is unable to make or communicate health care decisions.** When the principal is capable, she will make her own health care decisions. Only when she is not, will the doctors turn to the health care agent. Also, if the principal is incapacitated, and then regains capacity, the health care agent will no longer have authority to make decisions. The doctors will again turn to the client for decisions.

In cases in which a client does not have a health care power of attorney, doctors will still need to seek a decision maker in the event that a client is unable to make decisions. For routine matters, they will turn to a spouse and other close family members. If family members cannot agree, or if doctors believe the family members are acting unwise, it could become necessary to petition for the appointment of a guardian. For decisions about removing life prolonging measures in the absence of a guardian or health care agent, North Carolina statutes set out a list of persons to whom doctors should turn.³¹

- i. **When Effective:** The health care power of attorney becomes effective only when the physician designated by the principal determines in writing that the principal lacks "sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal, and shall continue in effect during the incapacity of the principal.³² If there is no designated physician, then that decision will be made by the principal's attending physician. Under certain circumstances, a person other than a physician may be designated to make that determination.
 - ii. **Who can do a Health Care Power of Attorney:** A person may execute a health care power of attorney as long as he or she is 18 years old and mentally competent.
 - iii. **Who can be a Health Care Agent:** A person named as a health care agent must be at least 18 years old and not be providing health care to the client.³³
 - iv. **Health Care Agent vs. Agent.** The person named as health care agent need not be the same person named as agent under a general power of attorney. It is not uncommon for one person to be given the authority to make financial decisions for the principal, while another person, who may have a more detailed knowledge of the principal's wishes with regard to health care or experience in the health care field, may be named to make health care decisions. Many people do choose the same person.
- v. **Specific Powers Granted**

1. **Generally.** The powers granted in the health care power of attorney can be broad, giving the health care agent the authority to make and carry out all

³¹ N.C. Gen. Stat. § 90-322.

³² N.C. Gen. Stat. § 32A-20(a).

³³ N.C. Gen. Stat. § 32A-18.

health care decisions for the principal. The principal can also limit the health care agent's authority. Some clients, for example, have religious objections to blood transfusions and will not want to grant their health care agent the power to authorize blood transfusions.

2. **Mental Health Treatment.** For clients with a mental health diagnosis, there is an Advance Instruction for Mental Health Treatment that can be prepared. The Clinic occasionally prepares this document. The health care power of attorney can incorporate this advance instruction and place limitations on the health care agent's power to authorize certain mental health treatments (e.g. electroconvulsive treatment.)
3. **Life-Prolonging Measures.** Clients can give their health care agents the authority to make decisions about end of life care, including the withholding or withdrawing of life-prolonging measures. (See details below in discussion of the Living Will.)
4. **Maximum Treatment.** Some clients will want maximum treatment and will not wish to authorize the withholding or withdrawal of life-prolonging measure. There is an option in the Health Care Power of Attorney for a client to indicate a desire for maximum treatment.
5. **Other Matters Covered by the Health Care Power of Attorney:**
 - a. **Access to private health information** – By necessity, a person acting as health care agent will need to have access to private health information in order to make decisions on behalf of the client. The HCPOA document specifically authorizes this access. Thus, the client should be comfortable with the health care agent having full access to his/her private health information.
 - b. **Organ Donation** – The client may authorize donation of some or all organs.
 - c. **Autopsy** – The client may state preferences about autopsy.
 - d. **Disposition of Remains** – The client may state whether he/she wishes to be buried or cremated.
 - e. **Nomination of a Guardian** – The document states by default that the person named as health care agent is the client's preference should a guardian need to be appointed. The Durable Power of Attorney also contains language addressing the nomination of a guardian, but names the person named as agent in that document. This is fine, as long as the same people are appointed in both documents. If not, the client will need to choose, and appropriate changes made in the two documents.
6. **Signing Requirements.** Unlike the general power of attorney, which requires only a notary public, the health care power of attorney has special signing requirements. The document must be signed in front of two

qualified witnesses and acknowledged before a notary public.³⁴ The two witnesses must meet special requirements:

- a. At least 18 years old;
- b. Not an employee of the health care facility that treats the client;
- c. Not a person who would inherit under a will or intestate succession.

Students participating in the Clinic may serve as witnesses.

7. **After Signing.** After the document is executed, a copy should be provided to each of his or her physicians and any medical facility (such as hospice) that is involved. It is also best to provide a copy to the health care agent, or to let the health care agent know where the document can be found. It is also possible to register health care advance directives with the North Carolina Secretary of State. Generally, the Clinic mails copies of the executed documents as directed by the client.
8. **Revocation.** A health care power of attorney may be revoked by the principal at any time, “so long as the principal is capable of making and communicating health care decisions.”³⁵ The document may be revoked through a written revocation, by executing a new health care power of attorney, or by any manner “.... by which the principal is able to communicate an intent to revoke.” Revocation is effective upon communication to the health care agents named in the document and to the principal’s attending physician.³⁶

A health care power of attorney is also revoked by the death of the principal, except with respect to anatomical gifts, disposition of remains, and autopsy.

b. ADVANCE DIRECTIVE FOR A NATURAL DEATH ("LIVING WILL")

The Advance Directive for a Natural Death permits an individual to state his or her wishes regarding the use or removal of “life-prolonging measures,” in the event he or she suffers from a terminal illness. The authority for this document is granted pursuant to Article 23 of Chapter 90 of the North Carolina General Statutes.³⁷ Any directives made under this authority may also be included in the Health Care Power of Attorney form, but the Clinic form does not include this option.

Decisions about what should happen at the end of a person’s life are often difficult and emotional. The client may ask you questions that you cannot answer—particularly about

³⁴ N.C. Gen. Stat. § 32A-16(6).

³⁵ N.C. Gen. Stat. § 32A-32A-20(b)

³⁶ N.C. Gen. Stat. § 32A-32A-20(b)

³⁷ N.C. Gen. Stat. § 90-320 – 90-323.

the medical aspects of their decisions. You should encourage the client to talk with his or her medical providers about the medical specifics of their decisions.

- i. **Who can make a Living Will.** Any person at least 18 years old and competent can make a Living Will.
- ii. **Form.** No particular living will form is required. A statutory form living will is provided for in the statute. The form used by the Clinic is slightly adapted.
- iii. **Life Prolonging Measures.** This is a term defined by statute as follows:

Medical procedures or interventions which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment. Life-prolonging measures do not include care necessary to provide comfort or to alleviate pain.³⁸

Note that this includes more than simply “life support,” which people typically think of as a “breathing machine.” It includes such simple interventions as antibiotics to treat an infection, as well as artificial nutrition and hydration. Clients may have specific preferences about particular kinds of life-prolonging measures.

- iv. **Artificial Hydration and Nutrition.** This is a type of life-prolonging measure that will require specific discussion with the client when filling out the forms. Some clients do not want life-prolonging measures such as mechanical ventilation, but **do** want to receive artificial hydration and nutrition. Many clients do not view these interventions as medical treatment, but rather simple care and nourishment. Some have concerns about experiencing thirst or hunger. As legal professionals, we cannot answer medical questions about how it would feel to have hydration and/or nutrition withdrawn; these are questions for the doctors. However, we can discuss this issue with clients and enable them to give directions for how this will be handled.

On the both the Health Care Power of Attorney and Living Will form, the client can make specific choices about receiving artificial hydration and nutrition. The forms have been adapted from the statutory form to provide an additional option for receiving nutrition and/or hydration, “unless my attending physician determines that artificial hydration or nutrition would decrease my comfort, increase pain and distress, or increase risk of harm to me while failing to prolong my life.” This option recognizes what doctors tell us about the possible harmful effects of artificial nutrition and/or hydration when death is very near. If a client has questions, please direct him/her to his physician.

- v. **Situations where the client may decline life-prolonging measures:** If the client is alert and can make his or her own medical decisions, she or he can give any

³⁸ N.C. Gen. Stat. § 32A-16(4)

instructions about life-prolonging measures. If she or he is not competent, she can rely on advance directives in the living will. Under North Carolina law, there are three situations in which a client may, in advance, decline life-prolonging measures. The client can choose some or all of these situations, by initialing in the appropriate line(s) on the living will form.

1. "The declarant has an incurable or irreversible condition that will result in the declarant's death within a relatively short period of time; or
2. The declarant becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or
3. The declarant suffers from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible"³⁹

vi. Procedure for implementing the client's end-of-life directive for a natural death: Before life-prolonging measures may be withdrawn or withheld, the following must occur:

1. The client's attending physician must make a determination that the client is in one of the situations in which she or he authorized the withdrawal or withholding of life-prolonging measures.
2. A second physician must confirm this condition.⁴⁰

Once the two physicians have concurred that the client is in one of the conditions in which he or she authorized withholding or withdrawal of life-prolonging measures, the attending physician will make specific medical orders to effectuate the client's desires. If there is a health care agent, the physician will be consulting with the health care agent throughout the process.

vii. Enforceability. Binding or Discretionary? The living will statutory form requires the client to choose whether the health care provider "**may**" or "**shall**" withhold or withdraw life-prolonging measures under the circumstances provided in the advance directive.⁴¹ This option permits a client with strong feelings to make sure her or his wishes are met, even if the health care agent is not comfortable with those wishes. Mandating the withdrawal/withholding of life support is one way to take this decision off the shoulders of loved ones. Alternatively, leaving the decision to the health care agent might be the preference of a client who does not feel comfortable projecting what the circumstances may be like at the end of life.

viii. Operating in conjunction with a Health Care Power of Attorney. The living will may be a person's only documented statement regarding medical care, or may be in

³⁹ N.C. Gen. Stat. § 90-321(c).

⁴⁰ N.C. Gen. Stat. § 90-321(b).

⁴¹ N.C. Gen. Stat. § 32A-26; § 90-321(d1), paragraph 2.

addition to a health care power of attorney. The living will may even be incorporated into a health care power of attorney itself.⁴²

In the event a client is executing both a living will and a health care power of attorney, the two documents should be consistent. The health care power of attorney may grant to the attorney-in fact the authority to make any and all decisions regarding the use or removal of treatment, regardless of what statements may have been made in a living will.

The living will statutory form requires the client to choose whether the health care agent may override the instructions in the living will or whether the living will overrides any instructions given by the health care agent about prolonging the person's life. If the client has chosen in the living will to **mandate** withdrawal of life support, the living will should also indicate that the **living will** overrides any instructions given by the health care agent.

- ix. **Signing Requirements.** The signing requirements for the Living Will are the same as those for the Health Care Power of Attorney. The document must be signed by the client in the presence of two qualified witnesses (see above) and a notary public.⁴³
- x. **After Signing.** After the document is executed, a copy should be provided to each of his or her physicians and any medical facility (such as hospice) that is involved. It is also best to provide a copy to the health care agent, or to let the health care agent know where the document can be found. It is also possible to register health care advance directives with the North Carolina Secretary of State. Generally, the Clinic mails copies of the executed documents as directed by the client.
- xi. **Revocation.** The living will may be revoked by the declarant "in any manner by which the declarant is able to communicate the declarant's intent to revoke in a clear and consistent manner, without regard to the declarant's mental or physical condition."⁴⁴

c. **Withdrawal or Withholding of Life-Prolonging Measures in the Absence of an Advance Directive.**

In the event that a client has not given advance authorization for the withholding or withdrawal of life support, there is a statutory procedure for removal of life-prolonging measures when the client is near death. This procedure is found in Section 90-322 of the North Carolina General Statutes.

- i. **Determinations by Attending Physician.**⁴⁵ Before any action may be taken, the attending physician must make two determinations.

⁴² N.C. Gen. Stat. § 32A-26; § 90-321(d1)(j).

⁴³ N.C. Gen. Stat. § 90-321(c)(3),(4).

⁴⁴ N.C. Gen. Stat. § 90-321(e).

⁴⁵ N.C. Gen. Stat. § 90-322(a).

- a. **Lack of capacity:** First, the physician must determine “to a high degree of medical certainty, that a person lacks capacity to make or communicate health care decisions,” and that “the person will never regain that capacity.”
- b. **Client’s physical condition:** Second, the physician must determine that the client is in one of the following conditions:
 - i. “Has an incurable or irreversible condition that will result in the person’s death within a relatively short period of time;” or
 - ii. “Is unconscious and, to a high degree of medical certainty, will never regain consciousness.”
- ii. **Confirmation by a second physician.**⁴⁶ A second physician must concur *in writing*, that the client is in this condition.
- iii. **Current use or consideration of life-prolonging measures.**⁴⁷ The need to take action occurs when “a vital bodily function of the person could be restored or is being sustained by life-prolonging measures.”
- iv. **Attending physician consultation with friends/family.**⁴⁸ If the client does not have a valid living will, the physician must obtain permission to withdraw or withhold life prolonging measures. The statute sets out a list of persons who must concur. The physician must turn to the person or persons who are highest in the following list:
 - a. Legal guardian;
 - b. Health care agent, to the extent of authority granted;
 - c. Agent under a general power of attorney who has been given power to make health care decisions, to the extent authority granted;
 - d. The spouse;
 - e. A majority of the client’s reasonably available parents and children who are at least 18 years old;
 - f. A majority of the client’s reasonably available siblings who are at least 18 years old;
 - g. An individual who has an established relationship with the client, who is acting in good faith on behalf of the client, and who can reliably convey the client’s wishes.

If none of the above is reasonably available, then life-prolonging measures can be withheld or discontinued at the direction of the attending physician.⁴⁹

⁴⁶ N.C. Gen. Stat. § 90-322(a)(2).

⁴⁷ N.C. Gen. Stat. § 90-322(a)(3).

⁴⁸ N.C. Gen. Stat. § 90-322(b).

⁴⁹ N.C. Gen. Stat. § 90-322(b)

V. GUARDIANSHIP -- What happens when a person does NOT plan for incapacity.

The Clinic does not normally handle adult guardianship cases. But it is important to have a general understanding of what happens if someone fails to plan ahead for a period of incapacity.

It may become necessary to have a guardian appointed if a person loses mental capacity to the extent that he or she lacks sufficient is unable to make or communicate important decisions concerning his or her person, family, or property, or to take action on her own behalf. If the person had executed a durable power of attorney prior to becoming incapacitated, there would be someone ready to step in to attend to the client's business and legal needs. In most situations, the proper use of powers of attorney can completely avoid the necessity of a legal guardianship. As noted above, the Durable Power of Attorney and Health Care Power of Attorney both include provisions for nominating the named agent as guardian. If the client names different people in these two documents, it will be necessary to adjust one or both of the documents to reflect the client's choice of guardian.

Even without a power of attorney, it is possible, and even common, for a person to be cared for by friends or family without any legal paperwork. However, sometimes a major legal decision needs to be made, bank accounts need to be accessed, or significant medical treatment is required, for which someone must give consent. There are also situations where the person has lost mental capacity due to illness or substance abuse and is engaging in dangerous behavior or not adequately caring for him or herself. In these kinds of situations, family members or social services agencies may need to seek guardianship under North Carolina General Statutes §35A-1101 et seq.

A legal guardianship is almost always the option of last resort. Guardianship has many disadvantages, particularly as compared to use of a power of attorney. Guardians are required to pay a bond for the value of property held⁵⁰ and to file inventories and accountings with the Clerk of Superior Court on a periodic basis.⁵¹ The authority of the guardian to deal with the real and personal property of the "ward" may be severely restricted.

Appointment of a legal guardian is a two-step process. The individual must first be determined by the Clerk of Superior Court to be legally incompetent. If incompetence is found, then an appropriate guardian must be chosen and his or her authority specified. This process is relatively time-consuming and is likely to require several months to complete. In most cases, it can be avoided through advance planning and preparation of powers of attorney.

⁵⁰ N.C. Gen. Stat. § 35A-1230-39.

⁵¹ N.C. Gen. Stat. § 35A-1260-68.